



Review of Supported Decision-Making in South Australia

Fact Sheet 2 – Guiding Principles for a new Framework

Substituted vs Supported Decision-Making

There has been a major shift over recent years, in line with international human rights principles (noted below), away from the traditional ‘paternalistic’ decision-making models, such as substituted decision-making models. Under a traditional approach, decisions are made by a person(s), body or government agency for another person with decision-making support needs (see Fact Sheets 3 and 4). The international community instead calls for a supported decision-making model, where a person with decision-making support needs is assisted to make and implement their own informed decisions.¹

Supported decision-making is the process of providing support to people to make decisions to remain, as far as possible, in control of their lives. Under the National Disability Insurance Scheme’s (NDIS) policy, there are four underlying principles associated with a supported decision-making model:

- All adults have an equal right to make decisions that affect their lives and to have those decisions respected;
- There must be access to support for people who need help communicating and participating in decisions;
- Decisions should be directed by a person’s own will, preferences and rights; and
- Include appropriate and effective safeguards against violence, abuse, neglect or exploitation.²

Further, and on the topic of supported decision-making principles, the 2023 final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**‘Disability Royal Commission’**) recommended that State, Territory, and the Australian Government, adopt 10 uniform national decision-making principles:

- Principle 1 – Recognition of the equal right to make decisions
- Principle 2 – Presumption of decision-making ability
- Principle 3 – Respect for dignity and the right to dignity of risk
- Principle 4 – Recognition of the role of informal supporters and advocates
- Principle 5 – Access to support necessary to communicate and participate in decisions
- Principle 6 – Decisions should be directed by a person’s own will and preferences and rights
- Principle 7 – Inclusion of appropriate and effective safeguards against violence, abuse, neglect and exploitation
- Principle 8 – Co-design, co-production and peer-led design processes
- Principle 9 – Recognition of diverse experiences, identities and needs
- Principle 10 – Entitlement to culturally safe, sensitive and responsive decision-making support.³

¹ *New South Wales Law Reform Commission, Review of the Guardianship Act 1987 (Report No 145, May 2018) 19–21 [3.25]–[3.32].*

² These are taken from the NDIS Supported Decision Making Policy, <<https://www.ndis.gov.au/about-us/policies/supported-decision-making-policy>>.

³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Executive Summary, 78.



The concept of supported decision-making is sourced to international instruments including Article 12 of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*').

Convention on the Rights of Persons with Disabilities – Article 12

The *CRPD* is an international treaty regarding the rights of people with disabilities to which Australia is a State Party.

Article 12 of the *CRPD* specifically addresses equal recognition before the law for persons with disabilities. It states that persons with disabilities should 'enjoy legal capacity on an equal basis with others'⁴ and be provided with appropriate supports to exercise this capacity.⁵ Article 12 also notes that 'appropriate', 'effective' and 'proportional' safeguards should be put in place to prevent abuse.⁶

Whilst the *CRPD* is not binding in Australia, its principles are still influential. In relation to supported decision-making, SALRI draws on the *CRPD*, notably the requirements of Articles 3 and 12, and raises the following concepts of autonomy, accessibility and safeguarding as essential considerations for any new or modified supported decision-making framework which aims to promote independence and reduce the risk of abuse or exploitation.

Autonomy, Accessibility and Safeguarding

Supported decision-making allows a person with decision-making support needs to make their own decision, with assistance, if necessary. It is critical that the person does not relinquish their autonomy to another person (as is the case with substituted decision-making).

There are also a number of potential supported decision-making models, each of which has the flexibility to be tailored to the needs of the person with decision-making support needs. Any new framework should allow for the use of multiple supported decision-making models and tools, to maximise accessibility.

Safeguarding ensures that any new model protects people with decision-making support needs by ensuring they cannot be taken advantage of by the people in their support networks. However, safeguarding does have the potential to become 'paternalistic' if it is misapplied or disproportionate, potentially diminishing an individual's autonomy. As such, any safeguards should be necessary and proportionate to the circumstances.

Current Issues

Multiple public inquiries, including the Disability Royal Commission, as well as SALRI's previous references into the *Ageing and Adult Safeguarding Act 1995 (SA)* and the *Mental Health Act 2009 (SA)*, suggest that the central premise of supported decision-making is not widely or uniformly included across legislation and practice in South Australia. This reference seeks to investigate how supported decision-making principles can best be incorporated into new or existing South Australian frameworks to ensure a range of possible users can be supported to make their own decisions about their lives.

Consultation Questions

1. What specific principles or values do you believe are essential to include in a legal framework for supported decision-making to ensure empowerment and autonomy for people with supported decision-making needs?
2. Are there principles or values you think should take priority over others?
3. How can a framework best incorporate the diverse needs and perspectives of people with supported decision-making needs?

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2).

⁵ *Ibid* art 12(3).

⁶ *Ibid* art 12(4).



4. Should these principles be embedded in law or is there a more appropriate alternative?
5. What safeguards or mechanisms do you think are crucial to protecting the fundamental human rights of people with supported decision-making needs within a supported decision-making framework, including the right to dignity?

SALRI's consultation process will open in July 2024 and close on 30 September 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

