

## 4. Supported Decision-Making in Commonwealth Laws

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### Contents

Summary	91
Supported decision-making at a Commonwealth level	92
Levels of support	93
Operation and effect of the model	96
Terminology	97
Objects and principles of Commonwealth legislation	99
Supporters	99
Recognition of supporters	101
Functions and duties	103
Safeguards	109
Representatives	111
Appointment	112
Functions and duties	115
Safeguards	117
Interaction with other appointed decision-makers	119
Information sharing	123
Guidance and training	125

### Summary

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

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

4.3 The chapter then addresses the key elements of the model. It makes recommendations about amending the objects or principles provisions in relevant Commonwealth legislation; the appointment, recognition, functions and duties of supporters and representatives; and appropriate and effective safeguards. The chapter

also discusses the interaction of supporters and representatives with state and territory appointed decision-makers, such as guardians and administrators.

4.4 The ALRC recommends that mechanisms should be developed for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments and to facilitate review and monitoring; and that the Australian Government provide guidance and training in relation to supported decision-making.

### **Supported decision-making at a Commonwealth level**

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

4.5 In the ALRC's view, it is desirable to introduce statutory mechanisms for formal supported decision-making at a Commonwealth level.

4.6 The ALRC recommends introducing mechanisms for the appointment of 'supporters' for adults who may require decision-making support, in some areas of Commonwealth law. The introduction of provisions relating to 'representatives' to address circumstances in which a person may desire, or require, someone else to make decisions for them, is also recommended.

4.7 A range of stakeholders expressed support for the legislative recognition of supported decision-making or gave 'in principle' support for the model proposed in the Discussion Paper.<sup>1</sup>

4.8 The National Association of Community Legal Centres (NACLC), for example, submitted that the introduction of statutory mechanisms for formal supported decision-making at a Commonwealth level is an 'important first step in the reform of laws and legal frameworks to ensure people with disability in Australia enjoy equal recognition before the law and recognition of their right to legal capacity on an equal basis with others'.<sup>2</sup>

4.9 Pave the Way suggested that the decision-making model should be implemented through a single Commonwealth Act, so that 'all relevant Commonwealth agencies

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1 See, eg, Law Council of Australia, *Submission 142*; National Association of Community Legal Centres, *Submission 127*; Advocacy for Inclusion, *Submission 126*; Illawarra Forum, *Submission 124*; Office of the Public Advocate (Qld), *Submission 110*; Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*; MHCA, *Submission 77*; Office of the Public Advocate (SA), *Submission 17*; Office of the Public Advocate (Vic), *Submission 06*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [7.73]–[7.82], which adopted the view that formalisation of supported decision-making arrangements would be desirable.

2 National Association of Community Legal Centres, *Submission 127*.

recognise decisions that are made with support as well as recognising the role of supporters and representatives'.<sup>3</sup>

4.10 The Commonwealth decision-making model represents a significant shift in approaches to decision-making. The question of how the ALRC's model would interact with decision-making regimes under state and territory law also requires further consideration.

4.11 The ALRC considers that the model should be applied first to decision-making under the National Disability Insurance Scheme (NDIS) and in some other areas of Commonwealth responsibility—social security, aged care and eHealth records. It is intended that the Commonwealth decision-making model will also influence reform of state and territory laws.<sup>4</sup>

### Levels of support

4.12 Article 12 of the *UN Convention on the Rights of Persons with Disabilities* (CRPD)<sup>5</sup> and the Support Principle<sup>6</sup> contain the central concept of decision-making support. The Commonwealth decision-making model is based on the idea that all adults, except in very limited circumstances, have some level of decision-making ability and should be entitled to make decisions expressing their will and preferences, but may require varying levels of support to do so. Supported decision-making

reflects efforts to provide better ways of recognising and meeting the needs of adults who have difficulty with certain areas of decision-making but who could make their own decisions 'with a little friendly help'.<sup>7</sup>

4.13 Rather than starting by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision-making<sup>8</sup>—the preferable approach is to ask what level of support, or what mechanisms are necessary, to support people to express their will and preferences. This recognises that the ability of a person who needs decision-making support 'to exercise legal agency is dependent on the integrity, quality and appropriateness of support available'.<sup>9</sup>

4.14 A person may require varying levels of support to make a decision:

- Minimal support—for example, a person may require no support, or require some assistance obtaining information, but when provided with the information is then able to make the necessary decision. Similarly, the person may only require support to communicate to a third party a decision they have made.

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3 Pave the Way, *Submission 90*.

4 See Ch 10.

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

6 National Decision-Making Principle 2.

7 Office of the Public Advocate (Qld), *Submission 05*. See Robert M Gordon, 'The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making' (2000) 23 *International Journal of Law and Psychiatry* 61, 71.

8 See Ch 2.

9 PWDA, ACDL and AHR Centre, *Submission 66*.

- Low to medium support—for example, a person may require support to obtain information, have the information explained to them in an appropriate way, and receive advice about the possible decisions they might make.
- High support—for example, a person may require support to obtain information, have the information explained to them in an appropriate way, receive advice about the possible decisions they might make, communicate their decision, and follow through to ensure their decision is given effect.

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

4.16 There is one other category of support—full support.<sup>10</sup> In such circumstances a person may choose someone else to make decisions for them, or it may be necessary to appoint someone to do so. Under the Commonwealth decision-making model, a representative would first attempt to support the person to express their will and preferences in order to make a decision. Where it is not possible to determine the person's will and preferences, the representative would make a decision based on what the person would likely want, or on the basis of the person's human rights relevant to the situation. This is discussed further in Chapter 3 under the Will, Preferences and Rights Guidelines and is consistent with National Decision-Making Principle 3.

4.17 Representative decision-making is 'based on facilitating access to the enjoyment of existing rights, rather than on making decisions on behalf of a person based on a subjective assessment of their best interest'.<sup>11</sup> Importantly, the functions and duties of representatives differ from, and build on, those of nominees under existing Commonwealth laws, such as plan nominees appointed under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act).<sup>12</sup>

4.18 Stakeholders expressed concerns about the potential risks arising from a combination of supported decision-making and decision-making by a substitute. In particular, there was concern that substitute decision-making could become predominant—what Professor Terry Carney and Dr Fleur Beaupert refer to as 'net widening'.<sup>13</sup>

4.19 The Australian Guardianship and Administration Council (AGAC) stated that, while they agreed in principle with the application of the model to Commonwealth laws,

we are concerned about the details of implementing this in a practical sense and the very real risk of fragmentation, confusion and a potential for a lesser level of support being the functional outcome. In short it runs the risk of making everyday decision

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<sup>10</sup> The concept of fully supported decision-making and its development is discussed in more detail in Ch 2.

<sup>11</sup> PWDA, ACDL and AHR Centre, *Submission 66*.

<sup>12</sup> See Ch 5.

<sup>13</sup> Terry Carney and Fleur Beaupert, 'Public and Private Bricolage—Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175.

making more, not less complex, by adding an additional layer of formal decision making appointment.<sup>14</sup>

4.20 The Offices of the Public Advocate (South Australia and Victoria) (OPA (SA and Vic)) stated that providing a legislative framework for supported decision-making is desirable for a number of important reasons, including

to respect the rights of people with cognitive impairment to participate in the decisions that affect their lives; to reflect the sometimes evolving or fluctuating nature of capacity noting that capacity is decision-specific; to ensure guardianship laws are compliant with the CRPD; and to reinforce the supremacy of the rights paradigm in laws that impact on people who require decision-making support.<sup>15</sup>

4.21 However, they acknowledged that, in practice, ‘relationships of support currently operate informally, and often very effectively’ and there are risks in ‘formalising otherwise successful decision-making arrangements’.<sup>16</sup> Advocacy for Inclusion also cautioned against ‘over-formalising’ supported decision-making. This risks ‘hindering the autonomy and decision-making rights of people with disabilities’ and takes away their control ‘by potentially setting out how decision-making arrangements should operate, who they could appoint as a supporter, and what the supporter might be obliged to do’. However,

there will be cases where a person with disability does not have access to respectful, trusting, natural relationships. In these cases, if the person with disability chooses they should be supported to establish relationships with formal supporters who have undergone the appropriate checks, and who have undertaken training in supported decision-making. Supported decision-making should be considered a mostly informal arrangement, while facilitated decision-making should be considered a formal arrangement.<sup>17</sup>

4.22 Circumstances that can lead to the appointment of formal decision-makers include that supporters have difficulty dealing with third parties, such as telecommunications companies, hospitals and health services on behalf of persons with disability; and the need to fulfil administrative requirements demanded by government agencies.<sup>18</sup> The Office of the Public Advocate (Qld) observed that

The legal recognition of ‘supporters’ potentially addresses many of these problems. It may mean that a person with disability can continue to receive informal support to make decisions and communicate with third parties, without the need for their legal decision-making capacity to be revoked.<sup>19</sup>

4.23 Justice Connect and Seniors Rights Victoria (Justice Connect) submitted that a ‘mechanism for the appointment of support decision-makers may act as a valuable (and less restrictive) alternative to ... guardianship and administration orders’ for older

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14 AGAC, *Submission 91*.

