

Recommendations

3. National Decision-Making Principles

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

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

Principle 1: The equal right to make decisions

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

Principle 2: Support

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

Principle 3: Will, preferences and rights

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

Principle 4: Safeguards

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

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

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

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

(2) *Assessing support needs*

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

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

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

(1) *Supported decision-making*

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

(2) *Representative decision-making*

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

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

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

Recommendation 3–4 *Safeguards Guidelines*

(1) *General*

Safeguards should ensure that interventions for persons who require decision-making support are:

- (a) the least restrictive of the person's human rights;
 - (b) subject to appeal; and
 - (c) subject to regular, independent and impartial monitoring and review.
- (2) *Support in decision-making*
- (a) Support in decision-making must be free of conflict of interest and undue influence.
 - (b) Any appointment of a representative decision-maker should be:
 - (i) a last resort and not an alternative to appropriate support;
 - (ii) limited in scope, proportionate, and apply for the shortest time possible; and
 - (iii) subject to review.

4. Supported Decision-Making in Commonwealth Laws

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. The National Disability Insurance Scheme

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

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

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

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

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

6. Supporters and Representatives in Other Areas of Commonwealth Law

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

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

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

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

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

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

7. Access to Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 7-9 The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers.

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

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

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

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

Recommendation 7–13 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations.

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

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

Recommendation 7–15 The *Federal Court of Australia Act 1976* (Cth) should provide for offences, in similar terms to those under ss 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

8. Restrictive Practices

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

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

9. Electoral Matters

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

- (a) s 93(8)(a), which provides that a person of ‘unsound mind’ who is ‘incapable of understanding the nature and significance of enrolment or voting’ is not entitled to have their name on the electoral roll or to vote in any Senate or House of Representatives election; and
- (b) s 118(4), which relates to objections to enrolment on the basis that a person is of ‘unsound mind’.

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

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

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

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

Recommendation 9-5 Section 234(1) of the *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person chosen by the voter to assist them with voting.

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

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

10. Review of State and Territory Legislation

Recommendation 10–1 State and territory governments should review laws and legal frameworks concerning individual decision-making to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In conducting such a review, regard should also be given to:

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

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

11. Other Issues

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

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

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

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

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

