Australian Government
Australian Law Reform Commission

# Equality, Capacity and Disability in Commonwealth Laws

DISCUSSION PAPER

You are invited to provide a submission or comment on this Discussion Paper

Discussion Paper 81 (DP 81) May 2014

This Discussion Paper reflects the law as at 1 May 2014

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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# Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission (ALRC) seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

**The closing date for submissions to this Discussion Paper is 30 June 2014.**

## Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: http://www.alrc.gov.au/content/disability-dp81-make-submission Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Please send any pre-prepared submissions in Word or RTF format.

## Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

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# Contents

# Terms of Reference

## Review of equal recognition before the law and legal capacity for people with disability

I, Mark Dreyfus QC MP, Attorney-General of Australia, having regard to:

- the United Nations Convention on the Rights of Persons with Disabilities, to which Australia is a party and which sets out:
    - rights for people with disability to recognition before the law, to legal capacity and to access to justice on an equal basis with others, and
    - a general principle of respect for inherent dignity, individual autonomy, including freedom to make one's own choices, and independence of persons, and
- Australian Governments' commitment to the National Disability Strategy, which includes 'rights protection, justice and legislation' as a priority area for action.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the examination of laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity, and
- what if any changes could be made to Commonwealth laws and legal frameworks to address these matters.

For the purposes of the inquiry, equal recognition before the law and legal capacity are to be understood as they are used in the Convention on the Rights of Persons with Disabilities: including to refer to the rights of people with disability to make decisions and act on their own behalf.

### *Scope of the reference*

In undertaking this reference, the ALRC should consider all relevant Commonwealth laws and legal frameworks that either directly, or indirectly, impact on the recognition of people with disability before the law and their exercise of legal capacity on an equal basis with others, including in the areas of:

- access to justice and legal assistance programs
- administrative law
- aged care
- anti-discrimination law
- board participation

- competition and consumer law
- contracts
- disability services and supports
- electoral matters
- employment
- federal offences
- financial services, including insurance
- giving evidence
- holding public office
- identification documents
- jury service
- marriage, partnerships, intimate relationships, parenthood and family law
- medical treatment
- privacy law
- restrictive practices
- social security
- superannuation, and
- supported and substituted decision making.

The review should also have particular regard for the ways Commonwealth laws and legal frameworks affect people with disability who are also children, women, Indigenous people, older people, people in rural, remote and regional areas, people from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex people.

The purpose of this review is to ensure that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights. In considering what if any changes to Commonwealth law could be made, the ALRC should consider:

- how laws and legal frameworks are implemented and operate in practice
- the language used in laws and legal frameworks
- how decision making by people with impairment that affects their decision making can be validly and effectively supported
- presumptions about a person's ability to exercise legal capacity and whether these discriminate against people with disability
- use of appropriate communication to allow people with disability to exercise legal capacity, including alternative modes, means and formats of communication such as Easy English, sign language, Braille, and augmentative communications technology
- how a person's ability to independently make decisions is assessed, and mechanisms to review these decisions

- the role of family members and carers and paid supports such as legal or non-legal advocates in supporting people with disability to exercise legal capacity for themselves – both in relation to formal and informal decisions and how this role should be recognised by laws and legal frameworks
- safeguards – are the powers and duties of decision making supporters and substituted decision makers effective, appropriate and consistent with Australia's international obligations
- recognition of where a person's legal capacity and/or need for supports to exercise legal capacity is evolving or fluctuating (where a person with disability may be able to independently make decisions at some times and circumstances but not others or where their ability to make decisions may grow with time and/or support), including the evolving capacity of children with disability, and
- how maximising individual autonomy and independence could be modelled in Commonwealth laws and legal frameworks.

In conducting this inquiry, the ALRC should also have regard to:

- initiatives under the National Disability Strategy, including the National Disability Insurance Scheme and other services and supports available to people with disability, and how these should/could interact with the law to increase the realisation of people with disability's recognition before the law and legal capacity
- how Commonwealth laws and legal frameworks interact with State and Territory laws in the areas under review, contemporaneous developments and best practice examples within the States and Territories, and
- international laws and legal frameworks that aim to ensure people with disability are accorded equal recognition before the law and legal capacity on an equal basis with others, including international work to implement the Convention on the Rights of Persons with Disability.

## *Consultation*

In undertaking this reference, the ALRC should identify and consult with relevant stakeholders, particularly people with disability and their representative, advocacy and legal organisations, including through accessible formats, but also families and carers of people with disability, relevant Government departments and agencies in the Commonwealth and States and Territories, the Australian Human Rights Commission, and other key non-government stakeholders.

## *Timeframe*

The Commission should provide its report to the Attorney-General by August 2014.

Dated 23 July 2013

Mark Dreyfus

Attorney-General

# Participants

## Australian Law Reform Commission

### President

Professor Rosalind Croucher

### Part-time Commissioners

The Hon Justice Berna Collier, Federal Court of Australia, until October 2013

Graeme Innes AM, Disability Discrimination Commissioner, Australian Human Rights Commission

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Emeritus Professor Terry Carney, Sydney Law School, University of Sydney

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Graeme Smith, Public Guardian, NSW Department of Attorney General & Justice

Professor Cameron Stewart, Sydney Law School, University of Sydney

Matthew Wright, CEO, The Australian Federation of Disability Organisations, from April 2014

# Proposals and Questions

## 2. Conceptual Landscape—the Context for Reform

**Proposal 2–1** The Australian Government should review the Interpretative Declaration in relation to art 12 of the *United Nations Convention on the Rights of Persons with Disabilities* with a view to withdrawing it.

## 3. National Decision-Making Principles

**Proposal 3–1** Reform of Commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require support in making decisions should be guided by the National Decision-Making Principles and Guidelines, set out in Proposals 3–2 to 3–9.

**Proposal 3–2 National Decision-Making Principle 1**

Every adult has the right to make decisions that affect their life and to have those decisions respected.

**Proposal 3–3 National Decision-Making Principle 2**

Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.

**Proposal 3–4 Support Guidelines**

(a) Persons who may require decision-making support should be supported to participate in and contribute to all aspects of life.

(b) Persons who may require decision-making support should be supported in making decisions.

(c) The role of families, carers and other significant persons in supporting persons who may require decision-making support should be acknowledged and respected.

**Proposal 3–5 National Decision-Making Principle 3**

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

**Proposal 3–6 Will, Preferences and Rights Guidelines**

(a) *Threshold*: The appointment of a representative decision-maker should be a last resort and not as a substitute for appropriate support.

(b) *Appointment*: The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time.

(c) *Supporting decision-making*:

(i) a person's will and preferences, so far as they can be determined, must be given effect;

(ii) where the person's will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters; and

(iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person's human rights and act in the way least restrictive of those rights.

**Proposal 3–7 Representative Decision-Making Guidelines**

Any determinations about a person's decision-making ability and any appointment of a representative decision-maker should be informed by the following guidelines:

(a) An adult must be presumed to have ability to make decisions that affect their life.

(b) A person has ability to make a decision if they are able to:

(i) understand the information relevant to the decision and the effect of the decision;

(ii) retain that information to the extent necessary to make the decision;

(iii) use or weigh that information as part of the process of making the decision; and

(iv) communicate the decision.

(c) A person must not be assumed to lack decision-making ability on the basis of having a disability.

(d) A person's decision-making ability is to be assessed, not the outcome of the decision they wish to make.

(e) A person's decision-making ability will depend on the kinds of decision to be made.

(f) A person's decision-making ability may evolve or fluctuate over time.

(g) A person's decision-making ability must be considered in the context of available supports.

(h) In communicating decisions, a person is entitled to:

(i) communicate by any means that enables them to be understood; and

(ii) have their cultural and linguistic circumstances recognised and respected.

**Proposal 3–8 National Decision-Making Principle 4**

Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

**Proposal 3–9 Safeguards Guidelines**

Laws and legal frameworks must contain appropriate safeguards in relation to decisions and interventions in relation to persons who may require decision-making support to ensure that such decisions and interventions 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.

# 4. Supported Decision-Making in Commonwealth Laws

**Proposal 4–1** Commonwealth laws and legal frameworks should encourage supported decision-making by adopting a model for individual decision-making consistent with the National Decision-Making Principles and Proposals 4–2 to 4–9 (the 'Commonwealth decision-making model').

**Question 4–1** In what areas of Commonwealth law, aside from the National Disability Insurance Scheme, social security, aged care, eHealth and privacy law, should the Commonwealth decision-making model apply?

**Question 4–2** Are the terms 'supporter' and 'representative' the most appropriate to use in the Commonwealth decision-making model? If not, what are the most appropriate terms?

**Proposal 4–2** The objects or principles provisions in Commonwealth legislation that involves decision-making by people who may require decision-making support should reflect the National Decision-Making Principles.

**Proposal 4–3** Relevant Commonwealth laws and legal frameworks should include the concept of a 'supporter' and provide that an agency, body or organisation may establish supporter arrangements. In particular, laws and legal frameworks should reflect the National Decision-Making Principles and provide that:

(a) a person who requires decision-making support should be able to appoint a supporter or supporters at any time;

(b) where a supporter is appointed, ultimate decision-making authority remains with the person who requires decision-making support;

(c) any decision made with the assistance of a supporter should be recognised as the decision of the person who requires decision-making support; and

(d) a person should be able to revoke the appointment of a supporter at any time, for any reason.

**Proposal 4–4** A Commonwealth supporter may perform the following functions:

(a) assist the person who requires decision-making support to make decisions;

(b) handle the relevant personal information of the person;

(c) obtain or receive information on behalf of the person and assist the person to understand information;

(d) communicate, or assist the person to communicate, decisions to third parties;

(e) provide advice to the person about the decisions they might make; and

(f) endeavour to ensure the decisions of the person are given effect.

**Proposal 4–5** Relevant Commonwealth laws and legal frameworks should provide that Commonwealth supporters must:

(a) support the person requiring decision-making support to make the decision or decisions in relation to which they were appointed;

(b) support the person requiring decision-making support to express their will and preferences in making a decision or decisions;

(c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person who requires decision-making support;

(d) act honestly, diligently and in good faith;

(e) support the person requiring decision-making support to consult with 'existing appointees', family members, carers and other significant people in their life in making a decision; and

(f) assist the person requiring support to develop their own decision-making ability.

For the purposes of paragraph (e), 'existing appointee' should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.

**Question 4–3** In the Commonwealth decision-making model, should the relationship of supporter to the person who requires support be regarded as a fiduciary one?

**Question 4–4** What safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model?

**Proposal 4–6** Relevant Commonwealth legislation should include the concept of a 'representative' and provide that an agency, body or organisation may establish representative arrangements. In particular, legislation should contain consistent provisions for the appointment, role and duties of representatives, and associated safeguards, and reflect the National Decision-Making Principles.

**Question 4–5** What mechanisms should there be at a Commonwealth level to appoint a representative for a person who requires full decision-making support?

**Proposal 4–7** A Commonwealth representative may perform the following functions:

(a) assist the person who requires decision-making support to make decisions;

(b) handle the relevant personal information of the person;

(c) obtain or receive information on behalf of the person and assist the person to understand information;

(d) communicate, or assist the person to communicate, decisions to third parties;

(e) provide advice to the person about the decision they might make; and

(f) endeavour to ensure the decisions of the person are given effect.

**Proposal 4–8** Relevant Commonwealth laws and legal frameworks should provide that Commonwealth representatives must:

(a) support the person requiring decision-making support to express their will and preferences in making decisions;

(b) where it is not possible to determine the wishes of the person who requires decision-making support, determine what the person would likely want based on all the information available;

(c) where (a) and (b) are not possible, consider the human rights relevant to the situation;

(d) act in a manner promoting the personal, social, financial and cultural wellbeing of the person who requires decision-making support;

(e) support the person who requires decision-making support to consult with 'existing appointees', family members, carers and other significant people in their life when making a decision; and

(f) assist the person who requires support to develop their own decision-making ability.

For the purposes of paragraph (e), 'existing appointee' should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.

**Proposal 4–9** The appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

**Question 4–6** How should supporters and representatives under the Commonwealth decision-making model interact with state or territory appointed decision-makers?

**Proposal 4–10** The Australian Government should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication in appointments.

**Proposal 4–11** The Australian Government should ensure that people who may require decision-making support, and supporters and representatives (or potential supporters and representatives) are provided with information and advice to enable them to understand their roles and duties.

**Proposal 4–12** The Australian Government should ensure that Australian Public Service employees who engage with supporters and representatives are provided with regular, ongoing and consistent training in relation to the roles of supporters and representatives.

# 5. The National Disability Insurance Scheme

**Proposal 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.

**Proposal 5–2** The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include supporter provisions consistent with the Commonwealth decision-making model.

**Proposal 5–3** The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include representative provisions consistent with the Commonwealth decision-making model.

**Question 5–1** How should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules be amended to clarify interaction between supporters and representatives appointed in relation to the NDIS, other supporters and representatives, and state and territory appointed decision-makers?

**Question 5–2** In what ways should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules in relation to managing the funding for supports under a participant's plan be amended to:

(a) maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and

(b) clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?

## 6. Supporters and Representatives in Other Areas of Commonwealth Law

**Proposal 6–1** The *Social Security (Administration) Act 1999* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

**Proposal 6–2** The *Aged Care Act 1997* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

**Proposal 6–3** The *Personally Controlled Electronic Health Records Act 2012* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

**Proposal 6–4** The *Privacy Act 1988* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

**Proposal 6–5** The Australian Bankers' Association should encourage banks to recognise supported decision-making. To this end, the ABA should issue guidelines, reflecting the National Decision-Making Principles and recognising that:

(a) customers should be presumed to have the ability to make decisions about access to banking services;

(b) customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;

(c) customers are entitled to support in making and communicating decisions; and

(d) banks should recognise supporters and respond to their requests, where possible and consistent with other legal duties.

## 7. Access to Justice

**Proposal 7–1** The *Crimes Act 1914* (Cth) should be amended to provide that a person is unfit to stand trial if the person cannot:

(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; and

(d) communicate decisions in some way.

**Proposal 7–2** The *Crimes Act 1914* (Cth) should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial.

**Question 7–1** What other elements should be included in any new test for unfitness to stand trial, and why? For example, should there be some threshold requirement that unfitness be due to some clinically-recognised mental impairment?

**Proposal 7–3** State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.

**Proposal 7–4** The rules of federal courts should provide that a person needs a litigation representative if the person cannot:

(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 the decisions;

(c) use or weigh that information as part of a decision-making process; and

(d) communicate the decisions in some way.

**Proposal 7–5** The rules of federal courts should provide that available decision-making support must be taken into account in determining whether a person needs a litigation representative.

**Proposal 7–6** The rules of federal courts should provide that litigation representatives:

(a) must support the person represented to express their will and preferences in making decisions;

(b) where it is not possible to determine what are the wishes of the person, must determine what the person would likely want based on all the information available;

(c) where (a) and (b) are not possible, the litigation representative must consider the human rights relevant to the situation; and

(d) must act in a manner promoting the personal, social and financial and cultural wellbeing of the person represented.

**Proposal 7–7** Federal courts should issue practice notes explaining the duties of litigation representatives to the person they represent and to the court.

**Question 7–2** Should the Australian Solicitors' Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors' duties of confidentiality where:

(a) the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and

(b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative?

**Proposal 7–8** The *Evidence Act 1995* (Cth) should be amended to provide that, in assessing whether a witness is competent to give evidence under s 13, the court may take the availability of communication and other support into account.

**Proposal 7–9** The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers; and that the court may give directions with regard to this.

**Proposal 7–10** The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support has the right to have a support person present while giving evidence, who may act as a communication assistant; assist the person with any difficulty in giving evidence; or provide the person with other support. The court should be empowered to give directions with regard to the provision of support.

**Proposal 7–11** Federal courts should develop bench books to provide judicial officers with guidance about how courts may help to assist and support people with disability in giving evidence.

**Question 7–3** Should Commonwealth, state and territory laws be amended to avoid delays in obtaining consent to the taking of forensic samples from people who are incapable of giving consent, and who have been victims of crime? If so, how?

**Proposal 7–12** The *Federal Court of Australia Act 1976* (Cth) should provide that a person is qualified to serve on a jury if the person can, in the circumstances of the trial for which that person is summoned:

(a) understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;

(b) retain that information to the extent necessary to make these decisions;

(c) use or weigh that information as part of the jury's decision-making process; and

(d) communicate the person's decisions to the other members of the jury and to the court.

**Proposal 7–13** The *Federal Court of Australia Act 1976* (Cth) should provide that decision-making support should be taken into account in determining whether a person is qualified to serve on a jury.

**Proposal 7–14** The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations.

**Proposal 7–15** The *Federal Court of Australia Act 1976* (Cth) should be amended to provide:

(a) that communication assistants allowed by the trial judge to assist a juror should swear an oath faithfully to communicate the proceedings or jury deliberations;

(b) that communication assistants allowed by the trial judge to assist a juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements for the secrecy of jury deliberations; and

(c) for offences, in similar terms to those arising under ss 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

## 8. Restrictive Practices

**Proposal 8–1** The Australian Government and the Council of Australian Governments should facilitate the development of a national or nationally consistent approach to the regulation of restrictive practices. In developing such an approach, the following should be considered:

(a) the need for regulation in relation to the use of restrictive practices in a range of sectors, including disability services and aged care;

(b) the application of the National Decision-Making Principles; and

(c) the provision of mechanisms for supported decision-making in relation to consent to the use of restrictive practices.

## 9. Electoral Matters

**Proposal 9–1** Section 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person of 'unsound mind' who is 'incapable of understanding the nature and significance of enrolment or voting' is not entitled to have their name on the electoral roll or to vote in any Senate or House of Representatives election. This should be amended to replace the current wording with: 'does not have decision-making ability with respect to enrolment and voting at the relevant election'.

**Proposal 9–2** The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that a person lacks decision-making ability with respect to enrolment and voting at the relevant election if they cannot:

(a) understand the information relevant to decisions that they will have to make associated with enrolment and voting at the relevant election;

(b) retain that information for a sufficient period to make the decision;

(c) use or weigh that information as part of the process of making decisions; and

(d) communicate their decision in some way.

**Proposal 9–3** The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that decision-making assistance and support should be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.

**Proposal 9–4** The Australian Electoral Commission should develop a guide to assessing ability for the purposes of determining whether a person 'does not have decision-making ability with respect to enrolment and voting at the relevant election' consistent with the National Decision-Making Principles.

**Question 9–1** Section 118(4) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person's name cannot be removed from the electoral roll unless an objection is accompanied by a certificate of a medical practitioner. Should this be amended to provide that an objection may also be accompanied by a statement from a range of qualified persons, including a psychologist or social worker, concerning an elector's decision-making ability with respect to enrolment and voting?

**Proposal 9–5** The Australian Electoral Commission should collect, and make publicly available, information about the operation of s 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth), including the number of people removed from the electoral roll, the reason, and whether they responded to the objection.

**Proposal 9–6** Section 234(1) of the *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that 'if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter's ballot paper'.

**Question 9–2** What further changes, if any, are required to the *Commonwealth Electoral Act 1918* (Cth) or relevant legal frameworks to facilitate the provision of assistance and support to people who require decision-making support to vote, including by secret ballot?

**Proposal 9–7** The Australian Electoral Commission should develop or amend guidance for Divisional Returning Officers to assist them to determine if a valid or sufficient reason for failing to vote exists in circumstances where an elector is a person with disability.

# 10. Review of State and Territory Legislation

**Proposal 10–1** State and territory governments should review laws that deal with decision-making by people who need decision-making support 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; informed consent to medical treatment; mental health; and disability services.

# 11. Other Issues

**Question 11–1** Should provisions similar to the responsible lending provisions of the *National Consumer Credit Protection Act 2009* (Cth) apply to other consumer contracts? That is, should businesses have obligations to ensure that a consumer contract is suitable for the consumer, including making all reasonable inquiries and ensuring that the consumer fully understands the contract terms?

**Question 11–2** Should s 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth) be amended to provide that, instead of a test of mental incapacity, a party who did not have the decision-making ability with respect to the marriage, does not give 'real consent'?

**Proposal 11–1** The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* should be amended to ensure they are consistent with the National Decision-Making Principles.

**Question 11–3** Should the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide:

(a) for supported decision-making regarding a binding death nomination of a beneficiary;

(b) that a state or territory decision-maker (such as under an enduring power of attorney) may nominate a beneficiary on behalf of the member?

**Question 11–4** If a person acting under an enduring power of attorney may make a binding death nomination on behalf of a person holding a superannuation interest under the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth), should they be required to have regard to the will, preferences and rights of the member in making the nomination? What safeguards need to be in place?

**Proposal 11–2** Sections 201F(2), 915B and 1292(7)(b) of the *Corporations Act 2001* (Cth) should be amended to provide that a person is incapable of acting in the particular role if they cannot:

(a) understand the information relevant to the decisions that they will have to make in performing the role;

(b) retain that information to the extent necessary to make those decisions;

(c) use or weigh that information as part of the process of making decisions; and

(d) communicate the decisions in some way.

# 1. Introduction

## Contents



## The Inquiry

1.1 This Inquiry focuses on legal capacity for people with disability. It reflects the commitment expressed in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), to which Australia is a signatory, signalling

> the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.[1]

1.2 The Inquiry commenced in July 2013, the same month in which a pilot of the National Disability Insurance Scheme (NDIS) in Australia was initiated, representing 'a new way of providing community linking and individualised support for people with permanent and significant disability, their families and carers'.[2] The focus of the scheme is to provide greater choice and control over the disability services support received by persons with disability.

1.3 In considering what changes, if any, should be made to Commonwealth laws, the Terms of Reference for this Inquiry require the Australian Law Reform Commission (ALRC) to consider 'how maximising individual autonomy and independence can be modelled in Commonwealth laws and legal frameworks'.[3]

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1 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

2 Department of Families, Housing, Community Services and Indigenous Affairs, *One Big Difference to Lots of Lives: An Introduction to DisabilityCare Australia* (2013) 3.

