

Respecting the autonomy, will and preference of older persons in decision-making

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Elder Abuse

- What is elder abuse?

a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person

(World Health Organisation)

- Can take various forms including financial, physical, psychological / emotional, social and / or sexual

➤ Centrally about breach of trust

Elder abuse and approaches to decision-making

- Authentic participation in decision-making as a key strategy to preventing and addressing elder abuse
- ALRC Report (2017)
 - Aged Care (Chapter 4-12);
 - Guardianship and Financial Administration (Chapter 10-2)
 - Recommendation 3-3(a)
- Final Report of the Select Committee into Elder Abuse (WA) (Sept, 2018)
 - Recommendation 1: adopting a human rights-based approach
 - Approaches to decision-making (findings 45 and 46)

International Human Rights Treaties

Convention on the Rights of Persons with Disabilities and Optional Protocol



UNITED NATIONS

United Nations Convention on the Rights of Persons with Disabilities (CRPD)

Article 12 – Equal Recognition Before the Law

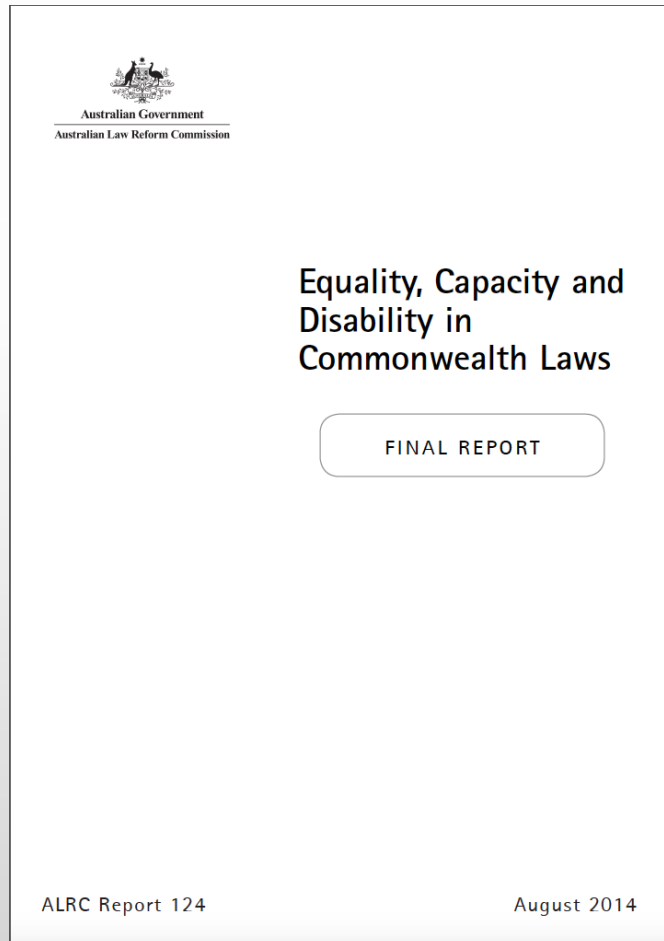
1. People with disabilities are recognised as **persons** before the law
2. People with disabilities have **legal capacity** on an equal basis with others
3. People with disabilities **have a right to access support**
4. There must be **safeguards to prevent abuse**

Decision-making and Older Persons

- The older population challenges the legal requirements for valid decision-making
 - Binary approach to capacity (Blake, Doray, Sinclair (2017));
 - Voluntariness issues;
 - Understanding (Blake, Sinclair, Stewart, forthcoming)
- Decision-making principles in the ALRC Report on Equality, Capacity and Disabilities in Commonwealth Laws (2014)
- Dementia recognised by WHO as a disability in 2015
 - The key decision-making principles established under the ALRC Report apply to older persons with progressive cognitive impairment
 - Working with persons LWD is an exercise in the promotion of the human rights of those persons