15 Offices of the Public Advocate (SA and Vic), *Submission 95*.

16 *Ibid.*

17 Advocacy for Inclusion, *Submission 126*.

18 Office of the Public Advocate (Qld), *Submission 110*.

19 *Ibid.*

people.<sup>20</sup> Encouraging alternatives to guardianship and administration was considered desirable by many stakeholders.

## **Operation and effect of the model**

### ***Operation***

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

4.25 The development of the Commonwealth decision-making model was influenced by the examination and articulation of approaches to supported decision-making by bodies such as the Victorian Law Reform Commission (VLRC), the Office of the Public Advocate (SA), as well as a number of international models.<sup>21</sup>

4.26 The ALRC intends that a supporter and representative scheme would be provided for in particular areas of Commonwealth law, tailored to suit the legislative context. However, it should incorporate a number of key elements based on the model outlined below.

4.27 This approach was supported in submissions which suggested, for example, that the ALRC ‘explore the idea of consolidating Commonwealth ... decision systems or at least having one consistent structure that each system hangs off’.<sup>22</sup>

4.28 The ALRC focuses on a number of key elements of the model, rather than being prescriptive about the mechanics of its application. For example, the ALRC does not intend to outline the formal requirements that may be necessary to facilitate the appointment of a supporter, or the way in which a particular Commonwealth department or agency might record the appointment, other than to highlight the need for information sharing between Commonwealth departments and agencies.

### ***Effect***

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

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20 Justice Connect and Seniors Rights Victoria, *Submission 120*.

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

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

4.30 Secondly, formalisation of support relationships would, as emphasised by the VLRC in its guardianship report, ‘provide important legal acknowledgment of the fact that mechanisms other than substitute decision making can be used to help people engage in activities requiring legal capacity’.<sup>23</sup>

4.31 Thirdly, formalisation of support arrangements in the way envisaged by the model is likely to create greater certainty for third parties about the role of supporters and facilitate the provision of decision-making support to persons who may require it.<sup>24</sup> It would allow third parties to interact with supporters about decision-making with greater confidence.

4.32 By formalising support relationships, the model also provides a mechanism for acknowledging and respecting the role of family, carers and other supporters in the lives of people with disability, which is one of the key elements of the Support Guidelines.<sup>25</sup> This may help address some of the difficulties and frustrations expressed by stakeholders in the course of this Inquiry about insufficient recognition of ‘natural’ supporters.<sup>26</sup> Recognition of supporters may also have the added effect of decreasing applications for state and territory guardianship and administration orders initiated primarily for the purposes of engaging with Australian Government systems.<sup>27</sup>

4.33 To guide the adoption of supported decision-making at a Commonwealth level, the ALRC makes a range of recommendations that form a Commonwealth decision-making model.

### Terminology

4.34 In the Discussion Paper, the ALRC asked whether the terms ‘supporter’ and ‘representative’ were the most appropriate to use in the Commonwealth decision-making model.<sup>28</sup>

4.35 As discussed in Chapter 2, the terminology relating to capacity and decision-making is often a contested area, but the development of a new lexicon of terms may

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

24 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67, 2010.

25 See Ch 3.

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

27 See, eg, Office of the Public Advocate (Qld), *Submission 110*; AGAC, *Submission 51*. Pave the Way observed that ‘families are less likely to seek a guardianship or administration order in relation to their loved one when government agencies and other organisations recognise their role in their family member’s lives’: Pave the Way, *Submission 09*.

28 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–2.

help to signal the ‘paradigm shift’ in attitudes to decision-making reflected in the CRPD. The ALRC concludes that retaining the terminology proposed in the Discussion Paper is the best option to effect this.

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

4.37 The term supporter is used by the VLRC in its guardianship report.<sup>29</sup> The VLRC described a supporter as a ‘new legal mechanism’. A supporter

could assist some people with impaired decision-making ability to continue to exercise legal capacity. Unlike substitute decision makers, supporters would not have the power to make decisions on behalf of a person, but they would be authorised to do certain things to assist the person to make their own decision.<sup>30</sup>

4.38 The term ‘representative’ is used in the Commonwealth decision-making model to signal that the role of a representative is to support and represent the will, preferences and rights of the person who requires decision-making support.<sup>31</sup> ‘Representative’ was preferred over ‘nominee’ to signal the shift from existing decision-making arrangements in areas of Commonwealth law, including the NDIS and social security, both of which use the term nominee. Further, in circumstances where a person who may require decision-making support has not chosen or ‘nominated’ the person, the term nominee does not appropriately reflect the nature of the appointment.

4.39 In general, stakeholders agreed with the chosen terminology,<sup>32</sup> although there were some divergent views. The Office of the Public Advocate (Vic) observed that ‘representative’ connotes an appointment that is ‘less permanent’ in nature than a substitute decision-maker, and that the representative is there ‘with the will of the person’, even though sometimes a representative may be appointed by a court or tribunal.<sup>33</sup>

4.40 However, AGAC pointed to a difference of opinion among its members about the potential for confusion concerning the use of the term ‘representative’:

Some members have raised concerns that the use of the term is potentially too broad and may lead to duplication of appointments under state legislation, and also possible conflict between multiple decision makers appointed under different regimes. Other members argued that ‘representative’ is closely aligned with concepts of agency,

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

30 Ibid 126. The *Powers of Attorney Act 2014* (Vic), enacted in August 2014, implements some of the VLRC’s recommendations in creating the role of a ‘supportive attorney’: see *Powers of Attorney Act 2014* (Vic) pt 7.

31 This formulation is currently used under the *Personally Controlled Electronic Health Records Act 2012* (Cth). The term representative is also used in other jurisdictions, eg, *Representation Agreement Act 1996* (British Columbia).

32 See, eg, Queenslanders with Disability Network, *Submission 119*; Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.

33 Offices of the Public Advocate (SA and Vic), *Submission 95*.



where principals have the capacity to instruct. Conversely, other members felt that it is appropriate.<sup>34</sup>

4.41 KinCare Services objected to the use of the term ‘supporter’ to identify individuals or organisations with formal support relationships because ‘exclusively informal networks have long been identified as “support” groups, and to attach this term to formal partnerships may bring about confusion’.<sup>35</sup>

## Objects and principles of Commonwealth legislation

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

4.42 The first key component of the ALRC’s recommended approach to reform of Commonwealth laws and legal frameworks is the inclusion of supported decision-making principles under relevant legislation.

4.43 The ALRC recommends amendment of existing objects or principles provisions contained in relevant legislation, or where there are no such provisions, their inclusion, to reflect the National Decision-Making Principles.

4.44 This would ensure the National Decision-Making Principles guide the application and interpretation of the legislation as a whole, or the particular division or part that deals with supporters and representatives.

4.45 This approach was supported by a number of stakeholders.<sup>36</sup> For example, the Disability Advocacy Network Australia (DANA) submitted that

it should be an explicit object of legislation in the disability area ... to promote the decision making capacity of people with disability, to build the capacity of people with disability to make decisions and participate in decision making, and to enable access to decision making support for all people with disability whose decision making capacity is impaired.<sup>37</sup>

## Supporters

4.46 The Commonwealth decision-making model recommended by the ALRC promotes formal supported decision-making. At the core of supported decision-making is the idea that all persons, except in very limited circumstances, have some level of decision-making ability and that, with appropriate support, they can be supported to

34 AGAC, *Submission 91*. AGAC stated that members agreed, however, that there is a need to move from old language to remove the ‘stigmatising effect’ of terms such as ‘financial manager’ and ‘guardian’.

35 KinCare Services, *Submission 112*.

36 See, eg, Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.

37 Disability Advocacy Network Australia, *Submission 36*.

make a decision. The nature and level of the support may vary but the decision remains that of the person who requires the decision-making support.

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

4.48 A person may appoint whomever they want as their supporter and may appoint more than one. For example, a person may appoint a family member, friend or carer. A supporter may perform a range of functions, including in relation to information, advice or communication. The ALRC does not consider that there should be a requirement that a supporter be unpaid.<sup>38</sup> For example, there may be circumstances in which a paid carer may be appointed as a supporter, particularly where the person does not have family support or is socially isolated.<sup>39</sup> Advocacy organisations, which may not be directly paid by the person, but receive funding from government or other sources, may in certain instances be appropriately appointed as a supporter.<sup>40</sup> A person may also appoint, or revoke their appointment of, a supporter at any time.