3 The full Terms of Reference are available on the ALRC website:<www.alrc.gov.au>.

1.4 In this Discussion Paper the ALRC proposes a model that includes high level principles in relation to decision-making—the National Decision-Making Principles—to provide a conceptual overlay and framework for reform of Commonwealth laws and a basis for review of relevant state and territory laws. The model also includes provision for supported decision-making in a formal way in key areas of Commonwealth laws—the Commonwealth decision-making model. The remaining chapters focus on particular areas identified in the Terms of Reference, demonstrating the application of the Principles in a range of Commonwealth laws.

1.5 The Discussion Paper commences the second stage in the consultation processes in this Inquiry. The first stage included the release of the Issues Paper, *Equality, Capacity and Disability in Commonwealth Laws* (IP 44), generating 84 public and 12 confidential submissions.[4] Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the ALRC website. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

1.6 In releasing this Discussion Paper, the ALRC again calls for submissions to build on the evidence base so far established and to inform the final stage of the deliberations leading up to the Final Report, which is to be provided to the Attorney-General by the end of August 2014.

## How to make a submission

1.7 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis.

1.8 There is no specified format for submissions, although the questions and proposals may provide guidance. Submissions may be made in writing, by email or using the online submission form. Submissions made using the online submission form are preferred.

1.9 Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

Submissions using the ALRC's online submission form can be made at: <http://www.alrc.gov.au/content/disability-dp81-make-submission>.

To ensure consideration for use in the Final Report, submissions must reach the ALRC by **Monday 30 June 2014**.

4 The 84 public submissions are available on the ALRC website: <www.alrc.gov.au>.

## Framing principles

1.10 The Issues Paper identified five principles for guiding the recommendations for reform in this Inquiry: dignity; equality; autonomy; inclusion and participation; and accountability. There was wide support by stakeholders for these principles, which are reflected in the model that is developed in this Discussion Paper.

### Dignity

1.11 The theme of 'dignity' emerges clearly in recent literature regarding people with disability. Importantly, it is seen as a 'relational concept' as it comes into play in transactions between individuals and between individuals and the State.[5] In the international context, dignity is one of the guiding principles of the CRPD.[6] The first paragraph in the Preamble recalls 'the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth ... of all members of the human family'.[7] Dignity is also recognised in a number of other international human rights instruments.[8] In the domestic context, the National Disability Strategy (NDS) prioritises the concept of dignity in its principles.[9] Similarly, the Productivity Commission identified human dignity as 'an inherent right' of persons with disability and suggested that dignity as a human being is linked to self-determination, decision-making and choice.[10]

### Equality

1.12 The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD), the treaty-monitoring body of the CRPD, commenced its General Comment on art 12 of the CRPD by saying that '[e]quality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights'.[11] Similarly, art 5 prohibits all discrimination on the basis of disability and requires States to promote equality;[12] and arts 6 and 7 emphasise equality for women and children. The NDS principles emphasise equality of opportunity;[13] and

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5 Lee Ann Basser, 'Human Dignity' in Marcia Rioux, Lee Ann Basser and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2010) 21.

6 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 3(a).

7 *UN Convention on the Rights of Persons with Disabilities*, opened for Signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

8 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

9 Australian Government, *National Disability Strategy 2010–2020*, 22.

10 Productivity Commission, 'Review of the *Disability Discrimination Act 1992* (Cth)' (30 Vol 1, 2004) 182.

11 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [1].

12 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

13 Australian Government, *National Disability Strategy 2010–2020*, 22.

a range of Commonwealth laws also protect the equality of people and proscribe discrimination on the basis of disability—for example, the *Disability Discrimination Act 1992* (Cth). The concept of equality is also considered in the discussion of equal recognition before the law in Chapter 2.

## Autonomy

1.13 Autonomy is a significant principle underlying the ability of persons with disability to exercise legal capacity. The principle of autonomy is enshrined in the general principles of the CRPD[14] and is a key principle of the NDS.[15] The objects and principles of the NDIS also reflect the notion of autonomy.[16]

1.14 Autonomy can be understood in a number of distinct senses. While a focus on the individual emphasises ideas of self-agency, contemporary theorists argue that autonomy needs to be conceptualised as 'empowerment'; and more than 'non-interference'.[17] This involves seeing an individual in relation to others, in a 'relational' or 'social' sense:

> 'Relational autonomy' is the label that has been given to an alternative conception of what it means to be a free, self-governing agent who is also socially constituted and who possibly defines her basic value commitments in terms of inter-personal relations and mutual dependencies.[18]

1.15 This understanding of autonomy connects to respect for the family as the 'natural and fundamental group unit of society' that is entitled to protection by States Parties.[19] Such a view sits comfortably with a shift in emphasis towards supported decision-making, which 'acknowledges that individuals rely to a greater or lesser extent on others to help them make and give effect to decisions'.[20]

1.16 Autonomy viewed in this sense can be seen in submissions which emphasised self-determination and the assistance required to exercise it.[21] The ALRC considers that the ideal of supported decision-making, which is central to the CRPD—as discussed in Chapter 2—draws upon this approach.

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14 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

15 Australian Government, *National Disability Strategy 2010–2020*, 22.

16 *National Disability Insurance Scheme Act 2013* (Cth) ss 3, 4.

17 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 269–272. Donnelly draws, for example, on the work of Joseph Raz, eg Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986). See her discussion particularly in ch 1, 'Autonomy: Variations on a Principle'.

18 John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143, 143.

19 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) art 23(1); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993) rule 9.

20 Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431, 435.

21 AFDS, *Submission 47*; Mental Health Coordinating Council, *Submission 07*.

1.17 At times, tensions may arise between the position of the family in providing support to people with disability to build their capacity for autonomy and their often protective role, which may limit the individual autonomy of a person with disability. The Law Council of Australia noted that 'legal recognition of supported decision-making is likely to necessitate an accompanying regime which is intended to promote autonomy and accountability'.[22] The ALRC considers that the principle of 'accountability' is a key counterbalance in developing the reform proposals in this Discussion Paper. It is reflected, in particular, in the Safeguards Guidelines, considered in Chapter 3.

## Inclusion and participation

1.18 Closely related to the principles of dignity and equality, the principles of inclusion and participation are central to many contemporary perspectives on disability, particularly a social model of disability. Such a model emphasises that, 'whilst a person might have an impairment, their disability comes from the way society treats them, or fails to support them'.[23] It has been suggested that promoting inclusion, through legal and social mechanisms, is a significant way of reducing these social barriers.[24]

1.19 Inclusion and participation are active values, consistent with an approach to autonomy as empowerment. Children with Disability Australia submitted that it may be advantageous to take this idea further and to include 'citizenship' as a principle:

> This principle involves consideration of responsibilities and active participation within community life whereas the other principles reflect more the rights and legal protections of people with disability.[25]

1.20 The inclusion and participation of people with disability is a commitment that is grounded in both international law and in Australia's domestic policy aims.[26] One of the principles of the CRPD is 'full and effective participation and inclusion in society'.[27] At a domestic level, the Australian Government's social inclusion agenda specifically prioritised people with disability in the goal of reducing disadvantage.[28] An emphasis on inclusion has important consequences for education, workforce participation and economic security, as people with disability are seen as 'citizens with rights, not objects of charity'.[29] Further, one of the objects of the *National Disability Insurance Scheme Act 2013* (Cth) is to facilitate greater community inclusion of people with a disability.[30]

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22 Law Council of Australia, *Submission 83*.
23 Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 1, 98.
24 Ibid.
25 Children with Disability Australia, *Submission 68*.
26 Productivity Commission, 'Disability Care and Support', above n 23, 203.
27 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 3(c).
28 Australian Government Department of the Prime Minister and Cabinet, *Social Inclusion Policy* (2010).
29 Australian Government, *National Disability Strategy 2010–2020*, 16.
30 *National Disability Insurance Scheme Act 2013* (Cth) s 3.

1.21 In the NDS, inclusion is seen to involve a consultative and collaborative approach to law reform and policy development:[31] It recognises the need to include people with disability and their carers in consultation with government to develop a 'shared agenda'.[32] Thus, inclusion is also linked with civic participation, voting and public office—'that we all have something to contribute'.[33]

1.22 The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance commented that a principle of inclusion and participation needs to acknowledge 'a right to supports that enable community inclusion' and that the availability of supports is 'critical' to persons with disability.[34]

1.23 The emphasis on supported decision-making developed throughout this Discussion Paper reflects the principle of inclusion and participation.

## Accountability

1.24 The concept of accountability has a number of key components. The first is the need for systemic and specific accountability mechanisms and safeguards associated with measures that relate to arrangements for the exercise of legal capacity.

1.25 One important consequence of the shift towards empowering persons with disability to exercise their full legal capacity is the need to ensure that any 'supporters' who fulfil a supportive or assisted decision-making role are properly accountable. Article 16(1) of the CRPD stresses the need for States Parties to take

> all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

1.26 Consequently, an important focus of any reform relating to decision-making schemes is to ensure the inclusion of effective accountability mechanisms, both at a systemic and practical level. Another important component is the accountability and responsibility of people with disability for their decisions, recognising that with rights come responsibilities. Active participation carries with it responsibilities.[35]

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31 Australian Government, *National Disability Strategy 2010–2020*, 16.

32 Australian Government, *National Disability Strategy 2010–2020*, 15.

33 Melinda Jones, 'Inclusion, Social Inclusion and Participation' in Lee Ann Basser, Marcia Rioux and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2012) 57.

34 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. The submission noted that the availability of support could be particularly lacking in rural and regional communities.

35 Children with Disability Australia, *Submission 68*.

# 2. Conceptual Landscape—the Context for Reform

## Contents



## Summary

2.1 This Inquiry takes place within a context of a national and international focus on the rights of persons with disability. This chapter describes the international human rights context and analyses the key concepts in the literature concerning disability and issues of 'capacity'. It provides the essential conceptual structure to present the ALRC's key proposals in this Inquiry.

2.2 The 'paradigm shift' in approaches to persons with disability is discussed, outlining the transition from 'best interests' approaches to ones that emphasise the will and preferences of the individual in models of 'supported' rather than 'substitute' decision-making. The tensions around the meaning and application of art 12 of the *United Nations Convention on the Rights of Persons with Disabilities*[1] (CRPD) are analysed in the light of the historical development of decision-making models for

1 *UN Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

people who may require decision-making support. In this context Australia's Interpretative Declaration in relation to art 12 is considered. The ALRC concludes that, whatever the correct legal understanding of art 12 and substitute decision-making models, the retention of the Interpretative Declaration may act as a handbrake on reform. The ALRC therefore proposes that the Australian Government should review the Interpretative Declaration with a view to withdrawing it.

2.3 The chapter concludes by summarising the implications for reform of the paradigm shift towards supported decision-making. This provides a prelude to Chapter 3, where the ALRC sets out National Decision-Making Principles as the basis for modelling supported decision-making in Commonwealth laws.

# International context

## *United Nations Convention on the Rights of Persons with Disabilities*

2.4 Australia was one of the original signatories to the CRPD—the first binding international human rights instrument explicitly to address disability—when it opened for signature on 30 March 2007.[2] Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. The CRPD entered into force for Australia on 16 August 2008,[3] and the Optional Protocol in 2009.[4]

2.5 The purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.[5] The CRPD consolidates existing international human rights obligations and clarifies their application to persons with disabilities.[6] It does not create new rights.

2.6 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.[7] But, as noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*, a convention can still assist with the interpretation of domestic law:

> The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should

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2 Prior to the CRPD there were a number of non-binding standards specifically related to disability. See, eg: *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, UN GAOR, 3rd Comm, 26th Sess, UN Doc A/RES/2856 (20 December 1971); *Declaration on the Rights of Disabled Persons*, GA Res 3447, UN GAOR, 3rd Comm, 30th Sess, UN Doc A/RES/3447 (9 December 1975); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993).

3 The CRPD entered into force on 3 May 2008, on receipt of its 20th ratification.

4 The Optional Protocol to the CRPD allows for the making of individual complaints to the Committee about violations of the CRPD by States Parties.

5 *UN Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 1.

6 Such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976).

7 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315. See, eg, *Kioa v West* (1985) 159 CLR 550.

> act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law.[8]

2.7 Even when an international convention has been incorporated into domestic law, however, its beneficial impact cannot be assumed. Adam Johnston observed that 'the level of adherence and/or enforcement can rely on many factors':

> The first of these can be political willingness, reflected in the resourcing of relevant agencies. Domestic cultural norms can be important and the broad terms of many conventions can leave much up to an individual reader's interpretation as to what an Article requires. Judicial views, the lobbying of interest groups and the public credibility of international institutions can also play their part.[9]

2.8 While implementation can be a multifaceted challenge, a document like the CRPD can both reflect and propel shifts in thinking—in this context for persons with disability. Family Planning NSW commented that the CRPD is 'a powerful statement of what Australia and the world believe are the fundamental rights of people with disability';[10] and the ACT Disability, Aged and Carer Advocacy Service said that the CRPD 'represents a cultural, identity and legal shift'.[11]

2.9 The CRPD reflects a social model of disability, which describes disability in terms of the interaction between a person's disability and the external world.[12] As the Preamble of the CRPD states:

> Disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[13]

2.10 The Office of the Public Advocate (Qld) said that the CRPD incorporates 'a contemporary approach to disability':

- recognising that disability is an evolving concept and that disability results from the interaction between people with impairments and their surroundings as a result of attitudinal and environmental barriers;
- the right and capacity of people with disability to make valued contributions to their communities; and
- recognising that all categories of rights apply to people with disability, who should therefore be supported to exercise those rights.[14]

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8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288.

9 A Johnston, *Submission 12*.

10 Family Planning NSW, *Submission 04*.

11 ADACAS, *Submission 29*.

12 This is distinguished from medical a model of disability, which 'uses biomedical explanations which locate disability within the individual in terms of pathology': Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431, n 3.

13 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) Preamble.

14 Office of the Public Advocate (Qld), *Submission 05*.

2.11 As Professor Gwynnyth Llewellyn of the Centre for Disability Research and Policy, University of Sydney, submitted: 'defining disability as an interaction means that "disability" is *not an attribute of the person*'.[15]

2.12 In addition to the general principles and obligations contained in the CRPD,[16] art 12 underpins the ability of persons with disability to achieve many of the other rights under the Convention. It recognises the right of persons with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life'.[17] Article 12 is of central importance in this Inquiry.

2.13 By ratifying the CRPD, Australia accepted the obligation to recognise that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life and to take appropriate measures to provide persons with disability access to the support they may require in exercising their legal capacity. It also requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse.[18]

## *Other international instruments*

2.14 In addition to the CRPD, there are other international instruments of relevance to this Inquiry. The *Universal Declaration of Human Rights* affirms the inherent dignity and the equal and inalienable rights of all people and sets as a common standard the protection of these rights by the rule of law.[19] While the *International Covenant on Civil and Political Rights* makes no specific reference to persons with disability, it enshrines rights to self-determination of all people as well as rights to physical integrity, liberty and security of the person, equality before the law and non-discrimination.[20] Additionally, the *International Covenant on Economic, Social and Cultural Rights* protects the right to work, social security, family life, health, education and participation in cultural life;[21] and the *Convention on the Rights of the Child* refers specifically to disability.[22]

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15 G Llewellyn, *Submission 82*.

16 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 3, 4.

17 Ibid art 12.

18 Ibid art 12(4).

19 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976).

21 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

22 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2.

2.15 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (CAT)[23] may also be relevant, as there have been suggestions that the use of restrictive practices with respect to persons with disability might contravene the CAT.[24]

2.16 There are also a number of international instruments that specifically protect the rights of women,[25] children[26] and Indigenous peoples,[27] which are of relevance in considering intersectional discrimination. All of these instruments are reflected in the articles of the CRPD.

## *Interpretative Declarations*

2.17 An 'Interpretative Declaration' is a unilateral statement made by a State or an international organisation, in which that State or organisation purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.[28] Australia has made three Interpretative Declarations in relation to the CRPD:[29]

> [Re art 12:] Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;
>
> [Re art 17:] Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;
>
> [Re art 18:] Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.[30]

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23 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

24 Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd Sess, UN Doc A/63/175 (28 July 2008) 9.

25 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

26 *Convention on the Rights of the Child*, opened for Signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

27 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

28 International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [1.2].

29 *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

30 Ibid.

2.18 The Interpretative Declarations are intended to outline the Australian Government's understanding of its obligations under the Convention and do not purport to exclude or modify the legal effects of the CRPD.[31]

2.19 For the purpose of this Inquiry, it is the first declaration relating to art 12 and decision-making that is of principal concern. There are differing views about the effect of this declaration, particularly in relation to the role of substitute decision-making, which prompt a reconsideration of its retention. This is considered below.

# Concepts and terminology

## *The challenge of language*

2.20 This Inquiry tackles issues of great significance in contributing to the framing of legal policy responses for persons with disability. The ALRC recognises the importance of careful definition of terms and a need to clarify precisely how certain concepts are being described. The language concerning disability has demonstrated great shifts over time, for example:

- the distinction between 'lunatics' and 'idiots' in William Blackstone's day in the mid-18th century;[32]
- the language of 'unsound mind' of the early 20th century, as evident for example in the *Commonwealth Electoral Act 1918* (Cth);[33]
- the use of the terms 'mentally retarded persons' and 'disabled persons' in United Nations Declarations of 1971 and 1975;[34] and
- 'persons with disabilities' in the CRPD in 2007.

2.21 As words have become associated with negative connotations, or used pejoratively, a new lexicon has been developed.[35] As the ALRC commented in its 1989 report, *Guardianship and Management of Property*:

> There is a problem of language when dealing with people with disabilities. Some expressions which used to be common are no longer used by those working in the field because they are regarded as having connotations which tend to lower the dignity of people with disabilities.[36]

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31 International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [1.1]–[1.3]. An Interpretative Declaration can be modified at any time: [2.4.8].

32 William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, 292.

33 For the historical background see, eg, R Croucher, '"An Interventionist, Paternalistic Jurisdiction"? The Place of Statutory Wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674.

34 *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, UN GAOR, 3rd Comm, 26th Sess, UN Doc A/RES/2856 (20 December 1971). *Declaration on the Rights of Disabled Persons*, GA Res 3447, UN GAOR, 3rd Comm, 30th Sess, UN Doc A/RES/3447 (9 December 1975).

35 A similar shift is evident in relation to the terms applying to children born out of wedlock: from 'bastards', to 'illegitimate' to 'ex-nuptial'.

36 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [1.3].

2.22 The ALRC therefore took an approach in that report which was to adopt usages 'current among people who are disabled and those who work with them'.[37]

2.23 The present Inquiry takes place 25 years later and the language has shifted further in the intervening years. In this Inquiry the ALRC seeks to frame concepts and choose terms in ways that reflect the framing principles—in particular that of 'dignity'. Consistent with the approach identified by the ALRC in 1989, words and terms should not be used that 'tend to lower the dignity of people with disabilities'. Even where terms have an established usage,[38] the ALRC considers that the development of a new lexicon serves to signal the paradigm shift reflected in the CRPD. This Inquiry provides an opportunity to contribute to that process.[39]

## *Definitions of disability*

2.24 'Disability' may be defined in different ways and for different purposes. Approaches to defining disability have also shifted over time—particularly from a 'medical' to a 'social' approach. A 'medical' approach is one in which a diagnosis or categorisation of condition leads to consequences—for example, the imposition of guardianship.[40]

2.25 The CRPD does not include detailed definitions of 'disability' or 'persons with disabilities' in its definition section. Rather, art 1 states that

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

2.26 For the purposes of this Inquiry, the ALRC is taking a broad encompassing approach to definitions of disability, as reflected in the CRPD.[41] This definition includes: sensory, neurological, physical, intellectual, cognitive and psychosocial disability.

2.27 The social approach to disability, reflected in the CRPD, requires a policy focus on the person and their ability, with the support they require to interact with society and their environment—placing the policy emphasis not on 'impairment' but on 'support'. This approach informs the supported decision-making focus of the ALRC's proposals in this Discussion Paper.

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37 Ibid.

38 In the 1989 report the ALRC gave the following example: 'The problem is complicated by the fact that the medical profession has adopted some words as having reasonably precise meanings but the same words are used differently by non-medical people or are regarded as inappropriate': Ibid.

39 Support for this approach is evident in, eg, ADACAS, *Submission 29*.

40 Terry Carney, 'Guardianship, "Social" Citizenship and Theorising Substitute Decision-Making Law' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law* (Springer, 2012) 1. See also World Health Organisation and World Bank, 'World Report on Disability' (2011) 3–4.

41 Other definitions may be found in, eg, Australian Bureau of Statistics, *Disability, Australia, 2009, Cat No 4446.0* (2011); *Disability Discrimination Act 1992* (Cth) s 4(1).

### *Recognition as 'persons'*

2.28 The Terms of Reference require a consideration of the recognition of people with disability 'as persons before the law'.[42] This language reflects art 12(1) of the CRPD, that 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law'.[43]

2.29 To be recognised 'as persons' is the first question in any consideration of legal capacity. Historically, certain people have been denied recognition of their ability to act in law, or to have 'legal standing', at all.[44] Professor Bernadette McSherry explains that,

> at various times in different societies, certain groups have been viewed as not having legal 'personhood' or standing. The extinction or suspension of legal standing, sometimes referred to as 'civil death', was once seen as a necessary consequence of conviction. Similarly, women, children under the age of majority and those with mental and intellectual impairments have been and continue to be viewed in some societies as not having legal standing.[45]

2.30 The shift in language from 'disabled persons' to persons or people 'with disability' reflects an emphasis on personhood, rather than disability. It also reflects a social model of disability.

2.31 In its Draft General Comment on art 12, the UNCRPD emphasised that 'there are no circumstances permissible under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited'.[46] In this Discussion Paper, the ALRC proposes a model that emphasises ability and support to exercise legal agency, consistent with a full recognition of personhood. In Chapter 3, where the ALRC introduces the National Decision-Making Principles, there is a deliberate use of 'persons' rather than 'people' in the phrase 'persons who may require decision-making support'. The choice reflects a number of elements: the direction of the Terms of Reference on recognition 'as persons'; an understanding of legal capacity issues as individualised, task-specific and fluctuating; and a focus on an individual's ability rather than a generic, status-based approach.

