



**Australian Government**

**Australian Law Reform Commission**

**Professor Rosalind Croucher AM  
President**

NDIS Quality and Safeguards  
PO Box 7576  
Canberra Business Centre ACT 2610

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30 April 2015

Dear Sir/Madam,

**ALRC Submission: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework**

I refer to the invitation for submissions on the Disability Reform Council's consultation paper *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework* (the consultation paper).

The ALRC makes the following submission in response to the consultation paper. The submission draws on the recent experience of the ALRC in its disability inquiry, which culminated in the final report *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124), tabled in the Australian Parliament on 24 November 2014.

**The ALRC *Equality, Capacity and Disability in Commonwealth Laws* report**

The ALRC made a number of recommendations relevant to the recognition of supported decision-making within the NDIS. These included that:

- 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' recommended by the ALRC;<sup>1</sup>
- the NDIS Act and Rules should be amended to include provisions dealing with representatives (presently called 'nominees') consistent with the Commonwealth decision-making model.<sup>2</sup>

The Australian Government has not yet responded to the ALRC Report and legislative amendments to implement its recommendations are not anticipated in the short term.

As the ALRC Report recognised, the NDIS Act already provides for supported decision-making in a manner largely consistent with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the ALRC's recommended National Decision-Making Principles.<sup>3</sup>

In this context, even in the absence of legislative reform, this submission suggests how reference to supported decision-making might be more fully incorporated in the NDIS quality and safeguarding framework (the Framework).

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1 ALRC Report 124, rec 5–2. The 'Commonwealth decision-making model' refers to a regime that encourages supported decision-making in a form consistent with recommended National Decision-Making Principles and recs 4–2 to 4–9 (see ch 4, rec 4–1).  
2 ALRC Report 124, rec 5–3.  
3 See ALRC Report 124, ch 5.

Australian Law Reform Commission  
Level 40, MLC Centre  
19 Martin Place  
Sydney NSW 2000

Tel (02) 8238 6333  
Fax (02) 8238 6363

Web [www.alrc.gov.au](http://www.alrc.gov.au)  
Email [info@alrc.gov.au](mailto:info@alrc.gov.au)

Postal Address:  
GPO Box 3708  
Sydney NSW 2001

## **The Framework and supported decision-making**

The consultation paper states that the Framework will replace existing state-based arrangements and is ‘designed to give participants choice and control over their supports and allow people to take reasonable risks to achieve their goals’ consistent with the overall approach of the NDIS (p 10).

The central point that the ALRC would like to make is that the Framework provides an opportunity to ensure that:

- supported decision-making by NDIA participants is encouraged;
- representative decision-makers (such as NDIS nominees) are only appointed as a last resort and not as an alternative to appropriate support; and
- the will, preferences and rights of participants direct decisions that affect them.<sup>4</sup>

The consultation paper does not make explicit reference to supported decision-making principles. However, these are consistent with the overall approach of the Framework and, in the ALRC’s view, would assist in the pursuit of the aims of the NDIS. This following suggests how reference to supported decision-making might be more fully incorporated in the Framework.

### **Choice and control**

The consultation paper states that the Framework has been shaped, in part, by the principle of choice and control—that is, the NDIS should maximise opportunities for people with disability to make decisions about their supports (p 4).

However, the text of the proposed Framework does not make explicit reference to one of the central ways in which choice and control can be promoted—the principle that persons who require support in decision-making should be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.<sup>5</sup>

Recognising supported decision-making, directed by a person’s will and preferences, seems essential for the meaningful exercise of choice and control (and a ‘risk-based and person-centred approach’), and this should be emphasised in the Framework.

Explicit recognition of supported decision-making would be consistent with the overall approach of the Framework and its existing statements about, for example, the importance of support from family, carers and community as a ‘natural safeguard’ and as ‘essential in enabling people with disability to make informed choices as consumers’ (p 11). In this context, the ALRC also suggests that the definition of ‘supports’ (p vi) might include reference to supports in decision-making.

The reference to ‘actively supporting participants to develop their self-advocacy and decision-making skills and understand their rights’ (p 12) also provides an opportunity to incorporate recognition of supported decision-making.