4.49 There is currently no provision in Commonwealth legislation for a supporter or supporter-type role, which reflects the ideals of supported decision-making. The mechanisms closest to the role of a supporter are Centrelink correspondence nominees<sup>41</sup> and nominated representatives in relation to eHealth.<sup>42</sup> However, as outlined below, these roles differ significantly from that of a supporter, particularly with respect to the duties owed to the person who needs decision-making support.<sup>43</sup>

### ***What about informal supporters?***

4.50 Informal supporters and support networks play a vital role in decision-making of persons with disability. Support under art 12 of the CRPD ‘encompasses both informal and formal support arrangements, of varying types and intensity’.<sup>44</sup> As the VLRC stated:

supported decision making recognises the interdependent nature of most people’s lives. Most people make important decisions with personal support (such as advice

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

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

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

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

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

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

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

from family, friends or mentors), or sometimes with professional support (for example, doctors or accountants).<sup>45</sup>

4.51 A number of stakeholders emphasised the important role informal supporters play in decision-making and that entitlement to support should include informal support.<sup>46</sup> The Multicultural Disability Advocacy Association of NSW highlighted the effect of culture on decision-making and noted ‘the differences in ways decisions are made in various cultures’:

in some cultures decisions are made by individuals, whereas in others, all important decisions may be made by the head of the family, or collectively by the local elders, or in consultation with other significant members of the family or community concerned.<sup>47</sup>

4.52 Consistent with these observations, some stakeholders have expressed concerns about the potential for over-formalising existing support mechanisms and support networks that assist people with disability to make decisions.<sup>48</sup> In the ALRC’s view, the recognition of supporters should not diminish the involvement of, or respect for, informal support, including in relation to decision-making.

4.53 A number of the elements of the Commonwealth decision-making model recognise the valuable role played by informal supporters. For example, the ALRC recommends that formal supporters have an obligation to support a person to consult family members, carers and other significant people in their life in the process of making decisions. A similar duty applies to representatives. There are also specific mechanisms in some areas of Commonwealth law considered in following chapters.

4.54 Importantly, however, some informal arrangements are ‘in fact more restrictive ... because decisions [are] made informally on a substitute basis by others’.<sup>49</sup> The formalisation of such arrangements and associated safeguards may ensure people are able to exercise choice and control over decision-making in their lives.

### Recognition of supporters

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

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

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

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

47 MDAA, *Submission 43*.

48 See, eg, Law Council of Australia, *Submission 83*; Queensland Advocacy Incorporated, *Submission 45*. See also in relation to ‘net widening’: Carney and Beaupert, above n 13.

49 Office of the Public Advocate (SA), *Submission 17*. See also AGAC, *Submission 51*.

- (c) supported decisions should be recognised as the decisions of the person who required decision-making support.

4.55 To introduce the concept of formal supported decision-making at a Commonwealth level, the ALRC recommends that relevant laws and legal frameworks should include the concept of a supporter and establish supporter arrangements. These laws and legal frameworks should reflect the National Decision-Making Principles and include a number of key elements relating to the recognition of supporters.

4.56 The most important element is recognition that, where a supporter is chosen, ultimate decision-making authority remains with the person who requires decision-making support, and that supported decisions must be recognised as the decision of the person who required that support.<sup>50</sup> These elements are intended to encourage support to be provided where this is needed to enable a person to make or convey a decision. This in turn maximises the autonomy of the person, and allows for dignity of risk.

4.57 The other element of the recommendation relates to ensuring that a person is able to exercise choice and control over their supporter or supporters. This is not provided for under any existing Commonwealth decision-making regimes.<sup>51</sup>

4.58 The ACT Disability, Aged and Carer Advocacy Service (ADACAS) submitted that the provision of a signed document should be a sufficient basis for a Commonwealth agency to recognise a supporter. Any other approach, it said, ‘reinforces the old fashioned view that people with disabilities lack capacity’. Further, ‘specific recognition of supporters should only be required by the Commonwealth where they need a level of access that would otherwise be prevented by law’—including for privacy reasons, receipt of monies or ‘where the supporter conveys ... decisions purportedly made by the person being supported’.<sup>52</sup>

4.59 The OPA (SA and Vic) observed that further consideration will be required as to the status of supporter arrangements, and information about where any ‘appointment instruments’ are to be lodged.<sup>53</sup>

4.60 Any new legislative scheme for recognising supporters is likely to have limited practical impact if people do not have access to an appropriate supporter. Under the CRPD, Commonwealth, state and territory governments have an obligation to provide

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

51 For example, social security legislation does not make provision for the person with a nominee arrangement to request suspension or revocation: *Social Security (Administration) Act 1999* (Cth) s 123E. Stakeholders emphasised the importance of this power: see, eg, Physical Disability Council of NSW, *Submission 32*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 54.

52 ADACAS, *Submission 108*.

53 Offices of the Public Advocate (SA and Vic), *Submission 95*.

support to persons with disability to assist them in decision-making.<sup>54</sup> There seems no reason why individual advocates or advocate organisations should not be recognised as supporters. Only the person supported would have the authority to choose a supporter, and would also have the power to suspend or revoke the arrangement at any time.

4.61 The OPA (SA and Vic) suggested that further consideration be given to the possible role of government, including Australian Government departments and state and territory offices of the public advocate and public guardians, in providing supporters. Another possibility is the development of organisations specialised in providing advice and support, such as the Nidus Personal Planning Resource Centre in British Columbia, Canada.<sup>55</sup>

## Functions and duties

### *Functions of a supporter*

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

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

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

4.63 For example, a supporter may need to obtain relevant information and explain it to the person they are supporting in a way that is easily understood, or provide advice to the person about the decisions the person might make. This role in the collection and explanation of information is provided for under a number of existing and proposed models of supported decision-making.<sup>56</sup>

54 ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’: *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(3).

55 Offices of the Public Advocate (SA and Vic), *Submission 95*. Nidus is a non-profit, charitable organisation established by citizens and community groups involved in the development of the British Columbia *Representation Agreement Act*, to ensure the public had access to information and assistance with Representation Agreements: see Nidus, *History* <[www.nidus.ca](http://www.nidus.ca)>.

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

4.64 It is important that supporters are able to handle relevant personal information of the person they are supporting. Stakeholders highlighted the difficulties that family members and carers often face in attempting to obtain access to information. The operation of the *Privacy Act 1998* (Cth) and the recognition of supporters under that Act is discussed in Chapter 6.

4.65 In circumstances where a person who may require decision-making support experiences difficulty communicating, the supporter may either assist them to communicate a decision, or in some circumstances may communicate the person's decision to third parties. Where a supporter is purportedly communicating a person's decision, it may be necessary for the relevant Commonwealth department or agency to include additional safeguards to ensure that there is no abuse of the supporter's function or duties. This communication-related role is currently provided for under a number of decision-making models.<sup>57</sup>

4.66 A supporter may also play a role in endeavouring to ensure that the decision of the person is given effect. They may, for example, contact the relevant Commonwealth department or agency to follow up on the information provided, or the decision, or provide assistance for the person to seek review of a decision. However, it would be a matter for individual supporters to determine the extent to which they are able to play this role, depending on the circumstances of the person who requires decision-making support and the particular decision. This role is also provided under some current decision-making regimes overseas, including in the United Kingdom and Yukon, Canada.<sup>58</sup>

### ***Supporter duties***

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

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

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

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

(f) assist the person to develop their own decision-making ability.

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

4.67 The duties of supporters should be set out in the legislation relevant to the area of Commonwealth law. In response to the Discussion Paper, stakeholders broadly supported this statement of duties.<sup>59</sup>

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

4.69 Supporters should be required to act in a manner that promotes the personal, social, financial, and cultural wellbeing of the person who requires decision-making support. This duty is similar to the duty imposed on nominees under the NDIS Act to act in a manner that promotes personal and social wellbeing,<sup>60</sup> but adds elements relating to financial and cultural wellbeing.

4.70 Given the potential role of supporters in supporting people to make decisions which relate to finances, reference to financial wellbeing seems important. In addition, the importance of cultural wellbeing and sensitivity was highlighted by a number of stakeholders.<sup>61</sup> However, National Disability Services (NDS) noted that it is ‘unclear exactly how cultural wellbeing will be promoted in relation to decision-making; this will require thoughtful evaluation as there are some risks of conflict between cultural considerations and individual rights’.<sup>62</sup> The OPA (SA and Vic) submitted that ‘financial’ and ‘cultural’ wellbeing need not be listed separately, as these aspects of wellbeing can be considered encompassed by the term ‘personal and social wellbeing’.<sup>63</sup>

4.71 In addition, there should be a duty to facilitate consultation. A number of stakeholders highlighted the importance of ensuring supporters (and representatives) consult family members, carers and other significant people in the life of the person

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59 National Association of Community Legal Centres, *Submission 127*; ADACAS, *Submission 108*; Offices of the Public Advocate (SA and Vic), *Submission 95*; National Disability Services, *Submission 92*.