### *'Equal recognition'*

2.32 The Terms of Reference state that, for the purposes of this Inquiry, equal recognition before the law and legal capacity are to be understood as they are used in

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42 The Terms of Reference are set out in full on the ALRC website: <www.alrc.gov.au>.

43 The term 'States Parties' is used in this Discussion Paper to ensure consistency with the terminology in the CRPD.

44 For example, the early laws of marriage in the common law treated the husband and wife as one: the wife's legal personality merged with that of her husband. When the *Statute of Wills 1540* granted the power to devise real estate, an explanatory statute was passed in 1542 to clarify that this power did not extend to married women; nor to infants and 'lunatics'.

45 McSherry, Bernadette, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22, 23.

46 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [5].

the CRPD, 'including to refer to the rights of people with disability to make decisions and act on their own behalf'. The concept of equality therefore emphasises independent decision-making by persons with disability.

2.33 Professor Terry Carney stated that equality, in the sense used in art 12, 'can be variously formulated':

> It can be expressed as a purely *formal* concept (ie an 'opportunity') or in more substantive terms, as an achievement of distributive equity. It can be conceived as a universal right of citizenship for all, or as a special standard for particular groups (such as the disabled aged). And it also raises notoriously complex issues about respect for diversity and the right to make poor choices (the so-called 'dignity of risk').[47]

2.34 The UNCRPD emphasised that the idea of equality reflected in art 12 is essentially about the exercise of human rights: '[e]quality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights'.[48] Rather than providing additional rights, art 12 of the CRPD 'simply describes the specific elements required to ensure the right to equality before the law for people with disabilities on an equal basis with others'.[49]

2.35 In this Inquiry, the ALRC is considering how equal recognition of persons with disability as persons before the law and their ability to exercise legal capacity is denied or diminished in laws and legal frameworks within the Commonwealth jurisdiction.

2.36 The key element in equal recognition, as understood in the CRPD and the discourse that has developed around it, is the embracing of a supported decision-making paradigm so that persons with disability are acknowledged as having the right to make decisions on an equal basis with others and are supported in exercising that right. The linking of support with equality was made in submissions. For example, Hobsons Bay City Council, while supporting the framing principles, said that

> equality should also recognise that in some instances people with disabilities need to be treated with equity in order to create equality. For example, needing additional assistance with some elements of the law in order to fully participate.[50]

## *Legal capacity*

2.37 The Terms of Reference require consideration of Commonwealth laws and legal frameworks that deny or diminish the ability of persons with disability to exercise 'legal capacity'. This language reflects art 12(2) of the CRPD, that 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'. The Terms of Reference state that, for the purposes of this Inquiry, legal capacity is to be understood as it is used in the CRPD.

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47 Terry Carney, above n 40, 3. See also Terry Carney, 'Participation and Service Access Rights for People with Intellectual Disability: A Role for Law?' (2013) 38 *Journal of Intellectual and Developmental Disability* 59, 66.

48 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [1].

49 Ibid.

50 Hobsons Bay City Council, *Submission 44*.

2.38 Capacity in a general sense refers to decision-making ability. Decisions may cover a wide range of choices in everyday life. They may relate to personal matters, financial and property matters, and health and medical decisions. The concept of *legal* capacity in the CRPD contains two aspects: 'legal standing' and 'legal agency'. Legal *standing* is the ability to hold rights and duties—to be recognised as legal persons. Legal *agency* is the ability to exercise these rights and duties to perform acts with legal effects. Dr Mary Donnelly commented that

> A presumption of agency underlies the liberal conception of autonomy. Our choices are autonomous because they are, in a fundamental sense, *our* choices.[51]

2.39 The UNCRPD explains that 'legal capacity to be a holder of rights entitles the individual to the full protection of her rights by the legal system'.[52]

2.40 Legal capacity sets the threshold for undertaking certain actions that have legal consequences. For example, a range of transactions may involve an age threshold as a benchmark of when a person is regarded as being able to act independently and with binding effect—to have legal agency to make 'legally effective choices'.[53] Legal capacity goes to the validity, in law, of choices and being accountable for the choices made. As Carney states:

> Those who make the choice should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent.[54]

2.41 There are examples of tests of legal capacity—in terms of levels of understanding for particular legal transactions—that have been developed through the common law:[55]

> Legal incapacity means that, in law, a person is not competent to enter into legal transactions, such as making a contract, executing a will, or giving a legally-recognised consent, for example to an operation.[56]

2.42 The common law starts from a presumption of legal capacity—'the law's endorsement of autonomy'.[57] Common law definitions of legal capacity are generally

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51 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 24.

52 The right to recognition as a legal agent is also reflected in art 12(5) CRPD, which outlines the duty of States Parties to 'take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit and shall ensure that persons with disabilities are not arbitrarily deprived of their property: United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [11]. See also Bernadette McSherry, 'Legal Capacity Under the Convention on the Rights of Persons with Disabilities' (2012) 22 *Legal Issues* 23.

53 Terry Carney and David Tait, *The Adult Guardianship Experiment—Tribunals and Popular Justice* (Federation Press, 1997) 3.

54 Ibid.

55 Contracts: *Blomley v Ryan* (1954) 99 CLR 362. Wills: *Banks v Goodfellow* (1870) LR 5 QB 549. See also: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 7.

56 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [1.4].

57 Donnelly, above n 51, 93.

invoked after the event, when a transaction is later challenged on the basis of a lack of capacity (in the sense of agency) to rebut the presumption of legal capacity.[58] The definitions in these contexts focus on the nature of the transaction and the level of understanding required for legal agency. The common law—including doctrines of equity—also includes protective doctrines for vulnerable people, such as the doctrines concerning undue influence and unconscionable transactions.[59] Where a lack of the required level of understanding is proven in the particular circumstances, the transaction may be set aside. Such doctrines focus on a transaction and the circumstances surrounding it. They are decision-specific and involve assessments of understanding relevant to the transaction being challenged. As Bruce Arnold and Dr Wendy Bonython commented,

> It is axiomatic that in some instances differences in capability will be recognised in law. Lack of capacity is one [of] those instances, and is not inherently discriminatory on the basis of disability.[60]

2.43 Capacity assessments have been made as the trigger for formal arrangements for decision-making support through the appointment of, for example, guardians and administrators—or for the commencement of enduring powers of attorney and advance directives. They are also made in the context of a range of health care decisions.

2.44 The common law presumption is embodied in some guardianship legislation.[61] In the Commonwealth context, the *National Disability Insurance Scheme Act 2013* (Cth) includes an assumption of capacity:

> People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.[62]

2.45 Legal capacity is a different concept from 'mental capacity' and should not be confused with it.[63] The UNCRPD commented that the CRPD 'does not permit perceived or actual deficits in mental capacity to be used as justification for denying legal capacity'.[64]

2.46 Stakeholders emphasised the distinction between legal capacity and mental capacity. For example, People with Disability Australia (PWDA), the Australian

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58 For example, in the context of wills, a person is presumed to have the legal capacity to make a will and it is for those who challenge a testator's capacity to bring evidence of incapacity: *Bull v Fulton* (1942) 66 CLR 295. The presumption of capacity arises if the will is rational on its face and is duly executed. See, eg, G E Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) ch 2. This was expressed in the legal maxim '*omnia praesumuntur rite et somemniter esse acta*': all acts are presumed to have been done rightly and regularly.

59 See, eg, J D Heydon and M J Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 14.

60 B Arnold and Dr W Bonython, *Submission 38*.

61 See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1, (WA) s 4(3).

62 *National Disability Insurance Scheme Act 2013* (Cth) s 17A(1). See also *Mental Capacity Act 2005* (UK) s 1, which addresses this explicitly by providing that individuals are assumed to have capacity to make decisions unless otherwise established.

63 See, eg, the distinction between medical and legal perspectives in Terry Carney, above n 40.

64 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [12].

Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRC) commented that any proposal for a uniform approach to legal capacity

> must remove any notion that the assessment of mental capacity is also an assessment of legal capacity, that assessing mental capacity is a mechanism through which to limit legal capacity, and that the existence of a cognitive impairment creates a limit to the exercise of legal agency. Concerns with the provisions in, and operation of, legislation ...cannot be ameliorated or rectified without an acceptance of this premise.[65]

2.47 This reflects two concerns: first, that legal capacity assessments should not simply be equated with mental capacity; and, secondly, that people with cognitive impairment should not be assumed to have limited legal capacity, in the sense of being able to exercise legal agency.

2.48 Similarly, stakeholders pointed to the danger of defining legal capacity on the basis of disability—of those who *have* legal capacity; and those who *have not*. Such a 'binary model' does not reflect how legal capacity should be represented. Arnold and Bonython submitted that

> [Legal capacity] may be context-dependent, and fluctuate, rather than static and permanent. In many instances, the primary focus of the law is not whether the individual has a disability; rather, it considers whether that disability impairs the individual's ability to act as a legally recognized entity, with the powers and obligations such recognition attracts. A person who is physically disabled, therefore, is entitled to exactly the same presumption of capacity at law as someone without a physical disability. ... For many disabled people, the question of capacity is no more relevant to them than it is [to] the remainder of society.[66]

2.49 What is clearly not appropriate in the context of the CRPD is a disqualification or limitation on the exercise of legal capacity *because of* a particular status, such as disability. As National Disability Services remarked, '[t]he crux of the issue is seen in historic legal frameworks that place constraints on the exercise of legal capacity based solely on disability status'.[67] The approach should therefore be on the support needed to exercise legal agency, rather than an assumption or conclusion that legal agency is lacking because of an impairment of some kind.

2.50 In this Inquiry the ALRC suggests that even the word 'capacity' may carry some of the connotations of previous times. 'Capacity' is regularly confused with 'legal capacity', and 'legal capacity' is regularly conflated with 'mental capacity'. To avoid such confusion and to focus the reform direction towards support in decision-making, the ALRC uses 'ability'.[68]

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65 PWDA, ACDL and AHRC, *Submission 66*.

66 B Arnold and Dr W Bonython, *Submission 38*.

67 National Disability Services, *Submission 49*. See also PWDA, ACDL and AHRC, *Submission 66*.

68 Others talk about 'capability', such as Amartya Sen and Martha Nussbaum. See discussion in Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

## Supported and substituted decision-making

2.51 There is an important distinction between 'substituted' and 'supported' decision-making. It is the key issue in the discussion surrounding the meaning and effect of art 12 of the CRPD.

2.52 Decision-making supports and arrangements for persons with disability take many forms along a spectrum, including:

- informal arrangements—usually involving family members, friends or other supporters;
- formal pre-emptive arrangements—anticipating future loss of legal capacity through appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical);[69] and
- formal arrangements—where a court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual's behalf (guardians and administrators).[70]

2.53 For Aboriginal and Torres Strait Islander people with disability decision-making may also have a collective quality.

2.54 Formal arrangements may also include recognition of support by family, friends or others where provision is made for designation of a 'nominee' for particular purposes, such as 'correspondence nominees' in the Centrelink context.[71]

2.55 The formal appointment of guardians and administrators in Australia occurs under state and territory laws. Guardians and administrators are vested with power to make decisions on behalf of persons assessed to be unable to make decisions for themselves.

2.56 In the literature discussing support for people who may require decision-making assistance there is an evident tension in the way that the labels of 'supported decision-making' and 'substituted decision-making' are used. The discourse around art 12, and particularly the General Comment on art 12 when published as a draft,[72] has exacerbated this tension. The ALRC considers that it is constructive to summarise the development of the use of these terms, and the conflict around them, and to place this in the context of formulating legal policy responses in this Inquiry that prioritise supported decision-making.

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69 Sometimes referred to collectively as 'living wills'. See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [4.3].

70 In some cases, such as emergency medical decisions, there are statutory hierarchies of those who may authorise certain actions—'generic lists of suitable proxies in the legislation': Carney and Tait, above n 53, 4.

71 These are considered in Ch 4.

72 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility*.

### *The emergence of 'substitute' decision-making*

2.57 Decision-making support has a long history, conventionally summarised in the evolution and development of guardianship regimes. Professors Carney and David Tait describe the history of adult guardianship as comprising three periods:

> The first period was characterised by an emphasis on protecting the property of individual family members who were disabled, with the courts stepping in to provide this security. The second period was one in which Public Trustee organisations took over responsibilities for property management for the whole groups of institutionalised people, usually without judicial review (or only token review). Medical control was growing, as forms of treatment and care became more specialised and sophisticated. Court-ordered guardianship was used occasionally, alongside various forms of welfare or mental health guardianship. The third stage maintained the ease of access characteristic of the second stage, but anchored reforms to a commitment to protecting individual freedoms. The state took on new responsibilities to minimise its own role.[73]

2.58 The first period was one in which the focus was upon the person who was being 'protected' and what they would have wanted.[74]

2.59 Guardianship and management of property reveal two broad themes: 'providing appropriate protection for those unable to look after themselves'; and 'preserving and, where possible, enhancing the personal autonomy of such persons'.[75] However, as Sarah Burningham commented, when these themes are articulated in legislative regimes,

> there is great potential for conflict between competing values as legislators attempt to manufacture statutes that both respect the adult's autonomy and protect the adult from harm. This tension recurs throughout guardianship's history.[76]

2.60 There may also be a distinction between law and what happens in practice. 'Traditional' guardianship laws have been described as 'exceedingly paternalistic', protecting the estate of the person under protection, and not promoting their autonomy, especially where 'plenary' forms were used involving a complete vesting of authority in another person. The disability rights movement of the 1960s led to increasing pressure to move away from such models, championing a social, rather than a medical, model of disability.[77]

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73 Carney and Tait, above n 53, 22.

74 A good example is *Ex Parte Whitbread, in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99, 35 ER 878. See discussion in Donnelly, above n 51, 178; John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' [1994] *Oxford Journal of Legal Studies* 159; R Croucher, '"An Interventionist, Paternalistic Jurisdiction"? The Place of Statutory Wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674.

75 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.1]. This report concerned the ACT.

76 Sarah Burningham, 'Developments in Canadian Adult Guardianship and Co-Decision-Making Law' (2009) 18 *Dalhousie J. Legal Stud.* 119, 128.

77 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [2.8].

> The principles of new legislation were fairly consistent: the least restrictive option (with guardianship as a last resort), promoting maximum autonomy, encouraging habilitation and living as 'normally' as possible, and a preference for family over state proxies. This meant keeping orders as short and limited as possible. Generally 'private' arrangements were to be preferred to public ones, and a 'substituted judgement' principle was to be used rather than a 'best interests' one, where these came into conflict.[78]

2.61 'Best interests' standards, as suggested in this quote, were ones that preceded, and were to be contrasted with, a 'substituted judgement' approach. The 'best interests' principle was seen to reflect the idea of 'beneficence'—a dominant theme in medical ethics, in which the 'primary imperatives were for doing good for the patient, the avoidance of harm and the protection of life'.[79]

2.62 A best interests standard was identified as associated with paternalistic approaches to persons with disability; 'substituted judgment' was seen as reflective of the person and respectful of their autonomy. Describing the emergence of the substituted judgment approach in the United States in the context of healthcare decision-making, Dr Mary Donnelly said that it was a standard 'based on what the patient would have wished had [they] had capacity notwithstanding, in some cases, very limited evidence of [their] likely views or preferences'.[80] Even in the medical context, therefore, the best interests standard had given way to autonomy.[81]

2.63 In a report in 1995, Robin Creyke described the emergence of a 'common core of principles' to guide substitute decision-makers as '[o]ne of the most remarkable developments in this area of law'. It involved an appreciation that disability

> is not an absolute state and that individuals' capacities to reason and to make decisions continue, or can be developed, in some areas, albeit they are lost, or cannot be exercised without assistance or training in others. This awareness, coupled with the growing focus on people's rights as individuals, led to the notion that the powers given to substitute decision-makers should be restricted and tailored to the special needs of the individual for whom assistance is needed.[82]

2.64 The 'guiding philosophies' that became 'strongly entrenched in Australian laws for guardians, financial managers or administrators' by the 1990s were: the presumption of competence; normalisation; the least restrictive option; respect for autonomy; and fostering self-management.[83] Even in a reformed context of being committed to advancing individuals' rights, 'best interests' standards were still retained.

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78 Carney and Tait, above n 53, 17–18. Citations omitted.

79 Donnelly, above n 51, 11. Donnelly refers to the Hippocratic Oath.

80 Ibid 176. Donnelly, 185, refers to the 'first significant application' of the standard in the decision of the Supreme Court of New Jersey in *Re Quinlan* (1976) 70 NJ 10.

81 See discussion in Donnelly, above n 51, 14–16. Donnelly refers in particular to the work of Tom Beauchamp and James Childress in their pioneering work on medical ethics.

82 R Creyke, *Who Can Decide? Legal Decision-Making for Others*, Aged and Community Care Service Development and Evaluation Reports, No 19, Department of Human Services and Health, Aged and Community Care Division (1995) 38.

83 Ibid 40.

2.65 The Australian Guardianship and Administration Council (AGAC) described the approach of state and territory appointments as being 'governed by three principles, variously expressed', that:

> (a) an appointment must promote as far as possible the person's freedom of decision and action (sometimes called the 'least restrictive alternative' or 'autonomy' principle); and
>
> (b) an appointment promotes the person's best interests; and
>
> (c) the person's wishes are given effect to, wherever possible.[84]

2.66 'Best interests' and the person's wishes are both used. Some 'best interests' standards have also been expressed in terms of prioritising the wishes and preferences of the person. For example, the *Mental Capacity Act 2005* (UK) s 4(6) requires a person making a determination of 'best interests' to consider, 'so far as is reasonably ascertainable':

> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so.[85]

2.67 In addition, s 4(7) requires the decision-maker to take into account, 'if it is practicable and appropriate to consult them', the views of:

> (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
>
> (b) anyone engaged in caring for the person or interested in his welfare,
>
> (c) any donee of a lasting power of attorney granted by the person, and
>
> (d) any deputy appointed for the person by the court,
>
> as to what would be in the person's best interests and, in particular as to the matters mentioned in subsection (6).

2.68 Of such a hybrid standard, Donnelly writes that it 'attempts to mitigate the consequences of a loss of capacity while staying within a best interests framework'.[86]

### *Shift towards supported decision-making*

2.69 Although substitute decision-making was a step that was seen as an advance and an expression of autonomy for persons with disability, and conceptually linked to the disability rights movement of the 1960s, by the second decade of the 21st century it

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84 Australian Guardianship and Administration Council, *Submission 51*.

85 A similar model is included, for example, in the Mental Health Bill 2013 (WA), pt 2 div 3, 'Best interests of a person'.

86 Donnelly, above n 51, 203. This approach, she writes, is 'not without difficulties': 203.

had become the focus of criticism in a new articulation of a standard described as 'supported decision-making'.

2.70 'Supported decision-making' places the person who is being supported at the front of the decision-making process. The decision is *theirs*. As Carney summarises:

> Supported decision-making encompasses a range of processes to support individuals to exercise their legal capacity, and these consist of:
>
> - effective communication, including in the provision of information and advice to a person and through ensuring that a person is able to communicate their decisions to others;
> - spending time to determine a person's preferences and wishes;
> - informal relationships of support between a person and members of their social networks;
> - agreements or appointments to indicate that a relationship of support exists; and
> - statutory relationships of support—whether through private or court/tribunal appointment.[87]

2.71 In the context of developing 'supported decision-making', 'substitute' is often equated with 'guardianship' and both are assumed to represent a standard that is not consistent with the rights of persons with disability. However, interwoven in the discussion about 'substitute' and 'supported' decision-making is a lack of conceptual clarity about the role that a person's wishes and preferences play when another acts for them as a 'substitute' decision-maker; and the role that a 'supporter' plays in assisting a person to make decisions. Conceptual confusion is also exacerbated when models use 'best interests' language but expressed in terms of giving priority to the person's wishes and preferences. Given the tensions around the usage and understanding about 'substituted' decision-making, the ALRC considers that it might be preferable to move away from this language altogether. These tensions are seen in the discussion about the meaning and effect of art 12 and submissions from stakeholders in this Inquiry.

### *Substitute decision-making and the CRPD*

2.72 An important issue to clarify is whether the CRPD permits substitute decision-making at all, or in what form. This also begs the question of what is meant by substitute decision-making in the CRPD context, how it is different from supported decision-making, and the extent to which arguments are ones of substance rather than of form. In the context of this Inquiry, the question becomes one of the implications for this analysis in informing reform proposals for Commonwealth laws and legal frameworks.

2.73 In September 2013, the UNCRPD focused attention on the distinction made between the concepts of substitute and supported decision-making in its Draft General

87 Carney, above n 47, 60.

Comment on Article 12.[88] After submissions were considered, the General Comment was finalised in April 2014.[89]

2.74 What is meant by the distinction? As the Committee explained, 'support' is a broad term—'that encompasses both informal and formal support arrangements, of varying types and intensity'.[90] It then spelled out its understanding of the difference between a 'support' model and a 'substitute' one.

2.75 A *supported* model comprises 'various support options which give primacy to a person's will and preferences and respect human rights norms' and, while supported decision-making regimes 'can take many forms', 'they should all incorporate key provisions to ensure compliance with article 12'.[91] Supported decision-making processes prioritise personal autonomy and recognise that individuals should be empowered with information to make decisions—even bad ones (acknowledging the dignity of risk).[92]

2.76 A *substituted* decision-making regime has different characteristics and can also take many forms. The common defining elements, as understood by the UNCPRD, are where

> (i) legal capacity is removed from a person, even if this is just in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will or (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences.[93]

2.77 The General Comment was prompted by what the UNCRPD described as 'a general misunderstanding of the exact scope of the obligations of States Parties under Article 12'.[94] Australia's view, as expressed through its Interpretative Declaration in respect of art 12, is that the CRPD allows for fully supported or substituted decision-making arrangements. However, the Declaration notes that such arrangements may only be made where they are necessary, as a last resort, and subject to safeguards.[95]

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88 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility*.

89 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law*.

90 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility* [15].

91 Ibid [25].

92 Bernadette McSherry, above n 52, 26.

93 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [23]. There was a slight change in wording between the draft and final versions of this paragraph, but not of significance to the meaning.

94 Ibid [3].

95 *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008). Canada made a similar declaration.