National Decision-Making Principles

Australian Law Reform Commission Report 2014



01
The right to
make decisions

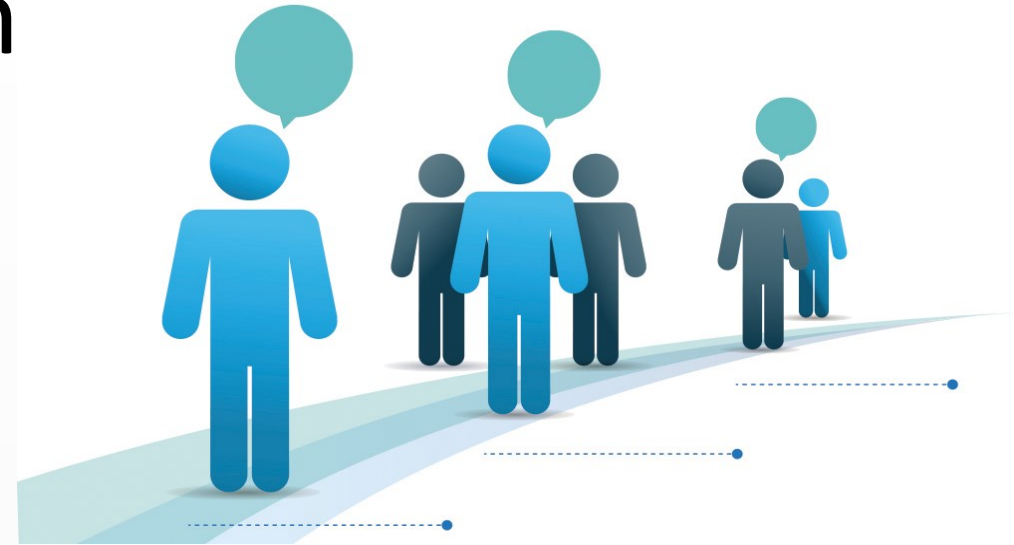
02
Support to
make
decisions

03
Will,
preferences
and rights

04
Safeguards to
prevent undue
influence and
abuse

*ALRC Recommendations

Decision-making continuum



- Spectrum model moves from independence through supported to wills and preference based substituted decision-making;
- Independent
 - The relational context;
 - Supported decision-making vs support for decision-making

Defining Supported Decision-Making

“
...the process
whereby a person
with a disability is
enabled to make
and communicate
decisions with
respect to personal
or legal matters”

(United Nations, 2006)

A voluntary process

Person's own decision

Assisting person to understand

Assisting person to weigh options

Assisting person to communicate

Developing person's decision-making ability

Creating enabling contexts

The decision-making spectrum

- Supported decision-making pilots in South Australia, Victoria and NSW;
- Law reform in Victoria;
- NDIS Act 2013 (Cth) section 4;
- Recommendations in NSW LRC Report on Review of the Guardianship Act 1987 (2018)
- Resources on supported decision-making available at <http://sydney.edu.au/medicine/cdpc/resources/supported-decision-making.php>;
[http://www.opa.sa.gov.au/resources/supported decision making](http://www.opa.sa.gov.au/resources/supported_decision_making)
- Substituted decision-making as a last resort;
- Basis for substituted decision-making
- Movement from best interests to the ascertainable will and preference of the person lacking capacity.

Changes to the Aged Care Act 1997

1. Aged Care Quality Standards 2018

<http://www.aacqa.gov.au/providers/standards/new-standards/guidance>

- Standard 1 – consumer dignity and choice esp.
 - 1.3: Each consumer is supported to exercise choice and independence;
 - 1.4: Each consumer is supported to take risks to enable them to live the best life they can;
 - 1.5: Information provided to each consumer is current, accurate and timely, and communicated in a way that is clear, easy to understand and enables them to exercise choice
- Standard 2 – ongoing assessment and planning with consumers esp.
 - 2.2: Assessment and planning identifies and addresses the consumer's current needs, goals and preferences, including advance care planning and end of life planning if the consumer wishes

2. Regulatory Structures

- Creation of the Aged Care Quality and Safety Commission (combining the Aged Care Complaints Commissioner and AACQA)
- From 1st Jan 2019