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

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

62 National Disability Services, *Submission 92*.

63 Offices of the Public Advocate (SA and Vic), *Submission 95*.

who may require decision-making support.<sup>64</sup> However, the duty should be to facilitate consultation only as desired by the person requiring decision-making support.<sup>65</sup>

4.72 In order to facilitate the appropriate interaction of supporters with existing state and territory appointed decision-makers, a supporter should also have a duty to facilitate consultation with existing appointees. The recommended definition of ‘existing appointee’ is similar to the one in the NDIS Act.<sup>66</sup> A duty to facilitate consultation with existing appointees may help address concerns about ‘access to critical and relevant information’ by state or territory appointed decision-makers.<sup>67</sup>

4.73 Finally, supporters should also have an obligation to develop the capacity of the person being supported to make their own decisions. This would mirror an obligation imposed on nominees under the *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) (the Nominee Rules).<sup>68</sup> The nature and content of the obligation will vary according to the circumstances of the appointment. For example, the identity of the supporter will affect their ability to develop the person’s capacity, as will resource constraints.

4.74 NDS observed that assisting the person to develop their own decision-making ability, while important, is potentially a complex task. This complexity, and the skills required to discharge this duty, must be considered ‘when applying the model to different areas of law’. Moreover, it is also likely to have training and funding implications.<sup>69</sup> Dr Fleur Beaupert, Dr Piers Gooding and Linda Steele submitted that this duty should be expressed as being ‘to assist the person requiring support to exercise his or her legal capacity with less support in the future if he or she so wishes’.<sup>70</sup>

4.75 Pave the Way considered the duty to be ‘too onerous’ and expressed the view that, according to the CRPD, the state (rather than the supporter or representative) is obliged to provide resources that aim to develop people’s decision-making ability.<sup>71</sup>

4.76 ADACAS suggested that, for the purpose of examining supporters’ duties and safeguards, it is necessary to distinguish carefully between the different categories of supporters—for example, support by family and friends, introduced volunteers, paid care workers, independent advocates and professional decision supporters.<sup>72</sup>

4.77 In a similar vein, NACLRC stated that the ALRC should give further thought as to how ‘professional supporters’ (such as social workers or lawyers) might operate in

64 See, eg, Carers Queensland Inc, *Submission 14*.

65 ‘If the person making decisions is unable to consult themselves even with support, and this is undertaken by the supporter, then the person should either be present or aware of the consultations’: Offices of the Public Advocate (SA and Vic), *Submission 95*.

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

67 Financial Services Council, *Submission 35*.

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

69 National Disability Services, *Submission 92*.

70 F Beaupert, P Gooding and L Steele, *Submission 123*.

71 Pave the Way, *Submission 90*.

72 ADACAS, *Submission 108*.



practice, and in relation to the ‘interaction of any duties owed by a supporter under the relevant piece of Commonwealth legislation and any other duties or obligations they owe (such as under professional conduct rules and regulations, or other relevant legislation) and the potential for conflict of interest’.<sup>73</sup> It also observed that some duties, such as the duty to develop the capacity of the person with disability, extend beyond the role played by a community legal centre lawyer.<sup>74</sup>

4.78 The ALRC considers that basic duties of the type recommended should be applicable to supporters of any kind. The exact nature and content of these duties is likely to require further articulation in specific areas of Commonwealth law, dependent on the context. It is implicit that supporters should only have to perform these duties to the extent reasonable in the circumstances and as desired by the person being supported.

4.79 While supporters should have a high level of responsibility, there may be concerns about the unintended consequences of statutory duties—and, in particular, people being deterred from acting as supporters.<sup>75</sup>

4.80 A notable issue is whether supporters should have any personal liability for decisions made by the person being supported. The VLRC commented that determining the extent to which supporters should be liable in such circumstances is ‘challenging’.<sup>76</sup> It can be argued ‘that the supported person should be responsible for the consequences of any decisions made within a supported arrangement because they retain decision-making authority’.<sup>77</sup> However, the VLRC concluded that the law should ‘recognise that the support relationship is one of special trust and confidence, and the supported person is likely to be in a position of vulnerability relative to their supporter’:

Therefore, to avoid doubt, the law should designate the relationship between a supporter and the supported person as fiduciary. Supporters who fail to comply with their fiduciary obligations will leave themselves open to the full range of equitable remedies that are available in these circumstances.<sup>78</sup>

4.81 In the Discussion Paper, the ALRC asked whether the relationship of supporter to the person who requires support should be regarded as a fiduciary one.<sup>79</sup> Stakeholders had mixed views on this issue.

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73 National Association of Community Legal Centres, *Submission 127*.

74 *Ibid.*

75 See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) [4.53]–[4.58].

76 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.128].

77 *Ibid.*

78 *Ibid* [8.128]–[8.130]. See *Ibid* recs 59–61.

79 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–3. Fiduciary obligations are a creation of the Chancery courts so that, within certain relationships, and in certain situations, ‘equity enforces stringent duties of loyalty and propriety which go far beyond the obligations which people owe to each other at common law’: Thomson Reuters, *The Laws of Australia* [15.2.10].

4.82 The Law Institute of Victoria (LIV) expressed concern that the ‘imposition of fiduciary duties might discourage people from accepting the role of supporter, especially if the duty results in supporters needing to take out insurance’.<sup>80</sup> As this might frustrate the objective of encouraging recognition of supported decision-making, the LIV argued that a lesser duty should be imposed on supporters than applies to substitute decision-makers.<sup>81</sup>

4.83 Other stakeholders agreed that supporters should not be subject to fiduciary duties.<sup>82</sup> NDS, for example, argued that such duties are unnecessary—first, because the role of a supporter can be revoked by the person being supported; and secondly, because, where supporters are in paid positions, this provides scope to hold them to account through a contractual relationship (for example, a supporter could be held liable if they are paid to manage correspondence, and negligence in this task results in financial disadvantage for the client).<sup>83</sup>

4.84 In contrast, the OPA (SA and Vic) submitted that it was appropriate to impose fiduciary duties on supporters, and this would be ‘unlikely to deter a well-intentioned, honest supporter’:

In considering this issue, there is a need to distinguish between lack of skill or diligence (negligence) and lack of honesty (breach of fiduciary duty). We suspect that supporters are more likely to be deterred by concerns about whether they are skilled enough or have enough time to perform the role, rather than concerns about such things as whether they might inadvertently benefit themselves or a related party.<sup>84</sup>

4.85 More generally, the ALRC acknowledges that the issue of the potential liability of supporters (and representatives) is a difficult one. There has been insufficient opportunity to fully canvass the issues involved and, therefore, it would be inappropriate to make any recommendation in this regard. It is also possible to argue that, given the many categories of supporters and representatives, and the widely varying contexts in which decision-making takes place, it may be best to leave

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80 Law Institute of Victoria, *Submission 129*.

81 *Ibid*.

82 ADACAS, *Submission 108*; National Disability Services, *Submission 92*; Pave the Way, *Submission 90*. Some stakeholders submitted that, in contrast, representatives should be subject to fiduciary duties, given their different role: ADACAS, *Submission 108*; Springvale Monash Legal Service, *Submission 104*.

83 National Disability Services, *Submission 92*.

84 Offices of the Public Advocate (SA and Vic), *Submission 95*. The OPA (SA and Vic) also noted that supporters may be voluntary or paid employees of an agency and subject to additional safeguards—for example, if engaged by an advocacy organisation they would be required to abide by the code of conduct or guidelines of that organisation and also be covered by its liability insurance. See also Justice Connect and Seniors Rights Victoria, *Submission 120*; I Watts, *Submission 114*.

consideration of this issue to those drafting Commonwealth laws in specific areas,<sup>85</sup> or to resolution by the courts.<sup>86</sup>

### Safeguards

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

discourage honest people from accepting an appointment as a supporter. Too much regulation would also have a tendency to undermine the important relationship of trust between a supporter and a supported person.<sup>87</sup>

4.87 There needs to be a number of safeguards and recognition of the purpose of each safeguard. For example, some are designed to protect the person who may require decision-making support from abuse, neglect or exploitation; others may be required to ‘ensure that a decision made under a supported decision making arrangement truly expresses and effects the wishes of the person with disability’.<sup>88</sup>

4.88 The OPA (Vic) highlighted that supported decision-making opens up ‘the possibility of conflict, undue influence, abuse and exploitation’.<sup>89</sup> Similarly, Bruce Arnold and Dr Wendy Bonython submitted that

factors such as undue, or inappropriate, influence are not specific to decision-making by disabled people; nonetheless steps should be taken to ensure that their decision-making—particularly decision-making with serious consequences, such as extensive or potentially high risk medical treatment, or decisions about care—are not a consequence of inappropriate consideration of factors of this type.<sup>90</sup>

4.89 AGAC observed that supported decision-making schemes must ‘value-add’ to informal decision-making schemes by providing accountability structures and transparency. It stated that, like guardianship systems, supported decision-making systems must also have ‘clear systems for avoiding, so far as possible, the inclusion of supported decision makers who may use that position to abuse a person with a disability’.<sup>91</sup> In this context, AGAC stated that, sometimes, a ‘guardianship or

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85 For example, the *Social Security (Administration) Act 1999* (Cth) provides nominees with statutory protection against criminal liability for things done in good faith, and by the nominee in his or her capacity as nominee; and that a nominee does not commit a breach of statutory duty in doing any act where there are reasonable grounds for believing that it is in the best interests of the person being represented: *Social Security (Administration) Act 1999* (Cth) ss 123N, 123O.