2.78 In the General Comment, the UNCRPD suggested that substitute decision-making regimes should be abolished and replaced by supported decision-making regimes and the development of supported decision-making alternatives. Most importantly, the Committee commented that '[t]he development of supported decision-making systems in parallel with the retention of substituted decision-making regimes *is not sufficient to comply with Article 12*'.[96] What is required is 'both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives'.[97]

2.79 The UNCRPD commented about Australia's Interpretative Declaration in its concluding observations on the initial report of Australia to the Committee in September 2013. The Committee noted the referral to the ALRC of this Inquiry, but expressed concern 'about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity'.[98]

2.80 The ALRC acknowledges that there is considerable tension about what is described as 'substitute decision-making'. As noted above, so-called 'substitute' regimes were conceptually anchored in the will and preferences of the person. They may, in fact, not be proscribed under art 12—so long as the governing standard is not 'the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences'.[99] Would a regime that contains elements (i) and (ii) of the General Comment, but which has a subjective focus and not an objective lens in element (iii), be regarded as an acceptable *supported* decision-making model, and not a *substituted* decision-making model?

2.81 Stakeholders pointed to art 12(4) and its requirements of safeguards, implicitly acknowledging measures that may be regarded as 'substitute' models. The Office of the Public Advocate (SA) observed that the protections of art 12(4) 'make sense as protections for substitute decision making as a "measure relating to exercising capacity"'.[100] The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance noted that Australia's Interpretative Declaration reflected this safeguards approach in relation to substitute decision-making arrangements,

> where decision-making support may extend to decisions being made by a third party on behalf of the person with the impairment, but where such arrangements

96 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [24]. Emphasis added.

97 Ibid.

98 Committee on the Rights of Persons with Disability, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2-13 September 2013)' (United Nations, 4 October 2013) 9, [24] <http://www.ncid.org.au/index.php/docman-documents/reports/30-un-report-on-australia-2013/file>.

99 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [23].

100 Office of the Public Advocate (SA), *Submission 17*. To similar effect see: Caxton Legal Centre, *Submission 67*.

> should be put in place only when they are necessary in order to enable to exercise of legal capacity and only where there are sufficient safeguards in place.[101]

2.82 While substitute decision-making models that reflect the constraints identified in such comments may technically not be contrary to the CRPD, '[t]here is still considerable debate over the significance of the [CRPD] for guardianship'.[102] Is 'guardianship' compatible with the CRPD? Or is it rather a question of what kind of guardianship (or whatever other label is used) is incompatible with it—namely, only guardianship where decisions are made without reference to the wishes and preferences of the person under protection? John Chesterman states:

> What is clear is that the Convention obliges countries to use guardianship as little as possible, and to limit as much as possible the powers that guardians have. Moreover, the Convention obliges us to utilise other processes, particularly now supported decision-making, wherever possible. In this way, the Convention is promoting some degree of uniformity, and will continue to do so as jurisdictions review their guardianship systems.[103]

2.83 The Office of the Public Advocate (Qld) referred to the ongoing debate about guardianship and art 12 of the CRPD. It submitted that, 'regardless of views about the compatibility of guardianship laws with the Convention', and even though guardianship is supposed to be an intervention of last resort, 'there are concerns that it is excessively used and misapplied':

> The accessibility and low cost of Australian guardianship systems have resulted in guardianship applications being sought in preference to other options that are less restrictive and do not infringe on people's rights. Arguably, it has also resulted in some guardianship orders being broader than is necessary.[104]

## *Australia's Interpretative Declarations*

**Proposal 2–1** The Australian Government should review the Interpretative Declaration in relation to art 12 of the *United Nations Convention on the Rights of Persons with Disabilities* with a view to withdrawing it.

2.84 In September 2013, Australia appeared before the 10th session of the UNCRPD.[105] In its concluding observations, the Committee recommended that Australia review its Interpretative Declarations in order to withdraw them.[106] The ALRC considers that the Declaration in relation to art 12 may be acting as a handbrake on reform and it is timely to reconsider the need for it, and, if retained, its wording.

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101 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

102 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26, 31.

103 Chesterman, above n 102, 31.

104 Office of the Public Advocate (Qld), *Submission 05*. Citations omitted.

105 Office of the High Commissioner for Human Rights, *10th Session of the Committee on the Rights of Persons with Disabilities* (12 November 2013) <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session10Old.aspx>.

106 Committee on the Rights of Persons with Disability, above n 98.

2.85 In the Issues Paper, the ALRC asked about the impact the Interpretative Declaration in relation to art 12 had on (a) provision for supported or substitute decision-making arrangements; and (b) the recognition of people with disability before the law and their ability to exercise legal capacity.

2.86 The submissions revealed distinct themes:

- the conceptual blurring about supported and substitute decision-making evident in the CRPD and surrounding discussions;[107]
- discomfort with the idea of 'substitute decision-making';[108] and
- concerns about the Interpretative Declaration in relation to art 12—in terms of its wording or in its effect.

2.87 The OPA (SA), for example, identified some ambiguity in the terms of the Interpretative Declaration with respect to art 12—namely in its statement that the CRPD 'allows for fully supported or substituted decision-making arrangements'.[109] Does this mean that 'fully supported' arrangements are equated with 'substituted' arrangements? The OPA (SA) found this wording 'unhelpful', as 'implying that fully supported and substituted are the same', which it considered they were not.[110]

2.88 On the other hand, the Centre for Regional Law and Justice and the National Rural Law and Justice Alliance, while agreeing about the ambiguity, submitted that, if substitute decision-making is to be understood as 'fully supported' decision-making, this is

> consistent with the tenor of Article 12, in the sense that the role of any third-party decision maker should be primarily to enable the exercise of the person's legal capacity on an equal basis with other members of the community. This means realising the decisions that the person themselves would make if they were able to do so, rather than making the decision that the third party decision maker considers in their best interests.[111]

2.89 In other words, substitute decision-making should be regarded as consistent with art 12, so long as it is not based on a best interests standard; and to the extent that Australia's Interpretative Declaration is only saying this, it is not objectionable. Some stakeholders supported the idea reflected in the Interpretative Declaration: that substitute decision-making may be appropriate in the limited circumstances identified: 'as a last resort and subject to safeguards'.[112]

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107 Eg, Office of the Public Advocate (SA), *Submission 17*; Mental Health Coordinating Council, *Submission 07*.

108 Eg, Caxton Legal Centre, *Submission 67*.

109 Office of the Public Advocate (SA), *Submission 17*. See also Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

110 Office of the Public Advocate (SA), *Submission 17*.

111 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

112 B Arnold and Dr W Bonython, *Submission 38*; NSW Council for Intellectual Disability, *Submission 33*.

2.90 The OPA (SA) submitted that the challenge in having such a declaration was not only that 'it fulfils its legal purpose', but also that it 'does not unnecessarily slow change in giving people with disability equal rights':

> A declaration can be an impediment if it creates a sense of complacency that our existing substitute arrangements already fully meet the expectations of the UNCRPD, and there is no need to change practices.[113]

2.91 The idea that having such a declaration may be an impediment to reform was also highlighted, for example, by the Disability Advocacy Network Australia (DANA), which argued that it

> has the effect of protecting the status quo of paternalistic substitute decision making regimes, inhibiting reform and slowing exploration and implementation of supported decision-making models in Australia.[114]

2.92 DANA submitted that 'reform to the legislative and regulatory framework is vital and must be prioritised' and 'to retain the Declaration and continue to accept the status quo would substantially diminish Australia's progress in disability rights and undermine its position as a State committed to advancing the inclusion, participation and wellbeing of people with disabilities, in our country and overseas'.[115]

2.93 The ALRC considers that there is weight in the argument that the Interpretative Declaration may impede reform. This is not to say, however, that it is incorrect in law—given that there is considerable ambiguity and confusion in art 12, its surrounding discourse and even the wording of the Declaration itself. However, it has been identified as a matter of concern by the UNCRPD and by many interested stakeholders, which suggests that the timing is opportune to review it.

### *Implications for reform*

2.94 A critical evaluation of all assisted decision-making models is called for in light of the UNCRPD's comments and the range of responses by stakeholders in this Inquiry. While the CRPD and its surrounding discourse have set a new benchmark of expectation, not only in terms of law, but also practice, the themes remain essentially those identified by the ALRC in 1989: 'providing appropriate protection for those unable to look after themselves'; and 'preserving and, where possible, enhancing the personal autonomy of such persons'.[116] There are also dangers in action that is not anchored in a strong conceptual framework, and tested in implementation. Caxton Legal Centre pointed out that

> A number of writers comment that insufficient research has been done on both supported decision making models and guardianship itself, and warn against inviting a 'bricolage' of experimental models resembling a 'young child's

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113 Office of the Public Advocate (SA), *Submission 17*.

114 Disability Advocacy Network Australia, *Submission 36*. See also NMHCCF and MHCA, *Submission 81*.

115 Disability Advocacy Network Australia, *Submission 36*. See also Carer's Alliance, *Submission 84*; WWDA, *Submission 58*; National Disability Services, *Submission 49*; Public Interest Advocacy Centre, *Submission 30*.

116 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.1]. This report concerned the ACT.

> pocketful of melted lollies on a hot summer's day'.[117] The task is complex and highly nuanced and as Terry Carney suggests, perhaps the best recommendation is to marshall the evidence and debate which is the least imperfect of the policy options at the disposal of the law.[118]

2.95 Two key policy issues are how far 'support' can really go without attracting criticism of being a legal fiction;[119] and the need to underpin change in practice by evidence. AGAC observed that, while supported decision-making 'is an excellent development and will be extremely successful in avoiding guardianship for many people with disabilities', it was 'not capable of universal application'.[120]

> Arguments for the total abolition of substituted decision making in favor of supported decision making or co-decision making fail to address the question: what mechanisms will be in place for the persons who, even with the benefit of infinite resources, cannot or will not act to protect their own interests?
>
> …
>
> Some decision making impairments may be accommodated or rectified but at the end of the spectrum there will be a very small proportion of persons whose impairments mean that they lack decision-making ability, even with infinite resources available for support. For those persons, the appointment of a substitute decision maker becomes a reasonable accommodation to ensure that they are afforded basic human rights including the right to exercise legal capacity.[121]

2.96 The policy impetus is clearly away from models that, in substance, form or language, appear as substitute decision-making ones. Although some have queried whether reformed law will have the desired effect *in practice*, and may be understood by stakeholders as 'little different from its predecessor', a shift to supported decision-making is to be highly commended', as Carney states, 'on the basis of its symbolic significance'.[122]

> It can be argued that at the very least a shift towards supported decision making sends two important symbolic messages regarding: (i) rejection of avoidable paternalism; and (ii) repositioning the state as an *adjunct to* (or facilitator of) civil society.[123]

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117 Citing Terry Carney and Fleur Beaupert, 'Public and Private Bricolage—Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175, 177.

118 Caxton Legal Centre, *Submission 67*. Citing Terry Carney, above n 40, 15. Carney and Beaupert, above n 118, 177.Carney and Beaupert, above n 117, 177.

119 Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' [1990] *Yale Law Journal* 1. See also Donnelly, above n 51, 185–187.

120 Australian Guardianship and Administration Council, *Submission 51*.

121 Ibid.

122 Carney, above n 47, 62.

123 Terry Carney, above n 40, 12.

2.97 The issue for policy reform, and law reform, is how to express this in a way that clearly reflects the paradigm shift in approach and thinking to the levels of support required for those who require decision-making support. As the Caxton Legal Centre submitted:

> The task is a tremendous one. The greatest challenges to ensuring equality before the law and the exercise of legal capacity for persons with disability involve the political will to endorse change to reflect consistency with a social model of disability, to provide sufficient education to the entire community, to stakeholders including all levels of employment and management, and to institutions and to implement the supply side and demand side reforms to ensure that supported decision making can effectively operate.[124]

2.98 Legal and policy reform must also include consideration of when support amounts to full support—where a person is not able to exercise any decision-making ability and may not have access to supporters in their network of family. It is in such cases, where the appointment of someone to make decisions is needed, that the standard by which they act and the nature of their appointment become the critical focus.

2.99 The NSW Council for Intellectual Disability submitted that

> Even with a comprehensive national strategy there will continue to be a need for a backstop of a substitute or fully supported decision-making system. In the absence of such a system, there will be no way to resolve many situations:
>
> - in which people with intellectual disability are being neglected, abused, exploited or overprotected on an ongoing basis and are unable to recognise these breaches of rights or and assert themselves in responding to the breaches.
> - in which there are disputes within families or between families and service providers or others about what decisions should be made about where a person should live, about health care or services or other lifestyle decisions.[125]

2.100 The need for support, and appropriate policy responses, is likely to increase moreover as Australia's population ages.[126] The Caxton Legal Centre submitted that,

> given the projected exponential increase in the ageing population and the consequent increase in the incidence of terminal cognitive diseases such as dementia and Alzheimer's, coupled with the factor of social isolation and sparse or non-existent support networks for many older people, the retention of a process of formal substituted decision making may be essential.[127]

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124 Caxton Legal Centre, *Submission 67*.

125 NSW Council for Intellectual Disability, *Submission 33*.

126 Demographic shifts were outlined in the ALRC's report: Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013) ch 2.

127 Caxton Legal Centre, *Submission 67*. See also Australian Guardianship and Administration Council, *Submission 51*.

2.101 But where institutional mechanisms of support cannot be avoided, 'new priorities, processes and language' are needed.[128] The legal and policy issues must focus on key questions. When is it appropriate to appoint someone to act on behalf of another? What test is used to determine when this should happen? What should this be called? What standard should guide the actions of a person appointed to act on another's behalf? What accountability mechanisms need to be in place? These questions necessarily focus on guardianship laws and the impact of the CRPD in moulding future reforms. As Barbara Carter observed:

> Guardianship is the 'elephant in the room' of Art 12 and the debate continues to rage about whether guardianship is allowable under the Convention. This debate is effectively stymying considered discussion of how the Convention, in its totality should be implemented in domestic guardianship legislation.[129]

2.102 The policy challenge for reform in this context was summed up neatly in the Caxton Legal Centre submission:

> Can a guardianship system remain as indicated by Australia's Interpretative Declaration and still provide full recognition of people with disability before the law and their ability to exercise legal capacity? The key issue centres around the adequacy of support mechanisms to assist persons with disability in decision making, so that substitute decision making truly is the last resort.[130]

2.103 The ALRC considers that the focus of reform initiatives needs to be towards providing clarity around the expectations of persons with disability, their families and carers, and the courts and tribunals involved in appointing those to assist in decision-making where it is required. The policy pressure is clearly towards establishing and reinforcing frameworks of support in law and legal frameworks, and through funding of support models. The momentum is also towards building the ability of those who may require support so that they may become more effective and independent decision-makers.

2.104 There will also be a need for thorough research. The Caxton Legal Centre submitted that

> models of supported decision making need to be thoroughly researched and evaluated particularly given the implications of profound change—the paradigm shift—across institutions, agencies, services and the community generally. The suggestion has been made that there is little evaluative research into the efficacy and acceptability of guardianship systems, and this too should be remedied. At the very least, guardianship should not continue on the basis of 'business as usual'. And as a number of writers have observed, legislative change without equal attention to supply side and demand side reforms, including adequate resourcing of free legal services for persons with disability, will only be as useful as the paper it is printed on.[131]

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128 ADACAS, *Submission 29*.

129 Barbara Carter, 'Adult Guardianship: Human Rights or Social Justice?' (2010) 18 *Journal of Law and Medicine* 143, 145.

130 Caxton Legal Centre, *Submission 67*.

131 Ibid.

2.105 The hardest and most challenging policy area will always be in the context of those who require the most support: to build law and legal frameworks in ways that signal the paradigm shift of the CRPD in practice as well as in form. In this Discussion Paper the ALRC puts forward a model that seeks to signal this shift in Commonwealth laws and to provide the catalyst towards further reform at the state and territory level.

# 3. National Decision-Making Principles

## Contents



## Summary

3.1 In this chapter the ALRC proposes a set of National Decision-Making Principles and accompanying Guidelines that provide the first part of the modelling in Commonwealth laws required under the Terms of Reference for this Inquiry. These principles should guide reform of Commonwealth laws and legal frameworks and the review of state and territory laws and legal frameworks.

3.2 The Principles reflect the paradigm shift signalled in the *United Nations Convention on the Rights of People with Disabilities*[1] (CRPD) to recognise people with disabilities as persons before the law and their right to make choices for themselves.

3.3 The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their wishes and preferences must drive decisions that they make, and that others may make on their behalf. The objective of the National Decision-Making Principles is to provide a conceptual overlay, consistent with the CRPD, that is applied in a Commonwealth decision-making model and provides the basis for review of relevant Commonwealth, state and territory laws.

1 *UN Convention on the Rights of Persons with Disabilities* Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

## National Decision-Making Principles

**Proposal 3–1** Reform of Commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require support in making decisions should be guided by the National Decision-Making Principles and Guidelines, set out in Proposals 3–2 to 3–9.

3.4 The National Decision-Making Principles are four general principles that reflect the key ideas and values upon which the ALRC's approach in relation to legal capacity is based. They are distinct from the framing principles for the Inquiry as a whole (dignity, equality, autonomy, inclusion and participation, and accountability), but reflect and are informed by those principles.

3.5 The National Decision-Making Principles provide a conceptual overlay at a high level. They are drawn from the CRPD, other international models, stakeholder submissions and the work of other bodies and individuals. They are not prescriptive, and are of general application. The Principles are supported by four sets of Guidelines, with more specific detail in each area.

3.6 The Terms of Reference require the ALRC to consider 'how maximising individual autonomy and independence *could be modelled* in Commonwealth laws and legal frameworks'.[2] The focus of the Inquiry is on the 'ability to exercise legal capacity' and equal recognition before the law of people with disability. The ALRC considers this can best be achieved by setting up an overall framework of principles and guidelines that can then be used as the template for specific reforms—both in Commonwealth areas of responsibility included in the Terms of Reference; and at state and territory level, in reviews of guardianship and related regimes. Application of the National Decision-Making Principles and Guidelines is then considered in a number of the areas set out in the Terms of Reference.

3.7 The National Decision-Making Principles identify the essential ideas in all recent law reform work on capacity. The tendency to suggest lengthy lists of principles may, however, distract from these four key ideas. The ALRC considers that identifying these four central ideas gives greater sharpness and clarity—and power—to the National Decision-Making Principles as reflecting the paradigm shift towards supported decision-making.

3.8 There is also a significant shift in the way these principles are expressed, starting with a right to make decisions, rather than a presumption of capacity.

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2 The Terms of Reference are set out in full on the ALRC website: <www.alrc.gov.au>. Emphasis added.

## The right to make decisions

**Proposal 3–2 National Decision-Making Principle 1**

Every adult has the right to make decisions that affect their life and to have those decisions respected.

3.9 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.[3]

3.10 In this Inquiry, the ALRC seeks to reflect the paradigm shift evident in the language of, and discourse around, the CRPD, and considers that it is necessary to place the emphasis on the right of citizens to make decisions, rather than the qualification intrinsic to 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.

3.11 This is not to suggest that legal capacity may never be lacking. Rather, it is better considered, in principles of general application, as a matter going to the question of what support is required and the threshold of appointment of others as supporters or representatives in a decision-making process.[4]

3.12 In terms of who has the right expressed in this principle, the ALRC considered whether it should be expressed more generally than applicable to adults. The Queensland Law Reform Commission (QLRC) used 'adult', but the Victorian Law Reform Commission (VLRC) considered the principle could have application to young people who are able to satisfy the *Gillick* 'mature minor' test endorsed by the High Court in *Marion's case*.[5] The ALRC has sought to avoid confusion in the first general principle by confining it to adults. The principles dealing with children involve a 'best interests' standard—a standard deliberately not used in this Inquiry.[6]

3.13 This does not mean that the National Decision-Making Principles could not have a broader application, but only that for the purposes of this Inquiry the ALRC has limited the expression to adults—at least as a starting point of reform. The remaining Principles are expressed in terms of 'persons'.

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3 See below.
4 See below.
5 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.
6 See Ch 2.

## Support

**Proposal 3–3 National Decision-Making Principle 2**

Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.

3.14 Support is the central theme in the CRPD. The Terms of Reference require the ALRC to consider:

- 'how decision making by people with impairment that affects their decision making can be validly and effectively supported'; and
- 'the role of family members and carers and paid supports ... in supporting people with disability ... and how this role should be recognised by law and legal frameworks'.

3.15 There are two elements: how a person can be supported in his or her decision-making; and how the law can give recognition to those who are providing the support. The ALRC's approach is to place the person who may require decision-making support at the forefront—as the decision-maker—and to include recognition in law for the position of 'supporters', both through a mechanism of appointment set out in relevant Commonwealth laws, and through including supporters in 'information loops' in certain situations. The 'supporter' model is considered in Chapter 4.

3.16 National Decision-Making Principle 2 and the Support Guidelines, set out in Proposal 3–4, reflect the ALRC's model of a spectrum of decision-making, from fully independent to supported decision-making, including where a person needs to be fully supported. They are underpinned by a conceptualisation of autonomy as empowerment, as noted in Chapter 1.

3.17 This Principle expresses the concept of support at a high level. The ALRC seeks to place the emphasis on the person as decision-maker not as a person with an impairment affecting their decision-making, but rather as a person who may require support in making decisions. Such language reflects art 12(3) of the CRPD:

> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

3.18 The ALRC considers that the emphasis on support should be strong, so the word 'must' is used in National Decision-Making Principle 2.[7] It is not prescriptive by

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7 Compare the formulation by the VLRC that people 'with impaired decision-making ability should be provided with the support necessary for them to make, participate in and implement decisions that affect their lives': Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 21(c). See also the QLRC formulation, 'the adult's right to be given any necessary support and access to information to enable the adult to make or participate in decisions affecting the adult's life': Queensland Law Reform Commission, Queensland Law Reform Commission, *Review of Qld Guardianship Laws*, Final Report (2010) rec 7–14(d).

whom, and how, the support may be given. The Principle reflects, as remarked by the Office of the Public Advocate (Qld),

> a general recognition that the focus must now move from the challenges facing a person with disability to the supports that should be provided to enable them to make decisions and exercise their legal capacity.[8]

3.19 National Decision-Making Principle 2 includes the recognition of communication support.[9] It also reflects some of the general principles contained in the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act), that '[p]eople with disability should be supported to participate in and contribute to social and economic life to the extent of their ability'.[10]

## Support Guidelines

**Proposal 3–4 Support Guidelines**

(a) Persons who may require decision-making support should be supported to participate in and contribute to all aspects of life.

