



Australian Government

Australian Law Reform Commission

**Emeritus Professor Rosalind Croucher AM
President**

Department of Social Services
GPO Box 9820
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Dear Sir/Madam

Submission to consultation about the new NDIS Code of Conduct

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to this consultation about the new NDIS Code of Conduct.

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.

One of the proposed obligations for NDIS providers and workers under the new Code of Conduct is the obligation to promote individual rights to freedom of expression, self-determination and decision making.

In the *Equality, Capacity and Disability* Report, the ALRC considered in detail the decision-making rights of people with disability, and foregrounded the principle that everyone has an equal right to make decisions and to have their decisions respected.

Some people with disability may require additional support so that they can exercise their right to make decisions. The ALRC endorsed a new standard for supported decision making for people with disability: that a person providing decision making support should act according to the will, preferences and rights of that person. Allied with this, the ALRC developed a set of National Decision-Making Principles for supported decision making.

The Principles are that:

- everyone has an equal right to make decisions and to have their decisions respected;
- persons who need support should be given access to the support they need in decision making;
- a person's will and preferences must direct decisions that affect their lives; and

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- there must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.¹

The National Decision-Making Principles were supported by guidelines relating to support in decision making, the will, preferences and rights standard, and safeguards.²

The emphasis of the National Decision-Making Principles is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive decisions that they are supported in making, and that others may make on their behalf.

The National Decision-Making Principles and associated guidelines provide useful guidance for how NDIS providers and workers should approach the obligation to promote individual rights to decision-making under the Code of Conduct.

The relevant recommendations are extracted in full below, at Appendix A.

We hope this submission is of assistance. If you require any further information, please do not hesitate to contact the ALRC.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM

1 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–1.

2 Ibid recs 3–2 to 3–4.

APPENDIX A: Selected recommendations from ALRC Report 124: *Equality, Capacity and Disability in Commonwealth Laws*

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.