86 The fiduciary concept is said to be a ‘fluid one, taking a wide variety of relationship forms and giving rise to a wide variety of obligations’. Courts may be required to ascertain whether a particular relationship is fiduciary, identify the nature of the particular fiduciary relation, and define the precise obligations flowing from it: Thomson Reuters, *The Laws of Australia* [15.2.10].

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

88 Caxton Legal Centre, *Submission 67*.

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

90 B Arnold and W Bonython, *Submission 38*.

91 AGAC, *Submission 51*.

administration order can be a tool to empower the person with the disability to exercise his or her own choice of support' where supporters have not been acting in their interest.<sup>92</sup>

4.90 While it is difficult to protect people who may require decision-making support from abuse and neglect in all instances, there are potential safeguards against exploitation by supporters under the Commonwealth decision-making model. The key safeguards include:

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

4.91 In the Discussion Paper, the ALRC asked what safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model.<sup>93</sup> For example, in British Columbia, Canada, a monitor must be appointed to oversee the person providing support to safeguard against financial abuse, except in certain circumstances.<sup>94</sup> Suggestions made to the VLRC in its guardianship inquiry included: the registration of arrangements; police checks on appointments; and appointment of monitors.<sup>95</sup>

4.92 Stakeholders generally agreed with the importance of the key safeguards listed above, while noting the complexity of issues involved.<sup>96</sup> The OPA (SA and Vic) suggested that additional safeguards might involve a register of appointments and police checks being conducted in relation to appointments.

4.93 In view of the possibilities of undue influence, abuse and exploitation, safeguards appropriate to the scope of the appointment are essential.<sup>97</sup> The possible conflicts of interest in relation to paid supporters were identified as a particular concern:

Some of the current projects in the area of supported decision making are using disability workers in the support role and this needs to be evaluated. It is conceivable that the role could expand to this wider group if conflict of interest considerations were managed as part of supporter selection and training.<sup>98</sup>

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92 AGAC, *Submission 91*.

93 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–4.

94 *Representation Agreement Act 1996* (British Columbia) ss 12(1), (2).

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

96 Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.

97 Offices of the Public Advocate (SA and Vic), *Submission 95*.

98 *Ibid*.

4.94 The NSW Council for Intellectual Disability (NSWCID) agreed that excessive regulation may ‘unduly interfere with the relationship between the person and supporter’. However it stated that

there needs to be some process for informing supporters of their responsibilities and to seek intervention by a tribunal if a supporter is not fulfilling their responsibilities to a person who lacks decision making capacity—this may entail an application to have a representative appointed as occurs now with applications for guardianship.<sup>99</sup>

4.95 The Victorian Deaf Society highlighted the importance of ‘a paper trail that formalises and legalises the relationship’ and proper oversight, for example, by a case manager.<sup>100</sup> Advocacy for Inclusion suggested that an ‘independent body should be established to provide formal monitoring and safeguards for people with disabilities in supported and facilitated decision-making arrangements’.<sup>101</sup>

4.96 In relation to safeguards, it may be necessary to distinguish between support provided by family and friends and support provided by paid professionals. For example, as discussed in relation to the NDIS,<sup>102</sup> advocacy or other organisations providing professional support services may be subject to quality assurance and other accreditation standards that should not apply to ‘natural’ supporters, such as family or friends.

## Representatives

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

4.97 In certain circumstances, a person may require someone else to make decisions for them. The ALRC recommends the introduction of representatives as a mechanism for this in areas of Commonwealth law.

4.98 A representative should only be appointed as a last resort and in limited circumstances. A representative under the model is an individual or organisation appointed by a person who requires decision-making support, or through some other appointment mechanism as discussed below. A representative would support a person to make decisions and express their will and preferences in making decisions; determine the person’s will and preferences and give effect to them; or consider the person’s human rights relevant to the situation in making a decision where their will and preferences cannot be determined at all.

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99 NSW Council for Intellectual Disability, *Submission 131*.

100 Vicdeaf, *Submission 125*.

101 Advocacy for Inclusion, *Submission 126*.

102 See Ch 5.

4.99 As with supporters, the introduction of representatives would occur under specific Commonwealth legislation and needs to be tailored to suit the particular legislative context. As discussed below, a number of core elements should be included in any Commonwealth scheme for representatives.

### **Appointment**

4.100 Representatives might be appointed under the Commonwealth decision-making model in a number of ways. The preferable form of appointment involves a person appointing their own representative.<sup>103</sup> A person may choose to appoint a representative—including in circumstances where they have decision-making ability but would prefer to appoint a representative, or in anticipation of losing decision-making ability.<sup>104</sup>

4.101 A representative should not generally be appointed without a request from the person, except where the person needs a representative but is unable to request appointment themselves, even with support. However, other appointment mechanisms need to be considered to account for circumstances where a person may not be in a position to appoint their own representative, but requires a decision-maker in an area of Commonwealth law and may or may not have a decision-maker appointed for them under state or territory legislation with relevant duties or powers. In such circumstances, the initiative might come from a carer or other person who offers to be the representative.<sup>105</sup>

4.102 The ALRC considered what mechanisms there should be at a Commonwealth level to appoint a representative for a person who requires decision-making support.<sup>106</sup> There are different options for appointment through a Commonwealth mechanism, or in a specific area of Commonwealth law.

4.103 First, jurisdiction might be conferred on a Commonwealth court or tribunal (or other body) to appoint representatives. Appointment might operate in a similar way to the appointment of state and territory guardians and administrators. That is, the Australian Government could develop ‘a single scheme for assessment of the need for a representative in these [Commonwealth] decision making areas, with a system for impartial appointment and review’.<sup>107</sup> ADACAS suggested that ‘the appointment of representatives should be made by an independent body’ at a Commonwealth level, mirroring the functions of state and territory tribunals.<sup>108</sup>

4.104 The ALRC has not pursued the idea of a new court or tribunal jurisdiction or Commonwealth body with responsibility for appointing representatives across different areas of Commonwealth law. The areas in which Commonwealth legislation needs to

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103 See, eg, ADACAS, *Submission 108*; Springvale Monash Legal Service, *Submission 104*.

104 Eg, in the appointment of enduring powers of attorney.

105 See, eg, *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.15.

106 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–5.

107 AGAC, *Submission 51*.

108 ADACAS, *Submission 108*. See also NSW Council for Intellectual Disability, *Submission 131*.

provide separately for the appointment of representatives are few, and there is no need to create what might be seen as a parallel or duplicate guardianship system.<sup>109</sup>

4.105 Another option is to provide for the appointment of a representative by the relevant Commonwealth department or agency, as is currently permitted in the context of the NDIS and social security.<sup>110</sup>

4.106 Many stakeholders expressed concerns about the appointment of representatives by the heads of Commonwealth agencies, such as NDIA and Centrelink.<sup>111</sup> The Springvale Monash Legal Service, for example, stated that, given ‘the imposition on the individual liberty of the represented person, the appointment of a substituted-decision maker should ideally be made by a tribunal or a court’.<sup>112</sup> ADACAS submitted that agencies should not have power to appoint representatives because ‘there is a clear conflict of interest’ as ‘it can be expected that diligent representatives will find themselves in conflict with Commonwealth agencies at some point’.<sup>113</sup>

4.107 Others were prepared to countenance the possibility, provided it was appropriately framed. The OPA (SA and Vic) stated that, in limited circumstances and subject to qualifications,<sup>114</sup> representatives ‘appointed by CEOs/Departmental Secretaries under Commonwealth laws could play decision-making roles on behalf of individuals who do not have the capacity to make particular decisions’.<sup>115</sup>

4.108 Finally, Commonwealth laws could provide mechanisms under which state and territory appointees would be recognised as representatives for the purposes of Commonwealth legislative schemes. That is, there would be a ‘more fully developed symbiosis with State and Territory substitute decision making schemes’.<sup>116</sup> NDS considered that the ‘least bureaucratic mechanism’ for appointing representatives would be through these existing courts or tribunals, rather than the ‘specific Commonwealth agency responsible for each affected area of law’:

This allows a common approach, and indeed a common representative across different areas of life and perhaps across jurisdictions. This approach also allows the chosen mechanism to build expertise and infrastructure for making good determinations, instead of spreading across several small subunits within larger agencies. This external mechanism could potentially monitor both representative and supporter arrangements.<sup>117</sup>

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109 Unless perhaps there were to be a national law dealing with supported decision-making, replacing existing state and territory guardianship and administration law.