(b) Persons who may require decision-making support should be supported in making decisions.

(c) The role of families, carers and other significant persons in supporting persons who may require decision-making support should be acknowledged and respected.

3.20 The purpose of support is to enhance the ability of people to make decisions and exercise choice and control—as the decision-maker. The Support Guidelines concern the support that should be provided to persons with disability, who may need support in making decisions.

3.21 The ALRC's model includes provision for formal recognition of supporters in Commonwealth laws and legal frameworks. This is considered in relation to Commonwealth supporters and representatives, discussed separately in Chapter 4.

3.22 The ALRC's approach is to provide recognition of supported decision-making. This goes beyond general statements about the importance of support in the lives of people with disability, to the proposal for a model for individual decision-making at Commonwealth level in which supporters can be nominated and recognised. As discussed in Chapter 2, there is very strong support for models that reflect supported decision-making norms and aspirations.

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8 Office of the Public Advocate (Qld), *Submission 05*.

9 Compare, eg, *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* s 2(b); Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 21(g).

10 *National Disability Insurance Scheme Act 2013* (Cth) s 4(2).

3.23 The Support Guidelines reflect the Inquiry's framing principles of dignity, autonomy, and inclusion and participation. They are consistent with the general principles of the NDIS Act, that people with disability should be supported to:

- exercise choice, including in relation to taking reasonable risks;[11] and
- receive reasonable and necessary supports, including early intervention supports.[12]

3.24 The Support Guidelines reflects the ALRC's approach that assumptions about ability—and the extent of support—should not be based on a person's disability. As one stakeholder commented, '[a]ssumptions should ... not be made that a person with physical disability will require supported decision-making or substitute decision making assistance'.[13]

3.25 Stakeholders endorsed the recognition of family as supporters. For example, the Mental Health Coordinating Council submitted:

> The role of family members and carers should be recognised in Commonwealth laws. The supporting policy frameworks must reflect that those assessing capacity and supporting decision-making must listen to, learn from and act upon communications from the individual and their carers about what is important to each individual. This involves acknowledging each individual is an expert on their own life and that their 'recovery' and care involves working in partnership with individuals and their carers to provide support in a way that makes sense to them and that assists them realise their own hopes, goals and aspirations.[14]

3.26 Paragraph (c) of the Support Guidelines is consistent with the NDIS Act principle that: 'The role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected'.[15]

## Will, preferences and rights

**Proposal 3–5 National Decision-Making Principle 3**

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

3.27 The Terms of Reference direct the ALRC to consider 'how maximising individual autonomy and independence' can be modelled in Commonwealth laws and legal frameworks. The ALRC considers that a principle of general application needs to embody this emphasis.

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11 Ibid s 4(4). The principle is focused on choice 'in the pursuit of their goals and the planning and delivery of their supports', which are the focus of the NDIS.

12 Ibid s 4(5).

13 Physical Disability Council of NSW, *Submission 32*.

14 Mental Health Coordinating Council, *Submission 07*.

15 *National Disability Insurance Scheme Act 2013* (Cth) s 4(12).

3.28 The emphasis on the will and preferences of a person who may require support in making decisions is at the heart of the paradigm shift away from 'best interests' standards—as discussed in Chapter 2. Given that the focus on will and preferences is such a key idea in all the discussions, the ALRC considers that it needs to be identified as a general principle. It reflects the framing principles of dignity, equality, autonomy, and inclusion and participation.

3.29 There is a range of formulations of this idea, including those of the VLRC and the QLRC in their reports on guardianship. In its list of 'new general principles', the VLRC included the principle that 'people with impaired decision-making ability ... have wishes and preferences that should inform decisions made in their lives'.[16] The QLRC recommended that emphasis should be placed on promoting and safeguarding 'the adult's rights, interests and opportunities' and 'the importance of preserving, to the greatest extent practicable, the adult's right to make his or her decisions'.[17]

3.30 The ALRC has chosen 'must' in the formulation of National Decision-Making Principle 3, to signal that this general principle has an important role in modelling Commonwealth laws. The word 'direct' should also be used, rather than a word like 'inform', as 'direct' attaches more weight to their will than does 'inform'. The ALRC also considers that the principle should not be qualified by words such as 'to the greatest extent practicable', which is contained, for example, in the QLRC formulation.

3.31 CRPD art 12(4) uses the formulation 'rights, will and preferences'. The ALRC formulation follows the logic of the spectrum of decision-making from the will and preferences of a person, underpinned by a human rights focus in circumstances where the will and preferences of a person cannot be determined.

3.32 By placing the emphasis on 'will and preferences', the emphasis is clearly shifted from 'best interests' approaches. Even in those examples of approaches where 'best interests' is defined by giving priority to 'will and preferences',[18] the standard of 'best interests' is still anchored conceptually in regimes that the ALRC is seeking to distinguish clearly in the National Decision-Making Principles.

3.33 The inclusion of 'rights' is the crucial backdrop. In cases where it is not possible to determine the will and preferences of the person, the default position must be to consider the human rights relevant to the situation as the guide for the particular decision to be made.

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16 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 21(d).

17 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, 2010 recs 7–14 (b), (c).

18 For example, *Mental Capacity Act 2005* (UK). See discussion in Ch 2.

## Will, Preferences and Rights Guidelines

**Proposal 3–6 Will, Preferences and Rights Guidelines**

(a) *Threshold*: The appointment of a representative decision-maker should be a last resort and not as a substitute for appropriate support.

(b) *Appointment*: The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time.

(c) *Supporting decision-making*:

(i) a person's will and preferences, so far as they can be determined, must be given effect;

(ii) where the person's will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters; and

(iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person's human rights and act in the way least restrictive of those rights.

3.34 The Will, Preferences and Rights Guidelines address the determination of will and preferences and what happens when the 'will and preferences' of a person who needs decision-making support cannot, or no longer can, be ascertained.

3.35 These Guidelines provide detail around the limits on the appointment and mode of operation of representative decision-makers that are consistent with the CRPD. Any supported decision-making model should reflect the Guidelines.

## Representative Decision-Making Guidelines

3.36 Paragraph (a) of the Wills, Preferences and Rights Guidelines contains several elements. First, there is an acknowledgment that a person may need to be appointed to act for another when that other does not have legal capacity to make decisions for themselves. Secondly, the person who is appointed is described as a 'representative decision-maker'. Thirdly, the appointment is expressed in limited terms.

3.37 By including such a threshold the ALRC acknowledges that there are times when a person may need to be appointed to act for another, beyond supporting a person who remains as the primary decision-maker. The ALRC has chosen a new term to reflect the role of the person appointed, to embody the model being proposed in this Discussion Paper. By choosing the word 'representative' the ALRC seeks to signal that the role is not as a 'substitute' for the person who requires support. Whatever the

understanding of the concept of 'substitute decision-maker',[19] the ALRC considers that it is better to create some distance from any controversy surrounding this usage and to find a new term.[20]

3.38 The limitation of the appointment of a representative decision-maker reflects the safeguards provision in art 12(4) of the CRPD.

3.39 The Terms of Reference require the ALRC to consider 'presumptions about a person's ability to exercise legal capacity' and 'how a person's ability to independently make decisions is assessed'. The ALRC considers that the threshold needs to be defined in terms which emphasise the *ability* of a person and proposes Representative Decision-Making Guidelines reflecting this approach.

**Proposal 3–7 Representative Decision-Making Guidelines**

Any determinations about a person's decision-making ability and any appointment of a representative decision-maker should be informed by the following guidelines:

(a) An adult must be presumed to have ability to make decisions that affect their life.

(b) A person has ability to make a decision if they are able to:

  (i) understand the information relevant to the decision and the effect of the decision;

  (ii) retain that information to the extent necessary to make the decision;

  (iii) use or weigh that information as part of the process of making the decision; and

  (iv) communicate the decision.

(c) A person must not be assumed to lack decision-making ability on the basis of having a disability.

(d) A person's decision-making ability is to be assessed, not the outcome of the decision they wish to make.

(e) A person's decision-making ability will depend on the kinds of decision to be made.

(f) A person's decision-making ability may evolve or fluctuate over time.

19 See Ch 2.

20 'Representative' has some established record of usage in the context of deceased estates, where a legal personal representative, as executor or administrator with the will annexed, 'represents' the will of the deceased and must carry out the terms of the will. See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [16.1]. [16.4].

(g) A person's decision-making ability must be considered in the context of available supports.

(h) In communicating decisions, a person is entitled to:

(i) communicate by any means that enables them to be understood; and

(ii) have their cultural and linguistic circumstances recognised and respected.

3.40 The Representative Decision-Making Guidelines sit within the Wills, Preferences and Rights Guidelines. They are set at a fairly high, general, level. They should guide the assessment of decision-making ability, although the exact definition of ability and the way in which it is assessed will vary depending on the particular context in which the assessment is being made. More fine-grained assessments will depend on the kinds of decision to be made. As one stakeholder commented, a tool is needed to assess capacity and it should include

> clear legal definitions to determine capacity, and appropriate training on how to use the tool, to reduce the risk of incorrect conclusions relating to an individual's capacity[21]

3.41 The ALRC acknowledges that capacity assessments are part of a process of 'gatekeeping'—and a complement to respect for autonomy. As Dr Mary Donnelly explains,

> Where the right of autonomy is recognised, the law has relied on the requirement for capacity to act as gatekeeper for the application of the right. Thus, while respect for autonomy provides the principled foundation for the law's approach to decision-making, the question of whether or not each individual's decision will actually be respected is dependent on whether she meets the legal standard for capacity in respect of the decision in question.[22]

3.42 Because assessments of capacity have served this gatekeeping role, they 'sort' people:

> People with capacity represent the norm. Those who do not are defined in contrast to this norm; they are, in this sense, the 'other'.[23]

3.43 Although this sorting has negative connotations, the ALRC recognises that some form of 'sorting' is inescapable in a number of cases. As Donnelly acknowledged, '[w]hile capacity is a flawed gatekeeper, it is nonetheless probably the best way of sorting decisions'.[24] What the ALRC proposes is, however, that the place of such assessments be reconsidered—and, in particular, that it is not a starting point in an

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21 Physical Disability Council of NSW, *Submission 32*.

22 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 2.

23 Ibid 3.

24 Ibid 273.

expression of principle. The starting point, as National Decision-Making Principle 1, is the *right* to make decisions. Any assessment should be seen as much further along a spectrum, with the focus being squarely on supporting decisions, rather than assessing whether or not a person can make a decision.

3.44 By proposing Representative Decision-Making Guidelines, the ALRC seeks to foster a nationally consistent approach. In the Issues Paper the ALRC asked whether there should be a nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity; and, if so, what was the most appropriate mechanism and what should the key elements be?[25] Stakeholders supported strongly the idea of a nationally consistent approach. For example, the Mental Health Coordinating Council said that it agreed

> with the Law Council of Australia that a nationally consistent approach to the assessment of capacity in the context of substitute decision-making 'is highly desirable in order to promote greater clarity and ultimately, to more effectively provide protection and foster individual autonomy as circumstances require'.[26]

3.45 The Representative Decision-Making Guidelines reflect an approach to ability that is functional (ability to make the particular decision in question), not outcome-based (the result or wisdom of the decision), or status-based (because of a condition). A functional approach of this kind 'seeks to maximise the circumstances in which the right of autonomy is protected'.[27] As the Law Commission of England and Wales concluded in a review of 'mental incapacity' in 1995, status-based assessments should be rejected as being 'quite out of tune with the policy aim of enabling and encouraging people to take for themselves any decision which they have capacity to take'.[28] In that inquiry, the Law Commission received a 'ringing endorsement' of the functional approach.[29]

3.46 In its extensive inquiry on Queensland's guardianship laws, the QLRC commented that the functional approach is a 'widely accepted modern capacity model':[30]

> It has been suggested that one of the advantages of the functional approach is that it 'best accommodates the reality that decision-making capacity is a continuum rather than an endpoint which can be neatly characterised as present or absent'. In contrast to the status model, there is no requirement for the presence of a particular type of

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25 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) Question 4.

26 Mental Health Coordinating Council, *Submission 07*. The submission refers to The Law Council Australia, Submission 056 to the House Standing Committee on Health and Ageing, *Inquiry into Dementia: Early Diagnosis and Intervention* (2012) item 21.

27 Donnelly, above n 22, 92. In recommending such an approach that was subsequently incorporated in the *Mental Capacity Act 2005* (UK), the Law Commission was deliberately rejecting status-based assessments: Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.5]–[3.6].

28 Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.3].

29 Ibid [3.6].

30 Queensland Law Reform Commission, Queensland Law Reform Commission, *Review of Qld Guardianship Laws*, Final Report (2010) [7.105].

> disability or condition. The relevant question is whether the adult lacks capacity for making a decision about a given matter, for whatever cause and for whatever reason.[31]

3.47 The ALRC notes some criticism by the UNCRPD of what it described as a functional approach in its General Comment on art 12:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. ... This functional approach is flawed for two key reasons. The first is that it is discriminatorily applied to people with disabilities. The second is that it presumes to be able to accurately assess the inner-workings of the human mind and to then deny a core human right—the right to equal recognition before the law—when an individual does not pass the assessment. In all these approaches, a person's disability and or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but rather requires that support be provided in the exercise of legal capacity.[32]

3.48 When the General Comment was in draft form, the emphasis in this paragraph was softened by a later comment that 'functional tests of mental capacity, or outcome-based approaches that lead to denials of legal capacity violate Article 12 *if they are either discriminatory or disproportionately affect the right of persons with disabilities to equality before the law*' (emphasis added).[33] However, the final form of the General Comment dropped these words. The ALRC considers that, with appropriate safeguards, and a rights emphasis, there is no 'discriminatory denial of legal capacity'.

3.49 The starting point of any list of Representative Decision-Making Guidelines needs to include a presumption of ability.[34] It reflects the object of CRPD art 12(2)—'that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of their lives'. It also reflects the ALRC's framing principles, particularly of equality and autonomy. A presumption of capacity is also the starting point of the common law as discussed above. It places the onus on those who wish to contest that a person has decision-making ability with respect to a particular transaction, or generally.

3.50 Legislative statements of this presumption often use the word 'capacity' and include the rider 'unless it is established that he or she lacks capacity'. The ALRC proposes keeping the rider out of the Guidelines, reflecting the rights emphasis of the CRPD, rather than its qualification.

3.51 Paragraph (b) of the Representative Decision-Making Guidelines focuses on *having* ability, rather than not having it:

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31 Ibid [7.103]. Citing Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.28].

32 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [13].

33 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility* [21].

34 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 26. Examples: *Mental Capacity Act 2005* (UK) s 1(2); *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* s 2(a); *Guardianship and Administration Act 2000* (Qld) ss 5–7, sch 1; *National Disability Insurance Scheme Act 2013* (Cth) s 17A. See also: NCOSS, *Submission 26*; Mental Health Coordinating Council, *Submission 07*; Office of the Public Advocate (Qld), *Submission 05*.

(b) A person has ability to make a decision if they are able to:

(i) understand the information relevant to the decision and the effect of the decision;

(ii) retain that information to the extent necessary to make the decision;

(iii) use or weigh that information as part of the process of making the decision; and

(iv) communicate the decision.

3.52 There are many other comparable provisions.[35] The VLRC, for example, includes both 'Defining Capacity' and 'Defining Incapacity', which are mirror images of each other.[36] The ALRC proposes to keep the focus on the affirmation of ability, rather than its converse.

3.53 The formulation in paragraph (c) of the Representative Decision-Making Guidelines is suggested to get away from status-based assessments:

(c) A person must not be assumed to lack decision-making ability on the basis of having a disability.

3.54 It reflects comments by the UNCRPD in its General Comment on Art 12, and its criticism of conflating legal and mental capacity:

> Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. ... Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.[37]

3.55 The ALRC has deliberately omitted any qualification, such as '*solely* on the basis of disability' in the proposed guideline.

3.56 Arnold and Bonython submitted that stereotyping detracts from equality, and prevents the 'flourishing' of people with disability:

> Ultimately equality is a pernicious abstraction unless it fosters flourishing. Equality is significant because inequality is associated with discrimination, in particular the non-recognition of capabilities on the basis of stereotypes and the retention of barriers to the fulfilment of both people with disabilities and people around them.[38]

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35 See, eg, *Mental Capacity Act 2005* (UK) s 1(3); New South Wales, Attorney General's Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

36 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 24, 25.

37 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [12].

38 B Arnold and Dr W Bonython, *Submission 38*. The submission of NCOSS to the NDIS Rules also strongly rejected decisions based on stereotyping, referred to in its submission to this Inquiry: NCOSS, *Submission 26*.

3.57 Paragraphs (e)–(f) of the Representative Decision-Making Guidelines reflect a functional assessment of ability:

> (e) A person's decision-making ability will depend on the kinds of decision to be made.
>
> (f) A person's decision-making ability may evolve or fluctuate over time.

3.58 These Guidelines may apply to a decision, or types of decision, depending on the circumstances. As NCOSS submitted:

> Determinations about capacity must be made not only on a person-by-person basis, but also about every separate decision for each person, because people may have different capacity to make different decisions at different times.[39]

3.59 Other law reform bodies have reached similar conclusions.[40] The New South Wales Legislative Council Standing Committee on Social Issues recommended, for example, that

> the legislative definition in NSW should define 'capacity' with reference to the ability to understand, retain, utilise and communicate information relating to the particular decision that has to be made, at the particular time the decision is required to be made, to foresee the consequences of making or not making the decision and to separate the concepts of 'incapacity' and 'disability'.[41]

3.60 Paragraph (d) of the Representative Decision-Making Guidelines rejects an outcomes-based approach:

> (d) A person's decision-making ability is to be assessed, not the outcome of the decision they wish to make.

3.61 Paragraph (d) captures what is described as 'the dignity of risk', which is underpinned by the framing principle of autonomy. As Donnelly explains,

> Respect for the liberal principle of autonomy requires that external factors, including the outcome of the decision reached and the degree of risk assumed, are irrelevant to the determination of capacity. ... [R]espect for autonomy is premised on allowing each individual to determine for herself what is good. Therefore, whether or not a person's decision complies with other people's perception of 'the good' is irrelevant to whether the person has capacity. In the words of the Law Commission, according a role to the nature of the decision reached is inappropriate because it 'penalises individuality and demands conformity at the expense of personal autonomy'.[42]

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39 NCOSS, *Submission 26*.

40 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(a); Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, NSW Parliament (Report 43, 2010) [4.56]. With respect to para (f), compare, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(b); Queensland Law Reform Commission, Queensland Law Reform Commission, *Review of Qld Guardianship Laws*, Final Report (2010) rec 7–14(d). See also Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, NSW Parliament (Report 43, 2010) rec 1.

41 Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, NSW Parliament (Report 43, 2010) [4.57].

42 Donnelly, above n 22, 101. Citing Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.4].

3.62 Paragraph (g) of the Representative Decision-Making Guidelines reflects the second of the National Decision-Making Principles concerning support:

> (g) Decision-making ability must be assessed in the context of available supports.

3.63 The VLRC recommended, similarly, that a person 'should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support'.[43] An assessment of ability in terms of support incorporates the encouragement of supporting—and thereby enhancing—a person's ability. The *Mental Capacity Act 2005* (UK) s 1(3) provides, for example, that '[a] person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success'. Donnelly describes this provision as 'one of the most striking innovations' in the UK Act.[44]

3.64 Paragraph (h) of the Representative Decision-Making Guidelines focuses on communication:

> (h) In communicating decisions, a person is entitled:
>
> (i) to communicate by any means that enables him or her to be understood; and
>
> (ii) to have his or her cultural and linguistic circumstances recognised and respected.

3.65 The Terms of Reference require the ALRC to consider 'the use of appropriate communication to allow people with disability to exercise legal capacity'. Comparable examples include:

- for (i), the QLRC recommendation that 'a person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to the person in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means)';[45] and
- for (ii), the VLRC recommendation that '[p]eople with impaired decision-making ability ... 'should have their cultural and linguistic circumstances recognised and respected by others'.[46]

## Appointment

3.66 Paragraph (b) of the Will, Preferences and Rights Guidelines provides that:

> The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time

3.67 This proposed guideline reflects CRPD art 12(4)—a safeguards provision stipulating that 'all measures that relate to the exercise of legal capacity provide for

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43 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(e).

44 Donnelly, above n 22, 113.

45 Queensland Law Reform Commission, Queensland Law Reform Commission, *Review of Qld Guardianship Laws*, Final Report (2010) rec 7–14(c).

46 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 21(j). See, also, *National Disability Insurance Scheme Act 2013* (Cth) s 5(d).

appropriate and effective safeguards to prevent abuse in accordance with international human rights law'. The measures referred to relate to decision-making support, and can apply to appointment of representative decision-makers, who must be 'free of conflict of interest and undue influence'. The appointments covered by art 12(4) must also be 'proportional and tailored to the person's circumstances, apply for the shortest time possible'. A further aspect of art 12(4) is the provision that the 'measures' should be 'subject to regular review by a competent, independent and impartial authority or judicial body'. The ALRC includes this aspect of art 12(4) in the Safeguards Guideline, considered below.

3.68 The Guideline also reflects that, in some circumstances, another person may be needed to act for a person who requires full decision-making support.

## Supporting decisions

3.69 Paragraph (c) of the Will, Preferences and Rights Guidelines provides:

> (c) Supporting decision-making:
>
> (i) a person's will and preferences, so far as they can be determined, must be given effect;
>
> (ii) where the person's will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters;
>
> (iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person's human rights and act in the way least restrictive of those rights.