### **Presumption of capacity**

The consultation paper states that the Framework has been shaped, in part, by the presumption of capacity—that is, the NDIS should presume that all people with disability have the capacity to make decisions and exercise choice and control (p 4).

The principal idea in any discussion of legal capacity is that adults have the right to make decisions for themselves. This is frequently expressed in terms of a presumption of legal capacity, which may be rebutted if circumstances demonstrate that the requisite level of capacity is lacking in that context.

In its Report, the ALRC stated that, in this context, the emphasis should be placed on the right of people to make decisions, rather than on the qualification intrinsic in a ‘presumption’. The conceptual difficulty in starting with a presumption of legal capacity as an overarching principle is that it already contains a binary classification—of those who have legal capacity, and those who do not.

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4 See ALRC 124, National Decision-Making Principles.

5 ALRC Report 124, rec 3–1, National Decision-Making Principle 2.

The ALRC suggests, therefore, that the Framework refer instead to the ‘right of all adults to make decisions that affect their lives and to have those decisions respected’, as expressed in National Decision-Making Principle 1.<sup>6</sup>

### **Will and preferences decision-making**

The consultation paper states, in relation to safeguards for participants who manage their own plans, that a key aim of the NDIS is to ensure that participants ‘are able to determine their own best interests, have choice and control, and be equal partners in decisions that affect their lives, to the full extent of their capacity’. This includes taking control of the planning and delivery of supports if they wish (p 67).

In this context, there is an opportunity to highlight the desirable shift, consistent with art 12 of the CRPD, to ensuring that the ‘will, preferences and rights’ of persons who may require decision-making support direct decisions that affect their lives, not another person’s assessment of their ‘best interests’.<sup>7</sup>

Stakeholders in the ALRC inquiry strongly supported this shift in emphasis from ‘best interests’ to will and preferences decision-making. Even where ‘best interests’ are defined by giving priority to will and preferences, the standard of ‘best interests’ is still anchored conceptually in substitute decision-making regimes from which Australia should be seeking to depart.<sup>8</sup>

### **Restrictive practices**

The ALRC recommended that 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’.<sup>9</sup>

Among other things, this means that provisions regulating restrictive practices should: encourage supported decision-making before the use of such practices; provide for the appointment of representative decision-makers only as a last resort; and require that the will, preferences and rights of persons direct decisions about any use of restrictive practices.

The ALRC recognised the complexity of incorporating supported decision-making into regulation of restrictive practices, but considered that art 12 of the CRPD should help inform any future national approach to restrictive practices—in particular, by ensuring that decisions about restrictive practices are based on the ‘will, preferences and rights’ of the person subjected to them.

To some extent, the consultation paper’s stated approach to restrictive practices in the NDIS (pp 78-79) recognises supported decision-making—for example, by referring to ‘ensuring that families and others who know the person well should be used to help ensure the person understands and, to the greatest extent possible, agrees with the behaviour support plan’ (p 79).

The ALRC does not have a view on how restrictive practices might be authorised without the agreement of the person concerned—if, in fact, restrictive practices should be *ever* be permitted in such circumstances. However, whatever mechanism is used, the decision-maker should have obligations consistent with the ALRC’s recommended Will, Preferences and Rights Guidelines.<sup>10</sup>

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

- The person’s will and preferences must be given effect.
- 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.
- 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.
- A representative may override the person’s will and preferences only where necessary to prevent harm.

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6 ALRC Report 124, rec 3–1, [3.12]–[3.17].

7 ALRC Report 124, rec 3–1, National Decision-Making Principle 3, rec 3–3 (Will, Preferences and Rights Guidelines).

8 ALRC Report 124, [3.50]–[3.57].

9 ALRC Report 124, rec 8–1.

10 ALRC Report 124, rec 3–3 (Will, Preferences and Rights Guidelines).

Thank you for this opportunity to comment on the consultation paper. If you require any further information please do not hesitate to contact me on (02) 8238 6319.

Yours sincerely,

A handwritten signature in black ink, reading "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

**Professor Rosalind Croucher AM**