110 *National Disability Insurance Scheme Act 2013* (Cth); *Social Security (Administration) Act 1999* (Cth). See Chs 5–6.

111 See, eg, National Association of Community Legal Centres, *Submission 127*; ADACAS, *Submission 108*; Mental Health Coordinating Council, *Submission 94*; Children with Disability Australia, *Submission 68*; Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*.

112 Springvale Monash Legal Service, *Submission 104*.

113 ADACAS, *Submission 108*.

114 In relation to decision-making under the NDIS: see Ch 5.

115 Offices of the Public Advocate (SA and Vic), *Submission 95*.

116 AGAC, *Submission 51*.

117 National Disability Services, *Submission 92*.

4.109 NDS strongly supported encouraging the appointment of existing representatives, such as state-appointed guardians for Commonwealth duties, where appropriate, although this should not be automatic.<sup>118</sup> ADACAS also accepted that there may be a case for the Commonwealth recognising state and territory appointments.<sup>119</sup> The OPA (SA and Vic) stated, if representatives were to be appointed under Commonwealth laws (as proposed by the ALRC), existing state and territory tribunal appointments should be recognised ‘where certain thresholds are met’. In addition,

There needs to be clarity around who can appoint, and who can be appointed as, representatives (taking note, for example, of earlier personal and tribunal appointments at state and territory level), and there would be a place for the articulation in federal legislation of general principles governing when tribunal appointments would be required.<sup>120</sup>

4.110 The Safeguards Guidelines provide that the appointment of a representative decision-maker should be a last resort and not a substitute for appropriate support and that any appointment should be limited in scope, be proportionate, and apply for the minimum time. Further, decisions and interventions (which would include any appointment of a representative) must be the least restrictive of the person’s human rights; subject to appeal; and subject to regular, independent and impartial monitoring and review.<sup>121</sup>

4.111 Under the Commonwealth decision-making model, any appointment mechanism for representatives should comply with these requirements. For the purposes of describing the model, the ALRC does not intend to be any more prescriptive than this, because the best appointment mechanism will depend on the exact role of the representative within the particular area of Commonwealth legislative responsibility.

4.112 Appointment mechanisms need to be ‘proportionate’. For example, the NSWCID has suggested that there should be

a straightforward process for a close family member to become representative of a person for processes like Centrelink and eHealth records ... On the other hand, there will be situations where the enormity or contentiousness of the situation or the alleged inappropriateness of a proposed representative means that the issue of whether there should be a representative and who that should be needs to be determined by a tribunal analogously to guardianship proceedings in the current state and territory tribunals.<sup>122</sup>

4.113 In some cases, including in relation to the NDIS, there should be a confined power for the agency head to appoint a representative. In doing so, the agency head should consider whether an existing state or territory appointed decision-maker (or

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118 Ibid.

119 ADACAS, *Submission 108*.

120 Offices of the Public Advocate (SA and Vic), *Submission 95*.

121 See Ch 3.

122 NSW Council for Intellectual Disability, *Submission 131*.



existing Commonwealth supporter or representative) should be appointed.<sup>123</sup> The appointment mechanism for representatives under the NDIS is discussed in more detail in Chapter 5.

## Functions and duties

### *Functions of a representative*

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

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

4.114 The ALRC recommends that a representative perform the same basic functions as a supporter, with minor changes to reflect the fact that—while having a duty to support the person to make their own decisions where possible—the representative may make decisions on the person’s behalf, reflecting the person’s will and preferences.

### *Representative duties*

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

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

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

- (e) act honestly, diligently and in good faith;
- (f) consult with existing appointees, family members, carers and other significant people in their life in making decisions; and
- (g) assist the person to develop their own decision-making ability.

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

4.115 A representative should have the same basic duties as a supporter, and additional duties reflecting the fact that a representative may make decisions on the person’s behalf, reflecting the person’s will, preferences and rights.

4.116 The core duties the ALRC considers are appropriate for representatives include the duty to support the person who requires decision-making support to express their will and preferences. As discussed in Chapter 3, this standard is preferred to an objective ‘best interests’ test, which currently applies to nominees under existing Commonwealth legislation and to state and territory appointed decision-makers.<sup>124</sup>

4.117 This shift away from the best interests test received significant support from a wide range of stakeholders.<sup>125</sup> In circumstances where a representative needs to determine the will and preferences of the person, because the person is unable to communicate them, the representative must determine what the person would likely want based on all the information available. This may, for example, involve consideration of decisions the person has made in the past. If that is not possible, consideration should turn to the person’s human rights relevant to the situation. Ultimately, however, this approach requires decision-making ‘based on facilitating access to the enjoyment of existing rights, rather than on making decisions on behalf of a person based on a subjective assessment of their best interest’.<sup>126</sup>

4.118 What steps are reasonable to discharge the duties of a representative? It would have to be considered in the particular decision-making context. For example, it would be unreasonable to expect a representative to fulfil the duty to assist the person to develop their own decision-making ability in circumstances where a person does not have, and is unlikely ever to develop, the ability to make decisions.

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

125 See, eg, PWDA, ACDL and AHR Centre, *Submission 66*; Qld Law Society, *Submission 53*.

126 PWDA, ACDL and AHR Centre, *Submission 66*.

4.119 The statement of representatives' roles and duties set out in the Discussion Paper<sup>127</sup> and, in particular, the focus on assisting people to express their will and preferences was broadly supported by stakeholders.<sup>128</sup>

4.120 Beupert, Gooding and Steele submitted that the functions of a representative should refer to 'making representative decisions on a person's behalf, only in situations where the person's will and preferences and what they would likely want cannot be determined'.<sup>129</sup>

### Safeguards

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

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

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

- respect the rights, will and preferences of the person;
- are free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;
- apply for the shortest time possible;
- are subject to regular review by a competent, independent and impartial authority or judicial body; and
- are proportional to the degree to which such measures affect the person's rights and interests.<sup>130</sup>

4.123 Stakeholders emphasised the importance of safeguards and made a range of suggestions in this regard.<sup>131</sup> Justice Connect suggested a range of recordkeeping and audit requirements that should be imposed on representatives. In addition:

127 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposals 4-7, 4-8.

128 Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*; National Disability Services, *Submission 92*.

129 F Beupert, P Gooding and L Steele, *Submission 123*.

130 *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008) art 12(4).

131 See, eg, Vicdeaf, *Submission 125*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Offices of the Public Advocate (SA and Vic), *Submission 95*.

It may be appropriate to establish an independent regulatory body or Commonwealth agency (or confer state based tribunals with the power) to monitor and undertake investigations. It may also be appropriate for that body to receive declarations and carry out random audits.<sup>132</sup>

4.124 Other stakeholders also referred to the desirability of an independent body to provide formal monitoring and safeguards for representative decision-making.<sup>133</sup>

4.125 Review and appeal mechanisms were another area of concern. NACLC observed that the complexity of existing mechanisms ‘significantly affects the ability of some people with disability to seek review of government and substitute decision-maker decisions’.<sup>134</sup> More generally, some concern was expressed about the absence of a ‘definite proposal for appointment, reviews, monitoring and safeguards’ under the Commonwealth decision-making model.<sup>135</sup>

4.126 Clearly, there need to be safeguards with respect to representatives—both to protect people who require decision-making support from abuse, neglect or exploitation and to protect the appointed representative. However, the ALRC does not intend to be prescriptive about the nature or operation of the safeguards which should apply. As with appointment mechanisms, the appropriate safeguards are dependent on the decision-making context.

4.127 Article 12(4) of the CRPD represents the key safeguard elements of any Commonwealth representative scheme. In the light of art 12(4), it may be necessary for the Australian Government to consider the following elements in implementing the decision-making model in areas of Commonwealth law:

- mechanisms for review and appeal of the appointment of representatives, including on the application of any interested party;
- the potential for representatives to be periodically required to make declarations regarding compliance with their duties;<sup>136</sup>
- reporting obligations on representatives with respect to decisions, for example by provision of a report, inventory or accounts;<sup>137</sup>
- the powers of any Commonwealth body conferred with jurisdiction to appoint a representative should include the power to respond to instances of abuse, neglect or exploitation;

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132 Justice Connect and Seniors Rights Victoria, *Submission 120*.