3.70 This Guideline is a key element in the National Decision-Making Principles and reflects the importance of the autonomy of the individual. Decisions for those who may require support in making decisions must be directed by the will and preferences of the individual. The Office of Public Advocate (Qld) submitted:

> Regardless of views about the compatibility of guardianship laws with the Convention, there is general recognition that the focus must now move from the challenges facing a person with disability to the supports that should be provided to enable them to make decisions and exercise their legal capacity. This means that the appointment of a substitute decision-maker should not preclude efforts to support a person to make their own decisions.[47]

3.71 The challenge in advancing a supported decision-making approach is, as Donnelly suggests, 'to provide meaningful protection for autonomy notwithstanding incapacity'.[48] She wrote that there are two broad ways 'to protect the autonomy of a person lacking capacity':

> The first involves the preservation of the autonomy of the once capable person (sometimes described as precedent autonomy), either through formal advance decision-making mechanisms or the less formal means of taking account of past views, preferences and opinions in the decision-making proves. The second involves

47 Office of the Public Advocate (Qld), *Submission 05*.
48 Donnelly, above n 22, 192.

> supporting people lacking capacity so as to enable them to participate to the maximum degree possible in decision-making. The first of these is most consistent with the traditional liberal approach to decision-making for people lacking capacity while the second is more in line with the approach favoured by the CRPD.[49]

3.72 The starting point in paragraph (c)(i) of the Will, Preferences and Rights Guidelines is necessarily the ability to ascertain the will and preferences of the person being supported. Ascertaining the will and preferences of a person is central to the paradigm shift signalled in the CRPD. It involves an emphasis on participation and communication. In practice, however, there will be a limit: cases where it is not possible to determine a person's will and preferences. In practice there may also be situations where the will and preferences of a person are known but are likely to cause harm to the person or others. Cases of possible harm are considered under the Safeguards Guidelines, Proposal 3–9.

3.73 Paragraph (c)(ii) of the Will, Preferences and Rights Guidelines provides the standard for how a representative should act, in circumstances where the supported person's will and preferences are not known. The representative must seek to ascertain what the person would likely have wanted in the particular circumstances. This requires a consideration of past information about decision-making choices. A key source of such information is likely to be the person's supporters. For example, the *Mental Capacity Act 2005* (UK) includes a list of those who could provide such information.[50] Similar lists have been included in, for example, the *Mental Health Act 2014* (Vic);[51] and the Mental Health Bill 2013 (WA).[52]

3.74 Paragraph (c)(iii) of the Will, Preferences and Rights Guidelines is intended to embody a 'human rights' approach, where the will and preferences cannot be determined by any means:

> (iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person's human rights and act in the way least restrictive of those rights.

3.75 The underlying idea in this guideline is that the default position should not be expressed in terms of a 'best interests' standard.[53] There are different ways that this could be expressed. The VLRC, for example, recommended the 'promotion of the personal and social wellbeing of the person' to replace 'best interests'.[54] The QLRC recommended that powers in the amended legislation should be used in a way that

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49 Ibid 193. Donnelly notes that the *Mental Capacity Act 2005* (UK) allows for both of these ways. She then analyses 'some of the practical and normative issues to which these legal mechanisms give rise'.

50 *Mental Capacity Act 2005* (UK) s 4(6), (7). See also, *Guardianship and Administration Act 1993* (SA) s 5; *Guardianship and Management of Property Act 1991* (ACT) ss 4, 5A; *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* s 2(d).

51 For example, s 71(4).

52 For example, pt 2 div 4, 'Wishes of a person'.

53 Some have suggested the retention of the 'best interests' approach as a fallback. For example, the NSW Council for Intellectual Disability submitted that '[t]here should also be caution about completely dispensing with the best interests approach—it has weaknesses but it also has the strength of being able to flexibly accommodate the unique and fluctuating circumstances of an individual': NSW Council for Intellectual Disability, *Submission 33*.

54 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 536 n 83.

'promotes and safeguards' and is 'least restrictive' of the adult's 'rights, interests and opportunities'.[55]

3.76 The kinds of human rights embraced by this guideline include the various matters set out in the CRPD, including:

- respect for inherent dignity—preamble and art 3;
- non-discrimination—art 5;
- liberty and security—art 14;
- freedom from torture or cruel, inhuman or degrading treatment or punishment—art 15;
- physical and mental integrity—art 17;
- liberty of movement—art 18;
- independent living—art 19;
- respect for privacy—art 22;
- respect for home and family—art 23; and
- participation in political and public life—art 29.

3.77 Hence where a representative decision-maker is appointed, the standard to be applied in decision-making is to give priority to the will and preferences of the person—these must direct the decision or types of decision to be made—but if these cannot be determined, decision-making must emphasise the human rights of the person, particularly as articulated in the CRPD. Decisions must also be made on the basis of the least restrictive option—a point that is also included specifically in the Safeguards Principle.[56]

3.78 While autonomy is a key principle of the CRPD, a human rights approach places autonomy in a much wider context. As Donnelly suggests, a human rights framework 'provides a mechanism within which to deal with questions of limitations on the right of autonomy':

> The contribution of the CRPD is likely to be most significant in providing human rights support for the development of legal obligations to empower patients, in the context of capacity assessment, decision-making on behalf of people lacking capacity and treatment for a mental disorder.[57]

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55 Queensland Law Reform Commission, Queensland Law Reform Commission, *Review of Qld Guardianship Laws*, Final Report (2010) [5].

56 See, eg, *Mental Capacity Act 2005* (UK) s 1(6); *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* s 2(c); *NSW Trustee and Guardian Act* s 39(b). See also Mental Health Coordinating Council, *Submission 07*; Office of the Public Advocate (Qld), *Submission 05*.

57 Donnelly, above n 22, 277.

## Safeguards

**Proposal 3–8 National Decision-Making Principle 4**

Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

3.79 The Terms of Reference require the ALRC to consider safeguards in asking: 'are the powers and duties of decision-making supporters and substituted decision-makers effective, appropriate and consistent with Australia's international obligations'. The Terms of Reference also ask the ALRC to consider mechanisms to review decisions about the assessment of a person's ability 'to independently make decisions'.[58] Both these matters are included within the Safeguards Guidelines.

3.80 The Safeguards Guidelines build upon the requirements of art 12(4) of the CRPD and reflects the Inquiry's framing principle of 'accountability'. As the Caxton Legal Centre submitted,

> Key factors in considering models should include monitoring of arrangements, provisions for accountability and regular and unscheduled review as safeguards against exploitation and abuse.[59]

### Safeguards Guidelines

**Proposal 3–9 Safeguards Guidelines**

Laws and legal frameworks must contain appropriate safeguards in relation to decisions and interventions in relation to persons who may require decision-making support to ensure that such decisions and interventions 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.

3.81 These Guidelines are expressed in very general terms. They capture the essential elements of safeguards that should be incorporated in Commonwealth laws and legal frameworks about decision-making support.

3.82 Paragraph (a) reflects the fact that some decisions and interventions may be made contrary to what a person wants—particularly if the wishes and preferences of a person may cause harm to themselves or to others. A limitation based on harm puts a 'hard edge' on giving effect to a person's wishes and preferences. It also tests the limits of autonomy, where the limitation concerns harm to oneself. Examples of limitations of

58 The full Terms of Reference are set out on the ALRC website: <www.alrc.gov.au>.
59 Caxton Legal Centre, *Submission 67*.

this kind are seen usually in the context of mental health legislation: to save a patient's life, or to prevent a patient from seriously injuring themselves or others.[60] Safeguards may be included in terms of ensuring that the course of action proposed is the 'least restrictive' option.[61]

3.83 Whenever a limit is included, considerable care will be needed in translating it into practice. A provision that a person's will and preferences may be overridden, based on the outcome of that decision—in this case, harm—runs contrary to a focus on ability that is not outcomes-based.[62] But it is not necessarily inconsistent with a principle of autonomy.

3.84 Autonomy is not an absolute. The classical conceptualisation of autonomy, by John Stuart Mill, recognised some limit—that it may be limited in order 'to prevent harm to others'.[63] He gave the example of a wayfarer, summarised by Donnelly as follows:

> Mill describes a wayfarer approaching a dangerous bridge in circumstances in which it is uncertain whether she is aware of the danger. He states that it is permissible to stop the wayfarer and warn her of the dangers ahead but if, following the warning, the wayfarer still wishes to proceed, she should be permitted to do so. Mill also recognised that interference with individual freedom could be justified in order 'to prevent harm to others'. However, this justification does not allow a wholesale overriding of individual freedom. While acknowledging that 'no person is an entirely isolated being', Mill argued that a person can be stopped from doing something only if, in doing that thing, she would 'violate a distinct and assignable obligation' to others.[64]

3.85 Arnold and Bonython defended the need to make decisions on behalf of people in some contexts and suggested that this is consistent with human rights law and with 'accepted bioethical standards and with the practicalities of both health care and social activity':

> It is axiomatic that all Australians, with or without disabilities, may experience life-threatening circumstances in which a decision should be made by a medical practitioner or other recognised decision-maker within a coherent and transparent legal framework to preserve the life of the individual. From a human rights perspective it is also axiomatic that interventions that are contrary to the will of some individuals will be necessary in order to both preserve the life of those individuals and the lives of the intimates or other associates of those individuals.[65]

3.86 One of the challenging areas in practice, for applying a limitation based on harm, is in the context of restrictive practices, particularly for people with mental

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60 See, eg, Mental Health Bill 2013 cl 199(2)(a) regarding the administration of electroconvulsive therapy on an involuntary patient.

61 See, eg, *Mental Health Act 2014* (Vic) s 71(3) concerning treatment decisions for patients who either do not have capacity to give informed consent, or who do not give informed consent.

62 See above.

63 John Stuart Mill, *On Liberty* (London, 1859) in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991) 14.

64 Donnelly, above n 22, 21. Citing John Stuart Mill, *On Liberty* (London, 1859) in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991) 107, 14, 88 respectively.

65 B Arnold and Dr W Bonython, *Submission 38*.

disorders. Restrictive practices are discussed in Chapter 8. At a principle-based level, some limitation is appropriate, and is broadly consistent with the framing principles for this Inquiry. The challenge in practice, however, is the development of appropriate assessment and monitoring tools that are also consistent with the principles on an ongoing basis.[66]

3.87 The ALRC is interested in hearing how best to express the 'least restrictive' Safeguard Guideline, consistent with a human rights approach and the supported decision-making model proposed in this Discussion Paper.

66 See, eg, the discussion in Donnelly, above n 22, esp ch 6.

# 4. Supported Decision-Making in Commonwealth Laws

## Contents



## Summary


4.1 To encourage the adoption of supported and fully supported decision-making at a Commonwealth level, the ALRC proposes a new model for decision-making (the Commonwealth decision-making model). This chapter outlines the proposed model, the basis of which is the concept of a 'supporter' and 'representative'. The role of both supporters and representatives is to support people who may require decision-making support to make decisions in the relevant area of Commonwealth law.

4.2 This chapter first describes the Commonwealth decision-making model and discusses the potential application of the model in areas of Commonwealth law, and the chosen terminology.

4.3 The chapter then addresses the key elements of the model. It makes a number of proposals and asks questions about: the objects and principles of relevant legislation; the appointment, recognition, role and duties of supporters; and appropriate and

effective safeguards. The ALRC also proposes introducing the concept of a representative, outlines the possible roles and duties of representatives; and asks questions about appropriate mechanisms for their appointment and the interaction with state and territory appointed decision-makers.

4.4 Finally, the ALRC makes a number of complementary proposals with respect to information sharing and the need for training and guidance.

## Supported decision-making at a Commonwealth level

**Proposal 4–1** Commonwealth laws and legal frameworks should encourage supported decision-making by adopting a model for individual decision-making consistent with the National Decision-Making Principles and Proposals 4–2 to 4–9 (the 'Commonwealth decision-making model').

4.5 In the ALRC's view, it is desirable to introduce statutory mechanisms for formal supported decision-making at a Commonwealth level. A range of stakeholders expressed support for the introduction of supported decision-making and its introduction in statutory form.[1]

4.6 The ALRC proposes introducing mechanisms for the appointment of 'supporters' for adults who may require decision-making support, in a number of areas of Commonwealth law. The introduction of provisions relating to 'representatives' to address circumstances in which a person may desire, or require, fully supported decision-making, is also proposed.

4.7 The proposed Commonwealth decision-making model represents a significant shift and would require reconfiguration of decision-making approaches. The question of how the ALRC's model interacts with decision-making regimes under state and territory law is also discussed below.

### Levels of support

4.8 Article 12 of the CRPD and National Decision-Making Principle 2 contain the key idea of decision-making support. The central idea underlying the Commonwealth decision-making model is, therefore, that all adults, except in very limited circumstances, have some level of decision-making ability and should be entitled to make decisions expressing their will and preferences, but may require varying levels of support to do so. The Office of the Public Advocate (Queensland) observed:

1 See, eg, MHCA, *Submission 77*; Office of the Public Advocate (SA), *Submission 17*; Office of the Public Advocate (Vic), *Submission 06*. See also, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [7.73]–[7.82], which adopted the view that formalisation of supported decision-making arrangements would be desirable.

> supported decision-making ... reflects efforts to provide better ways of recognising and meeting the needs of adults who have difficulty with certain areas of decision-making but who could make their own decisions 'with a little friendly help'.[2]

4.9 Rather than starting by questioning whether a person has the capacity to make decisions— reflecting a binary view of capacity and decision-making[3]—the preferable approach is to ask what level of support, or what mechanisms are necessary, to support people to express their will and preferences. This recognises that the ability of a person who may require decision-making support 'to exercise legal agency is dependent on the integrity, quality and appropriateness of support available'.[4]

4.10 There are a number of levels of support that a person may require to make a decision:

- No or minimal support—for example, a person may require no support, or require some assistance obtaining information, but when provided with the information is then able to make the necessary decision. Similarly, the person may only require support to communicate to a third party a decision they have made.
- Low to medium support—for example, a person may require support to obtain information, have the information explained to them in an appropriate way, and receive advice about the possible decisions they might make.
- High support—for example, a person may require support to obtain information, have the information explained to them in an appropriate way, receive advice about the possible decisions they might make, communicate their decision, and to ensure their decision is given effect to.

4.11 At each of these levels of support, under the Commonwealth decision-making model, a person could appoint a supporter or supporters to assist them to make a decision in the particular area of Commonwealth law.

4.12 There is one other category of support—full support. In such circumstances a person may choose fully supported decision-making, or it may be necessary to appoint someone to provide that support. Under the Commonwealth decision-making model, a representative would support the person to express their will and preferences in order to make a decision. Where it is not possible to determine the person's will and preferences, the representative would make a decision based on the person's will and preferences as constructed using the information available, or on the basis of the human rights relevant to the situation. This is discussed further in Chapter 3 under the Will, Preferences and Rights Guidelines and is consistent with National Decision-Making Principle 3.

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2 Office of the Public Advocate (Qld), *Submission 05*. The OPA (Qld) referred to Robert M Gordon, 'The Emergence of Assisted (supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making' (2000) 23 *International Journal of Law and Psychiatry* 61, 71.

3 See Ch 2.

4 PWDA, ACDL and AHRC, *Submission 66*.

4.13 Fully supported decision-making differs from substitute decision-making because it is 'based on facilitating access to the enjoyment of existing rights, rather than on making decisions on behalf of a person based on a subjective assessment of their best interest'.[5] Importantly, representatives are not intended to replicate nominees under existing Commonwealth law. Stakeholders expressed concerns about the potential risks arising from a combination of supported and substitute decision-making. In particular, there was concern that substitute decision-making could become predominant—what Professor Terry Carney and Fleur Beaupert refer to as 'net widening'.[6] The concept of fully supported decision-making and its development is discussed in more detail in Chapter 2.

## Operation and effect of the model

### *Operation*

4.14 The Commonwealth decision-making model provides for formal supported decision-making along a spectrum. At one end is a supporter appointed by a person who requires decision-making support to assist them to make a decision or category of decisions. At the other is fully supported decision-making, which involves the appointment of a representative, either by the person who requires decision-making support or a court, tribunal or other body.

4.15 The development of the Commonwealth decision-making model differs from, but builds on, the examination and articulation of approaches to supported decision-making by bodies such as the Victorian Law Reform Commission (VLRC), the Office of the Public Advocate (SA), as well as a number of international models.[7]

4.16 The ALRC intends that a supporter and representative scheme would be provided for in particular areas of Commonwealth law, tailored to suit the legislative context. However, it would ideally incorporate a number of key elements based on the model outlined below. This approach was supported in submissions which suggested, for example, that the ALRC 'explore the idea of consolidating Commonwealth ... decision systems or at least having one consistent structure that each system hangs off'.[8]

4.17 The ALRC focuses on a number of key elements of the model, rather than being overly prescriptive about the mechanics of its application. For example, the ALRC does not intend to outline the formal requirements that may be necessary to facilitate the appointment of a supporter, or the way in which a particular Commonwealth

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5 Ibid.

6 Terry Carney and Fleur Beaupert, 'Public and Private Bricolage—Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175.

7 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Office of the Public Advocate (SA), *Submission 17*, attachment 1 'Stepped Model of Supported and Substitute Decision-Making'. See, also, *Mental Capacity Act 2005* (UK); Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Law Commission of Ontario, October 2010); Amnesty International and the Centre for Disability Law and Policy, National University of Ireland, Galway, *Essential Principles: Irish Legal Capacity Law*, 2001.

8 NSW Council for Intellectual Disability, *Submission 33*.

department or agency might record the appointment, other than to highlight the need for information sharing between Commonwealth departments and agencies.

### *Effect*

4.18 The implementation of the Commonwealth decision-making model is likely to have a number of important outcomes. First, it would ensure that people with disability retain decision-making power in areas of Commonwealth law in order to express their will and preferences and exercise legal capacity on an equal basis with others.

4.19 Secondly, formalisation of support relationships would, as emphasised by the VLRC in its guardianship report, 'provide important legal acknowledgment of the fact that mechanisms other than substitute decision making can be used to help people engage in activities requiring legal capacity'.[9]

4.20 Thirdly, formalisation of support arrangements in the way envisaged by the model is likely to create greater certainty for third parties about the role of supporters and facilitate the provision of decision- making support to persons who may require it.[10] This is likely to allow third parties to interact with supporters about decision-making with greater confidence.

4.21 A related point is that, by formalising support relationships, the model also provides a mechanism for acknowledging and respecting the role of family, carers and other supporters in the lives of people with disability, one of the key elements of the ALRC's Support Guidelines.[11] This may help address some of the difficulties and frustrations expressed by stakeholders in the course of this Inquiry.[12] Such recognition may also have the added effect of decreasing applications for state and territory guardianship and administration orders initiated primarily for the purposes of engaging with Commonwealth Government systems.[13] As Pave the Way highlighted,

> families are less likely to seek a guardianship or administration order in relation to their loved one when government agencies and other organisations recognise their role in their family member's lives.[14]

4.22 Finally, if implemented across a range of Commonwealth areas of law, support provided in accordance with the model may also facilitate navigation of the

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9 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012), [8.62]. See also: *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

10 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry,* May 2011 5. In a state and territory context see, eg, Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, 2010.

11 See Ch 3.

12 See, eg, Carer's Alliance, *Submission 84*; Carers NSW, *Submission 23*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Office of the Public Advocate (SA), *Submission 17*; Carers Queensland Australia, *Submission 14*. See also more generally in relation to family and carers: G Llewellyn, *Submission 82*; NMHCCF and MHCA, *Submission 81*; Children with Disability Australia, *Submission 68*; B Arnold and Dr W Bonython, *Submission 38*; Office of the Public Advocate (SA), *Submission 17*; Mental Health Coordinating Council, *Submission 07*.

13 See, eg, Australian Guardianship and Administration Council, *Submission 51*.

14 Pave the Way, *Submission 09*.

'labyrinth'[15] of Commonwealth systems by people who require decision-making support.

4.23 In order to guide the adoption of supported decision-making at a Commonwealth level, the ALRC makes a range of proposals below that, considered together, form the proposed Commonwealth decision-making model.

4.24 In outlining the model, there are a number of areas and issues in relation to which the ALRC seeks further stakeholder input prior to making final law reform recommendations. For example, the ALRC asks a question about the most appropriate approach to the complex interaction of Commonwealth decision-making structures and state and territory appointed decision-makers—an issue highlighted by a range of stakeholders in the course of the Inquiry.[16]

## Application of model

**Question 4–1** In what areas of Commonwealth law, aside from the National Disability Insurance Scheme, social security, aged care, eHealth and privacy law, should the Commonwealth decision-making model apply?

4.25 It may be beneficial to have consistent decision-making structures across Commonwealth law for people who may require decision-making support. However, given the significant shift the proposed model represents, and the views of some stakeholders and commentators who have emphasised the need for a fuller analysis of supported decision-making before wholesale implementation,[17] the ALRC limits its proposals to a number of key areas.

4.26 The following chapters of this Discussion Paper discuss the potential application of the model in a number of areas of Commonwealth law. Chapter 5 discusses the application of the model in the context of the NDIS. Chapter 6 discusses its possible application in other areas of Commonwealth law, including those that have existing decision-making provisions which will require amendment.

4.27 There are other areas of Commonwealth law to which the Commonwealth decision-making model could apply, including for example, Medicare and tax. The ALRC is interested in stakeholder comment in relation to these, or other areas of Commonwealth law.

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15 Youngcare, *Submission 34*.

16 See, eg, Financial Services Council, *Submission 35*; Australian Guardianship and Administration Council, *Submission 51*.

17 See, eg, Carney and Beaupert, above n 6; Nina Kohn, Jeremy Blumenthal and Amy Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship' (2013) 117 *Penn State Law Review* 1111.

### Terminology

**Question 4–2** Are the terms 'supporter' and 'representative' the most appropriate to use in the Commonwealth decision-making model? If not, what are the most appropriate terms?

4.28 As outlined in Chapter 2, in light of the often contested nature of terminology, and the potential need for a new lexicon in the context of capacity and decision-making, the ALRC is asking a number of questions about the appropriateness of particular terminology. In the context of this chapter, the ALRC is interested in stakeholder views on the appropriateness of the terms 'supporter' and 'representative', and suggestions for alternative terms.

