

APPENDIX 3

Summary of key recommendations from previous reports

Australian Law Reform Commission

Equality, Capacity and Disability in Commonwealth Laws, 2014

Recommendations¹

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.

¹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report, ALRC Report 124, August 2014, pp 11–21, <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124> (accessed 20 November 2015).

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 4–3 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 4–6 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 4–10 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.

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.

7. Access to Justice

Recommendation 7–1 and 7–3 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 7–7 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 7–11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may support persons with disability in giving evidence.

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.

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.

Australian Human Rights Commission***Equal Before the Law: Towards Disability Justice Strategies, 2014******Actions²*****Disability Justice Strategies**

The Australian Human Rights Commission (Commission) considers that each jurisdiction in Australia requires an holistic, coordinated response to the issues raised in this report through a Disability Justice Strategy.

The Commission considers that any Disability Justice Strategy should address a core set of principles and include certain fundamental actions. These are set out in the following six action areas.

4.1 Appropriate communications

Action 4.1.1 Include formal recognition of the requirement to ascertain the need for an interpreter service, communication support worker or hearing assistance when dealing with Aboriginal and Torres Strait Islander people.

Action 4.1.2 Provide access to an appropriate independent communication support worker and interpreter regardless of place of residence or geographical location.

Action 4.1.3 Align terms and conditions of bail, bonds and restraining orders to a person's abilities and capacity to comply.

Action 4.1.4 Communicate bail decisions in a format and mode appropriate to the person with disability.

Action 4.1.5 Provide support to remind a person of bail conditions and support compliance.

4.2 Early intervention and diversion

Action 4.2.1 Make available via an e-referral program information that assists police and courts with appropriate diversion and early intervention.

Action 4.2.2 Make the e-referral program state- or territory-wide and link it to registered local, state and national support service agencies.

Action 4.2.3 Use e-referral programs to provide timely interventions that stream Aboriginal and Torres Strait Islander children with disability to the support services that they need.

4.3 Increased service capacity and support

Action 4.3.1 Design intervention and support services that are:

- age-, gender- and disability-sensitive;

2 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, pp 31–38, <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 20 November 2015).

- appropriate for people with disabilities who have communication impairment or complex support needs; and
- culturally appropriate to the needs of women, children, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities.

Action 4.3.2 Expand Community Visitor's schemes to include a broader range of settings and apply to all people with disabilities.

Action 4.3.3 Provide access to advocacy and legal services with disability expertise regardless of place of residence or geographical location.

Action 4.3.4 Provide during interviews a sexual assault counsellor, disability support advocate or specialist disability lawyer to support adults and children with disabilities who have been sexually assaulted or experienced violence.

Action 4.3.5 Provide to people with disabilities who are lawfully deprived of their liberty the support, adjustments and aids they need to meet basic human needs and participate in custodial life.

Action 4.3.6 Establish as a matter of urgency a national Aboriginal and Torres Strait Island disability individual advocacy program.

Action 4.3.7 Create an assessment protocol that assists police, courts, and correctional institutions in identifying people with disabilities in order to determine:

- the necessity for Independent Communication Support Workers, and Disability Advocate / Support Person;
- the appropriate supports and services to exercise their legal capacity and enhance health, social and welfare outcomes; and
- the requirement for procedural and age-appropriate accommodations to ensure effective access to justice.

Action 4.3.8 Provide pre-court conferencing for children and young people with disabilities.

Action 4.3.9 Provide witness support services to people with disabilities,

Action 4.3.10 Aboriginal and Torres Strait Islander people with disabilities are provided with culturally secure assessment, supports and services that promote full and effective participation in society and a life with dignity.

Action 4.3.11 Adopt individual case management for prisoners/detainees with disability, including through prison in-reach services provided by community organisations, to provide education and support (pre- and post-release) to assist re-integration into the community and reduce offending behaviour.

Action 4.3.12 Make available quiet rooms for people with disabilities to wait, meet or for break times in court.

Action 4.3.13 Sentencing for unpaid fines should involve the exercise of discretion, taking into account the high incidence of poverty among people with disabilities.

4.4 Effective training

Action 4.4.1 Develop and deliver staff training that:

- improves responses and attitudes of staff
- addresses the impact of intersectional experiences of disability, gender and violence.
- emphasises the rights of people with disabilities to make their own decisions, with support if necessary, and that those decisions deserve respect.

Action 4.4.2 Provide to people with a disability, their families and carers appropriate education and information, in a culturally competent manner, so they are confident in using the service system and can acquire the 'inside knowledge' that makes a system work.

4.5 Enhanced accountability and monitoring

Action 4.5.1 Ensure people with disabilities are represented on relevant governance and advisory boards.

Action 4.5.2 Include transparent, effective and culturally appropriate complaints handling procedures.

Action 4.5.3 Implement a transparent independent mechanism to monitor the use of restraint and seclusion of people with disabilities in all settings, with a view to recording and minimising the use of these practices. When the circumstances justify the use of restraint and seclusion safeguards must in place and reported.

4.6 Better policy and frameworks

Action 4.6.1 At every stage of the criminal justice system, recognise the importance of providing procedural and age-appropriate accommodations to people with disabilities.

Action 4.6.2 Recognise that failure to provide necessary accommodations to a person with disabilities can create a legitimate mitigating circumstance that a court should consider.

Action 4.6.3 Where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome.

Action 4.6.4 Require chief executives of relevant agencies to report every 2 years to the Premier and the Premier's Disability Advisory Council in relation to access to justice for people with disabilities in the criminal justice system.

Action 4.6.5 All criminal justice agencies monitor and evaluate:

- participation rates by people with disabilities as victims of crime, witnesses, accused, defendants, offenders and jurors in all parts of the justice system
- provision of adjustments and supports on critical indicators including age, sex, gender, disability, race, type of violence.

Productivity Commission***Access to Justice Arrangements, 2014******Recommendations – Chapter 5: Understanding and navigating the system***³

Recommendation 5.1

Legal Assistance Forums should establish Community Legal Education Collaboration Funds (CLECFs) in their jurisdictions to ensure that high quality legal education resources for jurisdictional and Commonwealth matters are developed and maintained. Funding for community legal education should be allocated to projects where the forum has identified significant need. A database of community legal education projects should be used to share community legal education, identify community legal education that may be out of date and minimise duplication. Mechanisms to ensure coordination between CLECFs on matters of Commonwealth law should be put in place.

Recommendation 5.3

To support the identification and assistance of disadvantaged people with complex legal needs:

- legal health checks that are developed for priority disadvantaged groups should be funded through the proposed Community Legal Education Collaboration Funds. The resulting material should be shared amongst providers. Legal Assistance Forums should coordinate this activity to avoid duplication between jurisdictions and maintain the currency of the health checks.
- legal assistance and relevant non-legal service providers should be encouraged to coordinate their services in order to provide more outreach and holistic services where appropriate and need is greatest.
- the proposed Community Legal Education Collaboration Funds should assess the most effective way to support the legal education of non-legal community workers. Training materials should be shared among legal assistance providers and between jurisdictions.

Legal Assistance Forums should regularly reassess the mix of these services in order to promote efficient service delivery by adapting to changing needs.

3 Productivity Commission, 'Chapter 5: Understanding and navigating the system,' *Access to Justice Arrangements*, Productivity Commission Inquiry Report no. 72, volume 1, 5 September 2014, pp 149–185, <http://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 21 October 2015).