133 Advocacy for Inclusion, *Submission 126*; Vicdeaf, *Submission 125*.

134 National Association of Community Legal Centres, *Submission 127*.

135 Office of the Public Advocate (Qld), *Submission 110*.

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

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

- the role of Commonwealth departments and agencies in monitoring, auditing and investigating the conduct of representatives;<sup>138</sup> and
- the broader applicability of safeguards envisaged under a NDIS quality assurance and safeguards framework.

### Interaction with other appointed decision-makers

4.128 One of the major difficulties in applying the Commonwealth decision-making model is determining the appropriate interaction of supporters and representatives with other supporters and representatives, as well as state and territory appointed decision-makers, such as guardians and administrators. The NSW Government observed that important issues in relation to this interaction include:

Whether state-based appointees should automatically be appointed under the Commonwealth scheme.

If different persons are appointed, whether a Commonwealth appointee's authority would override the authority of a state-based appointee where the scope of their appointments may intersect (for example, would a decision by a representative under the NDIS affecting a person's accommodation override a decision by a state-based guardian in relation to accommodation?).

The mechanism for resolution of disputes between Commonwealth appointees and state-based appointees. It is important to recognise that state-based appointments include both Tribunal/Court appointed and principal-appointed arrangements, such as enduring guardianship.

The institution of double-duties upon appointees under both Schemes and whether this might make people reluctant to be appointed.

The recognition of Commonwealth appointees in State-based legislation and vice versa.<sup>139</sup>

4.129 Stakeholders raised a wide range of interaction issues and possible scenarios.<sup>140</sup> In some cases, support for the Commonwealth decision-making model was qualified by concerns about whether it would be able to interact successfully with state and territory appointments of substitute decision-makers, such as guardians and administrators.<sup>141</sup>

4.130 One starting point was that, ideally, where appointments are made under both Commonwealth and state or territory legislation, the same person should be appointed—to avoid multiple representatives, duplication of roles and duties, and

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

139 NSW Government, *Submission 135*.

140 See, eg, National Association of Community Legal Centres, *Submission 127*; Vicdeaf, *Submission 125*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Office of the Public Advocate (Qld), *Submission 110*; ADACAS, *Submission 108*; Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*.

141 Offices of the Public Advocate (SA and Vic), *Submission 95*.

problems where different representatives for the same person disagree about how to support decision-making. That is,

where there are several systems in which a person may have an appointed decision-maker, those systems must integrate and, where appropriate, allow the same decision-maker to act in all systems.<sup>142</sup>

4.131 Where different Commonwealth and state and territory representatives are appointed, this may ‘create conflict and ambiguity for the person and the support agency about who should provide support, obtain personal information and make decisions in a given situation’.<sup>143</sup> Justice Connect stated that this situation

has the potential to create inconsistency between roles and responsibilities of supporters or representatives appointed under Commonwealth laws, and those appointed under existing state and territory legislation. In turn, this may further confuse the vulnerable or cognitively impaired people who require assistance making decisions and their supporters and representatives who already deal with complicated State and Territory laws.<sup>144</sup>

4.132 It was said to be ‘highly desirable’ that the same person be appointed.<sup>145</sup> The appointment of an existing state or territory appointed decision-maker should be ‘permitted and encouraged’.<sup>146</sup>

4.133 To some extent, this is already the case under some existing Commonwealth schemes. For example, the Nominee Rules provide that the CEO is to have regard to a ‘presumption’ that a court-appointed decision maker or a participant-appointed decision-maker should be appointed as an NDIS nominee.<sup>147</sup> However, there may be circumstances where it is not appropriate for a state or territory appointed decision-maker to be a representative for Commonwealth purposes.

#### ***Existing state or territory appointment***

4.134 The following section explains how the ALRC envisages Commonwealth decision-making schemes would interact with those at the state and territory level. This issue is closely related to the chosen mechanism for appointing representatives; and highlights the need for parallel reform of state and territory guardianship and administration laws to integrate with the Commonwealth decision-making model. Chapter 5 examines in more detail how the model might interact with state and territory systems, in the particular context of the NDIS.

4.135 Under supporter and representative schemes, a Commonwealth agency would be responsible for recognising that a person is a representative for the purposes of the particular scheme being administered, whether or not the agency actually appoints the person. The agency would have to be satisfied that the person actually needs a

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

143 Office of the Public Advocate (Qld), *Submission 110*.

144 Justice Connect and Seniors Rights Victoria, *Submission 120*.

145 ADACAS, *Submission 108*.

146 Justice Connect and Seniors Rights Victoria, *Submission 120*.

147 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(a). See Ch 5.

representative—that is, a representative decision-maker is being appointed, or recognised as a last resort and not as a substitute for appropriate support.<sup>148</sup>

4.136 Some assessment of the person's support needs must take place before a representative is appointed for them. If there is an existing state or territory appointed guardian or administrator, there would be more reason to suggest the person also needs a representative for the purposes of the Commonwealth scheme, particularly where the appointment has been made in accordance with criteria consistent with the National Decision-Making Principles.

4.137 Even so, the appointment of that person as a representative should not be automatic. While there may be a presumption of appointment or recognition, the agency's decision may depend on the nature and scope of the state or territory appointment. Where the existing appointee has been appointed by the person themselves, for example under a power of attorney, the presumption may be seen as stronger—because it reflects the person's will and preferences. Against that, however, a tribunal appointment provides procedural standards and safeguards.

4.138 In some contexts, the agency may still decide that the appointee under state or territory law is not suitable for appointment, and appoint another person as the representative.

4.139 In the ALRC's view, the Commonwealth representative's authority would override the authority of a state or territory appointee where the scope of their appointments overlap. That is, where a matter concerns a decision being made for the purposes of the Commonwealth legislation, the Commonwealth representative is responsible.<sup>149</sup>

4.140 AGAC raised an example of possible interaction issues. It expressed concern about the possibility of Centrelink appointing a representative who is different from an existing state-appointed administrator or financial manager with responsibility for managing all other aspects of a person's financial affairs for a person whose primary income is a Centrelink benefit.<sup>150</sup> In the ALRC's view, this situation can be expected to arise only rarely because the administrator or financial manager would generally be appointed as the Centrelink representative, if one is needed.<sup>151</sup> Even where this does not occur, the problems caused may not be insuperable, given consultation and cooperation. In any case, if the administrator is effectively unable to perform any residual role, there may be no continuing need for the state or territory appointment.

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148 Consistently with the Safeguards Guidelines. While attention is being given here to the interaction of representatives, the whole thrust of the Commonwealth decision-making model is to encourage supported decision-making and to minimise the need to appoint representatives in the first place.

149 In some circumstances, s 109 of the *Australian Constitution* may operate to ensure that the responsibility of a state or territory appointed decision-maker extends only to those areas not covered by the decision-making powers of the Commonwealth representative.

150 AGAC, *Submission 91*.

151 Except perhaps where Centrelink is not aware of the existing appointment. See 'Information sharing' below.

***No existing appointment***

4.141 Where there is no existing appointment, and no other potential representative exists, such as a family member or other supporter, agencies may need to explore other options.

4.142 In some circumstances, these options may include applying to a state or territory guardianship board or tribunal for the appointment of a person with powers and responsibilities comparable to those of a representative under the relevant Commonwealth scheme. This possibility, which raises a range of interaction and other issues, is discussed in more detail in the context of the NDIS in Chapter 5.

4.143 Under some state or territory regimes, it may already be possible for a Commonwealth agency, or some other person, to apply for the appointment of a state or territory guardian or administrator to ensure that a person is available to make decisions.

4.144 This has already occurred in NSW, for example, where the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) has appointed the Public Guardian, in part, to ensure that there is someone to perform the duties of a nominee for a participant in the NDIS.<sup>152</sup> The NCAT stated that the appointment of a guardian ‘solely for this purpose’, where there is a friend or relative who could be considered as a nominee by the National Disability Insurance Agency, would not be consistent with the principles of the NSW legislation.<sup>153</sup>

4.145 If Commonwealth agencies were to have regular recourse to state and territory guardianship and administration systems to find people suitable for appointment as representatives, this would have resource and funding implications for state and territory governments.

***Implications for state and territory laws***

4.146 The interaction between Commonwealth and state and territory systems may be difficult in practice if states and territories retain ‘existing decision-making systems, particularly given the substitute decision-making nature of many such systems’.<sup>154</sup> The OPA (Qld) observed that proposals to address possible conflict between systems would require ‘extensive cooperation and communication between state-based guardianship tribunals and public guardians, and individual Commonwealth agencies who may have appointed representative decision makers’.<sup>155</sup>

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152 See *KCG* [2014] NSWCATGD 7.