4.29 The term 'supporter' is used in the ALRC's model to reflect the role played by an individual or organisation that provides a person with the necessary support to make a decision or decisions. The term reflects the nature of the role, and that ultimate decision-making power and responsibility remains with the person, with support being provided to assist them to make the decision themselves. The term supporter is used in a number of jurisdictions, including in a model recommended by the VLRC in its guardianship inquiry.[18]

4.30 The term 'representative' is used to signal that the role of a representative is to support and represent the will, preferences and rights of the person who requires decision-making support.[19] Representative is preferred over nominee in order to signal the shift from existing decision-making arrangements in a number of areas of Commonwealth law, including the NDIS and social security, both of which use the term nominee. Further, in circumstances where a person who may require decision-making support has not chosen or 'nominated' the person, the term nominee does not appropriately reflect the nature of the appointment.

## Objects and principles of Commonwealth legislation

**Proposal 4–2** The objects or principles provisions in Commonwealth legislation that involves decision-making by people who may require decision-making support should reflect the National Decision-Making Principles.

4.31 The first key component of the ALRC's proposed approach to reform of Commonwealth laws and legal frameworks is the inclusion of supported decision-making principles under relevant legislation. As a result, the ALRC proposes amendment of existing objects or principles provisions contained in relevant

18 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 30.

19 A formulation currently used under the *Personally Controlled Electronic Health Records Act 2012* (Cth). The term representative is also used in other jurisdictions: eg *Representation Agreement Act RSBC 1996 c405 1996*.

legislation, or where there are no such provisions, their inclusion, to reflect the National Decision-Making Principles. This would ensure the National Decision-Making Principles guide the application and interpretation of the legislation as a whole, or the particular division or part that deals with supporters and representatives. This approach was supported by a number of stakeholders. For example, the Disability Advocacy Network Australia (DANA) submitted that

> it should be an explicit object of legislation in the disability area ... to promote the decision making capacity of people with disability, to build the capacity of people with disability to make decisions and participate in decision making, and to enable access to decision making support for all people with disability whose decision making capacity is impaired.[20]

## Supporters

4.32 The Commonwealth decision-making model proposed by the ALRC introduces the concept of formal supported decision-making at a Commonwealth level. At the core of supported decision-making is the idea that people, except in very limited circumstances, have some level of decision-making ability and that, with the appropriate support, they can be supported to make a decision. The nature and level of the support may vary, however the decision remains that of the person who requires the decision-making support.

4.33 A supporter under the model is an individual or organisation appointed by a person who may require decision-making support to enable them to make a decision. Ultimate decision-making power and responsibility remains with the person who requires decision-making support. Supporters should be entitled to support people to make any decision relevant to the area of Commonwealth responsibility in relation to which they have been appointed, including in relation to financial decisions.

4.34 A person may appoint whomever they wish as their supporter and may appoint more than one. For example, a person may appoint a family member, friend or carer. A supporter may play a range of roles, including in relation to information, advice or communication. The ALRC does not consider that there should be a requirement that a supporter be unpaid.[21] For example, there may be circumstances in which a paid carer may be appointed as a supporter, particularly where the person does not have family support or is socially isolated.[22] Advocacy organisations, which may not be directly paid by the person, but which receive funding from government or other sources, may in certain instances also be appropriately appointed as a supporter.[23] A person may also appoint, or revoke their appointment of, a supporter at any time.

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20 Disability Advocacy Network Australia, *Submission 36*.

21 Compare Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 38; Office of the Public Advocate (SA), *Submission 17* Attachment 1.

22 See, eg, MHCA, *Submission 77*; Caxton Legal Centre, *Submission 67*; ADACAS, *Submission 29*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 62, 63.

23 See, eg, discussion of importance of advocates in decision-making regimes: Disability Advocacy Network Australia, *Submission 36*. See also MDAA, *Submission 43* in relation to advocates' authority to engage with Centrelink.

4.35 There is currently no provision for a supporter, or supporter-type role, which reflects the ideas of supported decision-making, in Commonwealth legislation. The mechanisms closest to the role of a supporter are Centrelink correspondence nominees[24] and nominated representatives in relation to eHealth.[25] However, as outlined below, these roles differ significantly, particularly with respect to the duties owed to the person who may require decision-making support.[26]

### *What about informal supporters?*

4.36 Informal supporters and support networks play a vital role in decision-making of people with disability. Support under art 12 of the CRPD 'encompasses both informal and formal support arrangements, of varying types and intensity'.[27] As the VLRC stated:

> supported decision making recognises the interdependent nature of most people's lives. Most people make important decisions with personal support (such as advice from family, friends or mentors), or sometimes with professional support (for example, doctors or accountants).[28]

4.37 A number of stakeholders emphasised the important role informal supporters play in decision-making and that entitlement to support should include informal support.[29] The Multicultural Disability Advocacy Association of NSW highlighted the effect of culture on decision-making and noted 'the differences in ways decisions are made in various cultures':

> in some cultures decisions are made by individuals, whereas in others, all important decisions may be made by the head of the family, or collectively by the local elders, or in consultation with other significant members of the family or community concerned.[30]

4.38 Consistent with these observations, some stakeholders have expressed concerns about the potential for over-formalising existing support mechanisms and support networks that assist people with disability to make decisions.[31] In the ALRC's view, the introduction of Commonwealth supporters should not diminish the involvement of, or respect for, informal support, including in relation to decision-making.

4.39 A number of the elements of the Commonwealth decision-making model recognise the important role played by informal supporters. For example, the ALRC proposes that formal supporters have an obligation to support a person in consulting family members, carers and other significant people in their life in the process of

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24 *Social Security (Administration) Act 1999* (Cth) ss 123C, 123H. See, also, Department of Social Services, *Guide to Social Security Law* (2014) [8.5.1], [8.5.2].

25 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7.

26 See the discussion of social security and eHealth in Ch 6.

27 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [15].

28 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.5].

29 See, eg, Carers NSW, *Submission 23*; Office of the Public Advocate (Qld), *Submission 05*.

30 MDAA, *Submission 43*.

31 See, eg, Law Council of Australia, *Submission 83*; Queensland Advocacy Incorporated, *Submission 45*. See also in relation to 'net widening': Carney and Beaupert, above n 6.

making decisions. A similar duty is proposed for representatives. There are also specific mechanisms in some areas of Commonwealth law considered in following chapters.

4.40 Importantly, however, the ALRC also makes a number of proposals in relation to safeguards, as some informal arrangements are 'in fact more restrictive ... because decisions [are] made informally on a substitute basis by others'.[32] The formalisation of such arrangements and associated safeguards may ensure people are able to exert choice and control over decision-making in their lives.

## Appointment and recognition

**Proposal 4–3** Relevant Commonwealth laws and legal frameworks should include the concept of a 'supporter' and provide that an agency, body or organisation may establish supporter arrangements. In particular, laws and legal frameworks should reflect the National Decision-Making Principles and provide that:

(a) a person who requires decision-making support should be able to appoint a supporter or supporters at any time;

(b) where a supporter is appointed, ultimate decision-making authority remains with the person who requires decision-making support;

(c) any decision made with the assistance of a supporter should be recognised as the decision of the person who requires decision-making support; and

(d) a person should be able to revoke the appointment of a supporter at any time, for any reason.

4.41 To introduce the concept of formal supported decision-making at a Commonwealth level, the ALRC proposes that relevant laws and legal frameworks should include the concept of a supporter. The ALRC also proposes that such laws and legal frameworks should reflect the National Decision-Making Principles and specifies a number of key elements relating to the appointment and recognition of a supporter or supporters that should be incorporated into any supporter scheme.

4.42 The most important elements of the proposal are recognition that, where a supporter is appointed, ultimate decision-making authority remains with the person who requires decision-making support, and that any decision made with the assistance of a supporter must be recognised as the decision of the person who requires that support.[33] These elements are intended to ensure that decisions are made by the people

32 Office of the Public Advocate (SA), *Submission 17* attachment 1, 31. See, also, Australian Guardianship and Administration Council, *Submission 51*.

33 The VLRC made a similar recommendation: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 46.

who require support, but also that support may be required to make or convey a decision, which in turn maximises autonomy, and allows for dignity of risk.

4.43 The other two elements of the proposal relate to ensuring that a person is able to exercise choice and control in relation to the appointment, or revocation of the appointment, of their supporter or supporters. There does not appear to be an equivalent power under existing Commonwealth decision-making regimes. For example, s 123E of the *Social Security (Administration) Act 1999* (Cth), which relates to suspension and revocation of nominee appointments, does not make provision for the person who has a nominee appointed to request suspension or revocation.[34] The importance of this power was emphasised by stakeholders.[35]

## Role and duties

### *Potential roles of a supporter*

**Proposal 4–4** A Commonwealth supporter may perform the following functions:

(a) assist the person who requires decision-making support to make decisions;

(b) handle the relevant personal information of the person;

(c) obtain or receive information on behalf of the person and assist the person to understand information;

(d) communicate, or assist the person to communicate, decisions to third parties;

(e) provide advice to the person about the decisions they might make; and

(f) endeavour to ensure the decisions of the person are given effect.

4.44 A supporter may perform a number of roles for a person who requires decision-making support. The ALRC proposes that relevant Commonwealth laws and legal frameworks should provide that supporters may exercise some or all of the roles outlined in Proposal 4–4.

4.45 For example, a supporter may need to obtain relevant information and explain it to the person they are supporting in a way that is easily understood, or provide advice to the person about the decisions the person might make. This role in the collection and

34 *Social Security (Administration) Act 1999* (Cth) s 123E.

35 See, eg Physical Disability Council of NSW, *Submission 32*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 54.

explanation of information is provided for under a number of existing and proposed models of supported decision-making.[36]

4.46 A related role is the handling of relevant personal information of the person being supported. In view of stakeholder submissions highlighting the difficulties that family members and carers often face in attempting to access information, it is important that supporters are able to handle the relevant personal information of the person they are supporting. The operation of the *Privacy Act 1998* (Cth) and the possible need for supporters under that Act is discussed in Chapter 6.

4.47 In circumstances where a person who may require decision-making support experiences difficulty communicating, the supporter may either assist them to communicate a decision, or in some circumstances may communicate the person's decision to third parties. Where a supporter is purportedly communicating a person's decision, it may be necessary for the relevant Commonwealth department or agency to include additional safeguards to ensure that there is no abuse of the supporter's role or duties. This communication-related role is currently provided for under a number of models.[37]

4.48 A supporter may also play a role in endeavouring to ensure that the decision of the person is given effect. They may, for example, contact the relevant Commonwealth department or agency to follow up on the information provided, or the decision, or provide assistance for the person to seek review of a decision which they consider does not appropriately reflect their will and preferences. However, it would be a matter for individual supporters to determine the extent to which they are able to play this role, depending on the circumstances of the person who requires decision-making support and the particular decision. This role is also provided for currently under some decision-making models.[38]

### *Supporter duties*

**Proposal 4–5** Relevant Commonwealth laws and legal frameworks should provide that Commonwealth supporters must:

(a) support the person requiring decision-making support to make the decision or decisions in relation to which they were appointed;

(b) support the person requiring decision-making support to express their will and preferences in making a decision or decisions;

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36 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 43; *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* div 1, s 4(2); *Decision Making, Support and Protection to Adults Act SY 2003 c21* sch A, pt 1, s 5(1).

37 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 43; *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* div 1, s 4(2); *Decision Making, Support and Protection to Adults Act SY 2003 c21* sch A, pt 1, s 5(1).

38 *Decision Making, Support and Protection to Adults Act SY 2003 c21* sch A, pt 1, s 5(1); *Mental Capacity Act 2005* (UK) s 36(3).

(c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person who requires decision-making support;

(d) act honestly, diligently and in good faith;

(e) support the person requiring decision-making support to consult with 'existing appointees', family members, carers and other significant people in their life in making a decision; and

(f) assist the person requiring support to develop their own decision-making ability.

For the purposes of paragraph (e), 'existing appointee' should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.

4.49 The duties of supporters should be set out in the legislation relevant to the area of Commonwealth law.

4.50 The first duty should be to act only within the scope of their appointment. This does not preclude supporters acting informally, or a person appointing a supporter in relation to a broader range of decisions than initially envisaged.

4.51 Supporters should be required to act in a manner that promotes the personal, social, financial, and cultural wellbeing of the person who requires decision-making support.

4.52 This duty is similar to the duty imposed on nominees under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) to act in a manner that promotes personal and social wellbeing,[39] but adds elements relating to financial and cultural wellbeing. Given the potential role of supporters in supporting people to make decisions which relate to finances, the ALRC considers financial wellbeing to be an important inclusion. In addition, the importance of cultural wellbeing and sensitivity was highlighted by a number of stakeholders.[40] The exact nature and content of this duty is likely to require further articulation, including in supporting material in specific areas of Commonwealth law.

4.53 Should supporters have any personal liability for decisions made by the person being supported? The VLRC commented that the extent to which supporters should be liable in such circumstances is 'challenging'. While it can be argued 'that the supported person should be responsible for the consequences of any decisions made within a supported arrangement because they retain decision-making authority', the VLRC concluded that the law the law should 'recognise that the support relationship is one of

39 *National Disability Insurance Scheme Act 2013* (Cth) s 80(1).
40 See, eg, MDAA, *Submission 43*.

special trust and confidence, and the supported person is likely to be in a position of vulnerability relative to their supporter':

> Therefore, to avoid doubt, the law should designate the relationship between a supporter and the supported person as fiduciary. Supporters who fail to comply with their fiduciary obligations will leave themselves open to the full range of equitable remedies that are available in these circumstances.[41]

4.54 The ALRC acknowledges that the issue of the potential liability of supporters (and representatives) is a difficult one. In the case of supporters, ultimate decision-making authority rests with the person who requires decision-making support, and therefore why should a supporter be held liable for any consequences arising from the decision or decisions? The ALRC is interested in stakeholder views on the question of the standard of the duty of supporters.

**Question 4–3** In the Commonwealth decision-making model, should the relationship of supporter to the person who requires support be regarded as a fiduciary one?

4.55 The ALRC also proposes a duty to facilitate consultation. A number of stakeholders highlighted the importance of ensuring supporters (and representatives) consult family members, carers and other significant people in the life of the person who may require decision-making support.[42] However, these submissions were primarily responding to decision-making circumstances involving substitute decision-making. Rather than imposing a duty on supporters to consult, the ALRC considers it may be more appropriate to propose a duty to facilitate desired consultation, between a person requiring decision-making support and with family, carers and other significant people in the life of the person.

4.56 In order to facilitate the appropriate interaction of supporters with existing state and territory appointed decision-makers, discussed in more detail later in the chapter, a supporter should have a duty to facilitate consultation with existing appointees. The description of 'existing appointee' is similar to the one in the NDIS Act.[43] This duty may, in part, address concerns such as those expressed by the Financial Services Council about the need for 'access to critical and relevant information, by a [state or territory] duly appointed decision-maker'.[44]

4.57 Finally, the ALRC is interested in stakeholder views on the appropriateness of imposing an obligation on supporters to develop the capacity of the person being supported to make their own decisions. This would mirror an obligation imposed on nominees under the *National Disability Insurance Scheme (Nominee) Rules 2013*

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41 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.128]–[8.130]. See Ibid recs 59–61.

42 See, eg, Carers Queensland Australia, *Submission 14*.

43 *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

44 Financial Services Council, *Submission 35*.

(Cth).[45] The nature and content of the obligation is likely to vary according to the circumstances of the appointment. For example, the identity of the supporter will affect their ability to develop the person's capacity, as will resource constraints.

4.58 The ALRC welcomes stakeholder feedback on the duties contained in the proposal, and whether there should be any additional duties of supporters. The ALRC considers a high level of responsibility and the imposition of particular duties is important. However, there may be concerns about unintended consequences, including, for example, people being deterred from acting as supporters.

## Safeguards

**Question 4–4** What safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model?

4.59 As outlined in Chapter 3, art 12(4) of the CRPD requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards. The balance between ensuring supporters and decisions made under support arrangements are subject to appropriate safeguards, and avoiding over-regulation of supporters is a delicate one. Excessive regulation may

> discourage honest people from accepting an appointment as a supporter. Too much regulation would also have a tendency to undermine the important relationship of trust between a supporter and a supported person.[46]

4.60 There needs to be a number of safeguards and recognition of the different purposes of safeguards. For example, some are designed to protect the person who may require decision-making support from abuse, neglect or exploitation; others may be required to 'ensure that a decision made under a supported decision making arrangement truly expresses and effects the wishes of the person with disability'.[47]

4.61 The Office of the Public Advocate (Vic) highlighted that 'supported decision-making does open up the possibility of conflict, undue influence, abuse and exploitation'.[48] Similarly, Bruce Arnold and Dr Wendy Bonython submitted that

> factors such as undue, or inappropriate, influence are not specific to decision-making by disabled people; nonetheless steps should be taken to ensure that their decision-making—particularly decision-making with serious consequences, such as extensive or potentially high risk medical treatment, or decisions about care—are not a consequence of inappropriate consideration of factors of this type.[49]

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45 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.10. See also *Mental Capacity Act 2005* (UK) s 4(4).

46 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012). [8.120]

47 Caxton Legal Centre, *Submission 67*.

48 Office of the Public Advocate Victoria, *Supported Decision-Making: Background and Discussion Paper* (2009) 25.

49 B Arnold and Dr W Bonython, *Submission 38*.

4.62 The Australian Guardianship and Administration Council (AGAC) observed that:

> Supported decision making schemes must 'value-add' to informal decision making schemes by providing accountability structures and transparency. Like guardianship systems, supported decision making systems must also have clear systems for avoiding, so far as possible, the inclusion of supported decision makers who may use that position to abuse a person with a disability.[50]

4.63 While it is difficult to protect people who may require decision-making support from abuse and neglect in all instances, there are a number of potential safeguards with respect to supporters under the Commonwealth decision-making model. The key safeguards include:

- the proposed duties of supporters;
- the ability of the person who requires decision-making support to revoke the appointment at any time;
- provision for appointment of more than one supporter; and
- the provision of guidance and training to people who require decision-making support, supporters and Commonwealth departments and agencies interacting with supporters.

4.64 The ALRC would be interested in stakeholder feedback about what other safeguards may be appropriate for supporters. For example, in British Columbia to safeguard against financial abuse a monitor must be appointed to oversee the person providing support except in certain circumstances.[51] Other suggestions made to the VLRC in its guardianship inquiry included: registration of arrangements; police checks on appointments; and appointment of monitors.[52]

## Representatives

**Proposal 4–6** Relevant Commonwealth legislation should include the concept of a 'representative' and provide that an agency, body or organisation may establish representative arrangements. In particular, legislation should contain consistent provisions for the appointment, role and duties of representatives, and associated safeguards, and reflect the National Decision-Making Principles.

4.65 In certain circumstances, a person may require full support in decision-making. The ALRC proposes the introduction of Commonwealth representatives as a

50 Australian Guardianship and Administration Council, *Submission 51*.
51 *Representation Agreement Act RSBC 1996 c405 1996* ss 12(1), (2).
52 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012), [8.57].

mechanism for the provision of fully supported decision-making in areas of Commonwealth law.

4.66 A representative should only be appointed as a last resort and in limited circumstances. A representative under the model is an individual or organisation appointed by a person who requires decision-making support, or through some other mechanism (discussed below). A representative would support a person to make decisions and express their will and preferences in making decisions; determine the person's will and preferences and give effect to them; or consider the human rights relevant to the situation in making a decision.

4.67 As with supporters, the introduction of representatives would occur under specific Commonwealth legislation and needs to be tailored to suit the particular legislative context. The ALRC proposes a number of key core elements of any Commonwealth representative regime.

4.68 The ALRC does not intend to make proposals with respect to different categories of representatives. However, consistent with the ALRC's approach to ensuring that fully supported decision-making is the least restrictive alternative and the scope of the appointment is as narrow in scope as possible, consideration will need to be given to possible categories or types of representatives in implementing the Commonwealth decision-making model.

## Appointment

**Question 4–5** What mechanisms should there be at a Commonwealth level to appoint a representative for a person who requires full decision-making support?

4.69 There are a number of ways a representative may be appointed. The most straightforward mechanism involves a person appointing their own representative. A person may choose to appoint a representative—including in circumstances where they have decision-making ability but would prefer to appoint a representative, or in anticipation of losing decision-making ability.[53]

4.70 It may also be necessary or appropriate to incorporate other appointment mechanisms into the model to account for circumstances where a person may not be in a position to appoint their own representative, but requires fully supported decision-making in an area of Commonwealth law. The ALRC would be interested in stakeholder feedback on what mechanisms there should be at a Commonwealth level to appoint a representative for a person who requires full decision-making support.

4.71 There are a number of other potential options for appointment, either through a central Commonwealth mechanism, or in a specific area of Commonwealth law. For example, it may be appropriate to confer jurisdiction on a court, tribunal or other body

53 This is like the appointment of enduring or lasting powers of attorney.

to appoint representatives. In some senses appointment by a court, tribunal or other body might operate similarly to current appointment of state and territory guardians and administrators. However, given the different nature of the role, any court, tribunal or body conferred with such jurisdiction would need to be guided by considerations different from those currently provided for under Commonwealth, state and territory law. AGAC suggested a mechanism along these lines, submitting that the Commonwealth could develop 'a single scheme for assessment of the need for a representative in these decision making areas, with a system for impartial appointment and review'.[54] AGAC also submitted that an alternative may be 'a more fully developed symbiosis with State and Territory substitute decision making schemes'.[55]

4.72 Another option may be to provide for the appointment of a representative by the relevant Commonwealth department or agency, as is currently permitted in the context of the NDIS and social security. For example, the *Social Security (Administration) Act 1999* (Cth) provides for appointment of a 'nominee', as does the NDIS Act. However, stakeholders expressed significant concerns about an agency head or their delegate having the power to make such an appointment,[56] and about the considerations relevant to making an appointment.

4.73 In light of such concerns, the ALRC is interested in stakeholder views on whether there should be a very confined power for an agency head to appoint a representative in some limited circumstances, and about what considerations should be taken into account. For example, should the desirability of appointing an existing Commonwealth supporter or representative, or a state or territory appointed decision-maker, be a factor that must be considered?[57]

4.74 In addition to possible appointment by a court, tribunal or other body, or in limited circumstances by an agency head, the ALRC is interested in stakeholder views on possible mechanisms at a Commonwealth level for the appointment of a representative for a person who requires full decision-making support.