153 See *Ibid* [70]. Referring to *Guardianship Act 1987* (NSW) ss 4, 14(2). Most importantly, s 14(2) requires NCAT, in considering whether to make a guardianship order to have regard, among other things, to the importance of preserving the person’s existing family relationships and the practicability of services being provided to the person without the need for the making of such an order.

154 National Association of Community Legal Centres, *Submission 127*. The NSWCID stated that a ‘national approach is highly desirable that involves a high degree of consistency and symbiosis between State/Territory and Commonwealth approaches’: NSW Council for Intellectual Disability, *Submission 131*.

155 Office of the Public Advocate (Qld), *Submission 110*.



4.147 In fact, a number of issues arise that may require legislative change to resolve, if state or territory guardians and administrators are to perform roles under Commonwealth schemes.

4.148 The first concerns duties and obligations. A person appointed by a state or territory body, such as NCAT, would have duties under state or territory legislation,<sup>156</sup> as well as under the Commonwealth law. While these duties may sometimes be interpreted as consistent, there may be times when they conflict.

4.149 Most obviously, under state legislation, a guardian may have a duty to make decisions in the best interests of the person represented, while having a duty under Commonwealth legislation to ensure that the person's own will and preferences direct the decision. While it seems clear that, when making decisions for the purposes of Commonwealth legislation, Commonwealth legislative duties would apply, the person may then be in breach of duties owed as a guardian under state or territory legislation making it difficult, if not impossible, for them to continue to act in the latter role.<sup>157</sup>

4.150 Legislative change may also be required to allow state or territory appointees to be appointed under orders that better align with duties and responsibilities under Commonwealth legislation—for example, so that they can make both lifestyle and financial decisions under the NDIS.

## Information sharing

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

4.151 Information sharing will be important in ensuring the effective operation of the Commonwealth decision-making model and its interaction with state and territory systems. Information about appointments needs to be shared between Commonwealth departments and agencies, and between the Commonwealth and state or territory bodies.

4.152 The ALRC recommends that the Australian and state and territory governments develop methods of information sharing. Information sharing could take a number of forms and serve different functions, including avoiding unnecessary duplication of appointments and facilitating review and monitoring of existing appointments.

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156 For example, under the *Guardianship Act 1987* (NSW) a guardian has a duty to ensure that the 'freedom of decision and freedom of action' of the person represented is 'restricted as little as possible'; and that the person is 'encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs': *Guardianship Act 1987* (NSW) s 4.

157 See, however, *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.7. This is discussed in Ch 5.

4.153 At the more formal end of the spectrum, information sharing could take the form envisaged by VLRC, which recommended that supported decision-making arrangements and orders be registered online and not come into force until registration.<sup>158</sup> This type of register could act as a centralised source of information about the appointment of supporters and representatives in particular areas of Commonwealth law, and facilitate the appointment of existing appointees or representatives as a supporter or representative.

4.154 Less formally, Commonwealth departments and agencies could develop or revise existing memoranda of understanding with state and territory bodies with respect to information sharing. Informal information sharing arrangements are already in place between some Commonwealth agencies and public trustees and guardians in some jurisdictions. For example, the NSW Trustee and Guardian has entered a number of arrangements under memoranda of understanding with Commonwealth agencies to 'share data in order to ensure that the needs of persons are protected and to minimise the duplication of effect'.<sup>159</sup>

4.155 AGAC highlighted that Commonwealth appointments may sometimes need to be reviewed because a representative's appointment at state or territory level has been varied or revoked.<sup>160</sup> This may be another reason to develop information sharing about appointments.

4.156 Stakeholders were positive about the idea of new registers of decision-makers and other information sharing mechanisms.<sup>161</sup> The Queensland Law Society, for example, submitted that strategies should include a register of decision-makers under state laws, including enduring powers of attorney and advance healthcare directives.<sup>162</sup>

4.157 The LIV has previously supported information sharing through a national register for powers of attorney, with the aim of reducing the extent of abuse of these instruments and increasing certainty for third parties about whether an enduring power is current and valid. Consistently, the LIV supported the development of mechanisms for sharing information about supporter and representative appointments and suggested that the Australian Government consider 'which agency would be responsible for administering and maintaining the register, funding arrangements, the use and accessibility of the register, and privacy issues of such a register'.<sup>163</sup>

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

159 AGAC, *Submission 91*.

160 *Ibid.*

161 Law Institute of Victoria, *Submission 129*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Office of the Public Advocate (Qld), *Submission 110*; Qld Law Society, *Submission 103*; Offices of the Public Advocate (SA and Vic), *Submission 95*.

162 Qld Law Society, *Submission 103*.

163 Law Institute of Victoria, *Submission 129*.

## Guidance and training

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

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

4.158 Consistent information and advice, and targeted guidance and training for all parties involved in the Commonwealth decision-making model is of vital importance in ensuring its effective operation.

4.159 Guidance and training also contributes to the fulfilment of Australia's obligations under art 4 of the CRPD to promote training in the rights recognised in the CRPD so as to better provide the assistance and services guaranteed by those rights.<sup>164</sup> It may also respond to recommendations made by the UNCRPD that Australia

provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.<sup>165</sup>

4.160 It will be important to develop and deliver accessible and culturally appropriate information, guidance and training for:

- people who require decision-making support;<sup>166</sup>
- supporters and representatives;<sup>167</sup> and
- the employees and contractors of Commonwealth agencies which operate under the recommended model.

<sup>164</sup> *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 4(1)(i). See also art 8.

<sup>165</sup> Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its 10th Session (2–13 September 2013)' (United Nations, 4 October 2013) 26.

<sup>166</sup> Office of the Public Advocate (SA), *Submission 17*; Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011.

<sup>167</sup> Carers NSW, *Submission 23*; Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011.

4.161 This approach was strongly encouraged by stakeholders.<sup>168</sup> For example, NDS observed that

To effectively implement both the supporter and representative role and more broadly the national decision-making principles, there is a need for an awareness-raising and learning and development strategy. Specific guidance and training needs to be available for the decision-maker, supporters, representatives and Commonwealth agencies interacting with the decision-maker.<sup>169</sup>

4.162 One obvious concern was for guidance and training that focuses on the concept of supported decision-making itself.<sup>170</sup> The point at which supported decision-making moves to representative decision-making needs to be closely monitored by supporters, and by the Commonwealth agencies responsible for implementing the scheme.<sup>171</sup>

[A] key element in educating supporters is that they have a support role only: the supporter is not the decision maker, and is educated as such on support strategies, and how not to inadvertently become a substitute decision maker in this role.<sup>172</sup>

4.163 Another concern was training in developing people's decision-making ability. Stakeholders emphasised the need for 'training and support being provided for people with disabilities to enhance their own decision making skills and their understanding of the various options for assistance'.<sup>173</sup> NSWCID submitted that for some people with intellectual disability,

in ideal circumstances they may be able to make their own decisions. However, they may not be in those circumstances in that they have had very limited exposure to alternatives to current deprived lifestyles and/or are in entrenched relationships of control (benevolent or malevolent) by family members or other long-standing people in their lives.<sup>174</sup>

4.164 Scope submitted that resources and supports are required to build decision-making ability and that

An evidence base is growing that supports the notion that all people, regardless of their level of cognitive impairment, can have their preferences heard through highly collaborative, detailed and lengthy supported decision making processes. These processes are reliant on strong circles of support that work collaboratively to support people to participate in decisions that reflect their preferences.<sup>175</sup>

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168 National Association of Community Legal Centres, *Submission 127*; Qld Law Society, *Submission 103*; Mental Health Coordinating Council, *Submission 94*; National Disability Services, *Submission 92*; AGAC, *Submission 91*; Scope, *Submission 88*.

169 National Disability Services, *Submission 92*.

170 See, eg, Carers NSW, *Submission 23*; Office of the Public Advocate (SA), *Submission 17*.

171 AGAC, *Submission 91*.

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

173 Disability Services Commissioner Victoria, *Submission No 61 to the Victorian Law Reform Commission, Guardianship Inquiry*, May 2011, 6.

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

175 Scope, *Submission 88*. References omitted.

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4.165 More broadly, stakeholders highlighted that the development and integration of supported decision-making will require significant cultural and attitudinal change within the community.<sup>176</sup> NACLC, for example, suggested that, in addition to education and training for those engaged directly in the decision-making, a national community awareness and education campaign should be recommended.<sup>177</sup>

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176 See, eg, National Association of Community Legal Centres, *Submission 127*; Scope, *Submission 88*.  
177 National Association of Community Legal Centres, *Submission 127*.