## Role and duties

### *Potential roles of a representative*

**Proposal 4–7** A Commonwealth representative may perform the following functions:

(a) assist the person who requires decision-making support to make decisions;

(b) handle the relevant personal information of the person;

54 Australian Guardianship and Administration Council, *Submission 51*.

55 Ibid.

56 See, eg, Children with Disability Australia, *Submission 68*; Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*.

57 For example, an amended form of the considerations under r 3.14 of the *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth). See also considerations as recommended in the Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012).

(c) obtain or receive information on behalf of the person and assist the person to understand information;

(d) communicate, or assist the person to communicate, decisions to third parties;

(e) provide advice to the person about the decision they might make; and

(f) endeavour to ensure the decisions of the person are given effect.

4.75 The ALRC proposes that a representative may perform the same roles as a supporter in supporting a person who requires decision-making support to make a decision or decisions. These roles are discussed in more detail below.

***Representative duties***

**Proposal 4–8** Relevant Commonwealth laws and legal frameworks should provide that Commonwealth representatives must:

(a) support the person requiring decision-making support to express their will and preferences in making decisions;

(b) where it is not possible to determine the wishes of the person who requires decision-making support, determine what the person would likely want based on all the information available;

(c) where (a) and (b) are not possible, consider the human rights relevant to the situation;

(d) act in a manner promoting the personal, social, financial and cultural wellbeing of the person who requires decision-making support;

(e) support the person who requires decision-making support to consult with 'existing appointees', family members, carers and other significant people in their life when making a decision; and

(f) assist the person who requires support to develop their own decision-making ability.

For the purposes of paragraph (e), 'existing appointee' should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.

4.76 A representative should have the same duties as a supporter, as well as a number of additional duties. It is important that representatives owe duties under the relevant Commonwealth legislation, even where they are an existing state or territory appointed decision-maker and are subject to duties under state and territory legislation.

4.77 The ALRC has outlined, in the context of supporters, some of the duties that a representative should have. The ALRC seeks stakeholder input on the appropriateness of these duties applying to both supporters and representatives. For example, in relation to the duty to develop the decision-making ability of the person being supported, the nature and content of the obligation should probably vary, according to the circumstances of the appointment. It would be unreasonable to expect a representative to fulfil this duty in circumstances where a person does not, and is unlikely ever to have, the ability to make decisions.

4.78 The key additional duties the ALRC considers may be appropriate for representatives include the duty to support the person who requires decision-making support to express their 'will, preferences and rights'. The ALRC prefers this obligation to the objective 'best interests' test which currently applies to nominees under existing Commonwealth legislation and to state and territory appointed decision-makers.[58] This shift away from the best interests test received significant support from a wide range of stakeholders[59] and is discussed in Chapters 2 and 3, including in relation to the corresponding principle of the National Decision-Making Principles.

4.79 In circumstances in which a representative is providing full support and needs to determine the will and preferences of the person because they are unable to communicate that will and those preferences, the representative must determine what the person would likely want based on all the information available. This may, for example, involve consideration of decisions the person has made in the past. If that is not possible, consideration should turn to the human rights relevant to the situation. Ultimately, however, this approach requires decision-making 'based on facilitating access to the enjoyment of existing rights, rather than on making decision on behalf of a person based on a subjective assessment of their best interest'.[60]

## Safeguards

**Proposal 4–9** The appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

4.80 Consistent with National Decision-Making Principle 4 and art 12(4) of the CRPD, the ALRC proposes that the appointment and conduct of Commonwealth representatives be subject to appropriate and effective safeguards.

58 See, eg, *Social Security (Administration) Act 1999* (Cth) s 123O.
59 See, eg, PWDA, ACDL and AHRC, *Submission 66*; Qld Law Society, *Submission 53*.
60 PWDA, ACDL and AHRC, *Submission 66*.

4.81 Article 12(4) of the CRPD requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards. In particular, it requires that such safeguards:

- respect the rights, will and preferences of the person;
- are free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;
- apply for the shortest time possible;
- are subject to regular review by a competent, independent and impartial authority or judicial body; and
- are proportional to the degree to which such measures affect the person's rights and interests.[61]

4.82 There needs to be a number of safeguards and recognition of the different purposes of safeguards with respect to representatives. For example, some safeguards are designed to protect the person who may require decision-making support from abuse, neglect or exploitation. Other safeguards are designed to protect the appointed representative.

4.83 The ALRC does not intend to be overly prescriptive with respect to the nature or operation of the safeguards which should apply to the appointment and conduct of representatives. However, the ALRC considers the elements outlined in art 12(4) represent the key safeguard elements of any Commonwealth representative scheme. In light of those elements, it may be necessary for the Australian Government to consider the following in implementing the Commonwealth decision-making model in areas of Commonwealth law:

- mechanisms for review and appeal of the appointment of representatives, including on the application of any interested party;
- the potential for representatives to be periodically required to make declarations regarding compliance with their duties;[62]
- reporting obligations on representatives with respect to decisions, for example provision of a report, inventory or accounts;[63]

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61 *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008) art 12(4).

62 Note, however the VLRC did not favour this form of compliance requirement: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.105].

63 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 84; *Social Security (Administration) Act 1999* (Cth) s 123L; Department of Social Services, *Guide to Social Security Law* (2014) [8.5.3]; Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 297–302.

- considering the powers of any Commonwealth body conferred with jurisdiction to appoint a representative to ensure it is capable of responding to instances of abuse, neglect or exploitation;
- considering the role of Commonwealth departments and agencies in monitoring, auditing and investigating the conduct of representatives;[64] and
- considering the broader applicability of safeguards envisaged under any NDIS quality assurance and safeguards framework.

## Interaction with other appointed decision-makers

**Question 4–6** How should supporters and representatives under the Commonwealth decision-making model interact with state or territory appointed decision-makers?

4.84 One of the key difficulties in applying the Commonwealth decision-making model is determining the appropriate interaction of supporters and representatives with other supporters and representatives and state and territory appointed decision-makers, such as guardians and administrators.

4.85 Stakeholders such as the Financial Services Council submitted that 'harmony between State and Territory Guardianship and Administration laws and Commonwealth laws is highly desirable so as to enhance the effectiveness of disability services on a national level'.[65]

4.86 There are a number of possible approaches to the issue of interaction between supporters and representatives, and state or territory appointed decision-makers. The ALRC is interested in stakeholder feedback on this issue, including on two possible approaches outlined below.

4.87 Under the first approach, which reflects the current position, it is possible to have a Commonwealth supporter or representative and a state or territory appointed decision-maker.

4.88 Under a second possible approach, where a state or territory decision-maker has been appointed, a new assessment of the support needs of the participant should be undertaken for Commonwealth purposes.

### Possible approaches

4.89 Under the first approach, it is possible to have a Commonwealth supporter or representative and a state or territory appointed decision-maker. In circumstances where they are appointed in relation to different decisions or areas of decision-making,

64 See, however, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.106]–[18.107].

65 Financial Services Council, *Submission 35*. See, also, Law Council of Australia, *Submission 83*.

this should operate without difficulty and may be facilitated by amendment of state and territory legislation to ensure state and territory appointments are as confined in scope and time as possible and, therefore, less likely to overlap with any Commonwealth appointment.

4.90 In circumstances where there is some overlap between the areas of decision-making in relation to which they have been appointed, there is a need to ensure that the authority of the state and territory decision-maker 'is recognised under the Commonwealth Scheme'.[66]

4.91 As a result, there is also a need to consider mechanisms for resolving any conflict between the two. In some circumstances, s 109 of the *Australian Constitution* may operate to ensure that the responsibility of a state or territory appointed decision-maker extends only to those areas not covered by the decision-making powers of the Commonwealth representative.

4.92 Where the scope of state or territory decision-making powers are not inconsistent with those of a Commonwealth decision-maker, harmonisation mechanisms may need to be considered. Stakeholders submitted that, to the greatest extent possible,

> where there are several systems in which a person may have an appointed decision-maker, those systems must integrate and, where appropriate, allow the same decision-maker to act in all systems.[67]

4.93 The ALRC suggests that it may be beneficial to propose a duty to facilitate consultation between Commonwealth, state and territory appointees, and to permit, but not require, that one person act under all systems. Importantly, under the ALRC model, representatives and state or territory appointed decision-makers will be subject to the relevant duties arising from the legislation under which they were appointed, which may differ.

4.94 Under a second possible approach, where a state or territory decision-maker has been appointed, a new assessment of the support needs of the participant should be undertaken for Commonwealth purposes. If the person requires fully supported decision-making, then a representative should be appointed, either by the person, or using a Commonwealth appointment mechanism. Under this approach, the ALRC considers that the appointment of the existing state or territory appointed decision-maker as a representative should be permitted and encouraged, but not automatic.

4.95 A number of stakeholders expressed the view that it would desirable for people to have one Commonwealth representative, who is also the relevant state or territory appointed decision-maker.[68] For example, the Financial Services Council submitted

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66 Australian Guardianship and Administration Council, *Submission 51*.

67 Office of the Public Advocate (Qld), *Submission 05*.

68 See, eg, Australian Guardianship and Administration Council, *Submission 51*; Financial Services Council, *Submission 35*.

that, in the context of the NDIS, state and territory appointed decision-makers should be the default nominee.[69]

4.96 This approach would make provision for the recognition of existing state and territory appointed decision-makers but would also provide sufficient flexibility to allow for circumstances where it is not appropriate for a state or territory appointed decision-maker to be a representative for Commonwealth purposes.

4.97 Even where an existing representative or state or territory appointed decision-maker was appointed, the appointee would be subject to the provisions of the particular Commonwealth legislation relating to their role and duties, and associated safeguards.

## Information sharing

**Proposal 4–10** The Australian Government should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments.

4.98 The appointment of supporters and representatives in accordance with the Commonwealth decision-making model would represent a significant reform to current Commonwealth decision-making arrangements. As outlined earlier in this chapter, one of the key effects is likely to be to provide greater certainty for third parties about the role of supporters and facilitate their provision of support to the person who may require decision-making support.[70] This will allow third parties, such as Commonwealth departments and agencies, to interact with those providing decision-making support with greater confidence.

4.99 It may also address the frustrations expressed by stakeholders such as the Carers Alliance, who submitted that 'there should be seamless sharing of information (by prior consent) to avoid the continuous and interminable requirements to complete forms'.[71]

4.100 In order to have such an effect, there is a need for information sharing between Commonwealth departments and agencies, and potentially also state and territory bodies, with respect to the appointment of supporters, representatives and state and territory appointed decision-makers.

4.101 Accordingly, the ALRC proposes that the Australian Government, through its departments and agencies, develop methods of sharing information about such appointments. Information sharing could take a number of forms and serve a number of different roles. For example, at one end of the spectrum it could serve the function envisaged under the VLRC's supporter model, which recommended that supported

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69 Financial Services Council, *Submission 35*.

70 See, eg, Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry,* May 2011; Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.66]. In a state and territory context see, eg, Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, (2010).

71 Carer's Alliance, *Submission 84*.

decision-making arrangements and orders should be registered on an online register and should not come into force until they are registered.[72] Development of a register of this type could act as a centralised source of information about the appointment of supporters and representatives in particular areas of Commonwealth law and facilitate the appointment of existing appointees or representatives as a supporter or representative.

4.102 Alternatively, departments and agencies could develop or revise existing memorandums of understanding with respect to information sharing in relation to individuals.

4.103 There is also a need for exchange of information between the Commonwealth and state and territory appointed decision-makers. The ALRC understands informal arrangements are already in place between some Commonwealth departments and agencies and public trustees and guardians in some jurisdictions. This should be considered in the development of any information sharing method.

4.104 The ALRC would be interested in stakeholder views on the most appropriate approach to information sharing in this context, including in relation to types of information shared, storage, access and associated costs.

## Guidance and training

**Proposal 4–11** The Australian Government should ensure that people who may require decision-making support, and supporters and representatives (or potential supporters and representatives) are provided with information and advice to enable them to understand their roles and duties.

**Proposal 4–12** The Australian Government should ensure that Australian Public Service employees who engage with supporters and representatives are provided with regular, ongoing and consistent training in relation to the roles of supporters and representatives.

4.105 The ALRC considers that consistent information and advice, and targeted training and guidance for all parties involved in the Commonwealth decision-making is of vital importance in ensuring the effective operation of the proposed Commonwealth decision-making model.

4.106 In addition to being central to the successful implementation of the model, as the model aligns Commonwealth decision-making structures with art 12 of the CRPD, such education, training and guidance may also contribute to the fulfilment of Australia's obligations under art 4 of the CRPD.[73] It may also respond to the recommendations made by the UNCRPD that Australia

72 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.123], [8.124].

73 *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008) art 4(1)(i). See also art 8.

> provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.[74]

4.107 The ALRC considers the complementary proposals with respect to training, awareness raising and guidance material are important because, as the Office of the Public Advocate (SA) noted in its submission,

> while supported decision-making interventions might notionally address a person's impairments, most of the work is in tackling attitudinal and environmental barriers. In particular, overcoming attitudinal beliefs that a person with disability cannot make a decision, and addressing environmental barriers, such as a lack of practical decision-making assistance and support.[75]

4.108 Similarly, Queenslanders with Disability Network emphasised that

> for any changes to be effective, accessible information and services must be provided, and free access to additional supports (advocacy, translation and interpretation) must be available. It is also critical that if systemic changes are made, these must be communicated to all stakeholders including people with disability.[76]

4.109 The ALRC considers it is necessary to develop and deliver accessible and culturally appropriate information and training for:

- supporters and representatives, and potential supporters and representatives;[77]
- people who require decision-making support;[78] and
- the employees of Commonwealth departments and agencies which operate under the proposed model, as well as associated experts and third parties.

4.110 This approach was strongly encouraged by a range of stakeholders. For example, the Mental Health Council of Australia emphasised the need for

> capacity building measures, programs or processes at the individual or community levels to empower consumers and communities to actively participate in supported decision-making. These could include programs to educate consumers and carers.[79]

4.111 In relation to supporters and representatives, the OPA (SA) noted that, in delivering its Supported Decision-Making Pilot Project, it established that 'a key element in educating supporters is that they have a support role only: the supporter is

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74 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)' (United Nations, 4 October 2013) 26.

75 Office of the Public Advocate (SA), *Submission 17*.

76 QDN, *Submission 59*.

77 Carers NSW, *Submission 23*; Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry,* May 2011.

78 Office of the Public Advocate (SA), *Submission 17*; Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry,* May 2011.

79 MHCA, *Submission 77*.

not the decision maker, and is educated as such on support strategies, and how not to inadvertently become a substitute decision maker in this role'.[80] Carers NSW emphasised the need for carers taking on either supported or substitute decision-making roles 'should have access to an easy to read document outlining the definition of capacity and any expectations and requirements involved with their role'.[81]

4.112 In addition, some stakeholders emphasised the need to develop the capacity of people with disability to make decisions. Stakeholders such as the DSC (Vic) has also emphasised the need for 'training and support being provided for people with disabilities to enhance their own decision making skills and their understanding of the various options for assistance'.[82] The NSW Council for Intellectual Disability submitted that for some people with intellectual disability,

> in ideal circumstances they may be able to make their own decisions. However, they may not be in those circumstances in that they have had very limited exposure to alternatives to current deprived lifestyles and/or are in entrenched relationships of control (benevolent or malevolent) by family members or other long-standing people in their lives.[83]

4.113 The ALRC welcomes stakeholder feedback on these proposals, either generally or in relation to specific areas of Commonwealth law.

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80 Office of the Public Advocate (SA), *Submission 17*.

81 Carers NSW, *Submission 23*.

82 Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry,* May 2011 6.

83 NSW Council for Intellectual Disability, *Submission 33*.

# 5. The National Disability Insurance Scheme

## Contents



## Summary


5.1 The National Disability Insurance Scheme (NDIS) represents a significant new area of Commonwealth responsibility and expenditure with respect to people with disability in Australia. The focus of this chapter is on decision-making by participants in the NDIS. It outlines existing structures that facilitate decision-making by participants; illustrates how decision-making might operate if the Commonwealth decision-making model were implemented; discusses possible approaches to issues concerning interaction between NDIS supporters and representatives with state and territory appointed decision-makers; examines appropriate safeguards within the context of the NDIS; and proposes education, training and guidance in relation to decision-making and the NDIS.

# The NDIS

5.2 The introduction of the NDIS followed long-term concern about the inefficiency and inequitable nature of disability support arrangements in Australia and calls for the introduction of a new mechanism for funding support for people with disability. The NDIS represents a significant new area of Commonwealth responsibility and expenditure. The NDIS represents

> a significant step toward addressing the deficiencies of the current disability service systems that exist across Australia, and to advancing cultural change and genuine social inclusion.[1]

5.3 While not all people with disability are eligible for the NDIS, it represents a key area of Commonwealth law in which the Commonwealth decision-making model should apply. The NDIS was designed to empower people with disability and to facilitate their choice and control.[2] With respect to decision-making, while the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) contains some provisions which facilitate supported decision-making, it ultimately retains a substitute decision-making model, through the use of 'nominees'.[3]

5.4 As outlined below, the NDIS is still in its early stages with roll-out at several trial sites. However, the ALRC considers that the ongoing roll-out of the NDIS and the scheduled reviews, outlined briefly below, provide useful opportunities for evaluating any supported decision-making model and making any necessary changes to ensure the model is working effectively.

## Background

5.5 In August 2011, the Productivity Commission released its report, *Disability Care and Support*.[4] The Report found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice'.[5] The Productivity Commission recommended the establishment of a new National Disability Insurance Scheme to provide insurance cover for all Australians in the event of significant disability. It suggested that the main function of the NDIS would be to fund long-term high quality care and support for people with significant disabilities.

5.6 In response, the Council of Australian Governments (COAG) recognised the need for major reform of disability services through an NDIS. At a meeting of the Select Council on Disability Reform in October 2011, all Select Council Ministers agreed to lay the foundations for the NDIS by mid-2013.[6] In December 2012, COAG

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1 Office of the Public Advocate (Qld), *Submission 05*.
2 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 3(1). See also discussion in Ch 2.
3 Ibid pt X.
4 Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 1; Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 2.
5 Productivity Commission, 'Disability Care and Support', above n 4, 2.
6 Select Council on Disability Reform, *Meeting Communiqué* (October 2011).

signed an Intergovernmental Agreement for the NDIS launch.[7] The Commonwealth and several states and territories also signed bilateral agreements confirming the operational and funding details for the roll-out of the NDIS.[8]

5.7 In March 2013, the NDIS Act was enacted.[9] The Act is supplemented by a number of NDIS Rules, which address the more detailed operational aspects of the scheme.[10] There are also a number of Operational Guidelines, including about nominees and supporting participants' decision-making.[11] The scheme is administered by the National Disability Insurance Agency (NDIA) (formerly DisabilityCare Australia).

5.8 Implementation of the NDIS began in July 2013 with roll-out in four trial sites—South Australia, Tasmania, the Hunter Area in New South Wales, and the Barwon area of Victoria.[12] In July 2014, the NDIS will commence in the ACT, the Barkly region of the Northern Territory, and in the Perth Hills area of Western Australia. Roll-out of the full scheme in all states and territories except Western Australia is scheduled to commence progressively from July 2016.[13]

## Reviews and evaluations

5.9 There are a number of completed, current and planned reviews of the NDIS and NDIA of potential relevance to this Inquiry, including:

- a review of the capabilities of the NDIA;[14]
- a COAG report on cost drivers of the NDIS;[15]
- consideration of the NDIS in the course of the National Commission of Audit;[16]

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7 *Intergovernmental Agreement on the NDIS Launch*, 7 December 2012.
8 Ibid schs A–E.
9 *National Disability Insurance Scheme Act 2013* (Cth).
10 See, eg, *National Disability Insurance Scheme (Children) Rules 2013* (Cth); *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth); *National Disability Insurance Scheme (Plan Management) Rules 2013* (Cth); *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (Cth); *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013* (Cth); *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (Cth).
11 National Disability Insurance Agency, *Nominees–Overview*, Operational Guideline (2013); National Disability Insurance Agency, *Nominees–Whether a Nominee Is Necessary*, Operational Guideline (2013); National Disability Insurance Agency, *General Conduct-Supporting Participant's Decision-Making*, Operational Guideline (2013).
12 While initially referred to as launch sites, the sites are now referred to as 'trial sites'. See, eg, Tony Abbott on ABC AM program, *NDIS 'launch' Sites Now 'trial' Sites* <www.abc.net.au/am/content/2013/s3911647.htm>.
13 See, eg, National Disability Insurance Scheme, *Roll out of the NDIS* <www.ndis.gov.au/roll-out-national-disability-insurance-scheme>.
14 J Whalan AO, P Acton and J Harmer AO, 'A Review of the Capabilities of the National Disability Insurance Agency' (January 2014).
15 Requested by COAG Disability Reform Council: COAG Disability Reform Council, *Meeting Communique*, 18 December 2013.
16 See, 'Towards Responsible Government, Phase One' (National Commission of Audit, February 2014); 'Towards Responsible Government, Phase Two' (National Commission of Audit, March 2014).

- an evaluation of the trial of the NDIS being led by the National Institute of Labour Studies;[17]
- an independent review of the operation of the NDIS Act;[18] and
- a review of the Intergovernmental Agreement by the Ministerial Council.[19]

5.10 A Joint Parliamentary Standing Committee on the NDIS was also established in December 2013, tasked with reviewing the implementation, administration and expenditure of the NDIS.[20]

5.11 While many of these reviews and evaluations will be conducted following the conclusion of the ALRC's Inquiry, the ALRC's Final Report may inform part of their work. In the same manner, the ALRC will consider relevant outcomes of these reports and evaluations, as well as the work of the Joint Standing Committee, in making recommendations in its Final Report.

## Decision-making under the NDIS

5.12 Decision-making under the NDIS Act incorporates elements of both supported and substitute decision-making, as well as informal and formal decision-making. There appear to be three key decision-making mechanisms operating in the context of the NDIS: autonomous decision-making by participants; informal supported decision-making; and substitute decision-making by nominees.

5.13 One of the key objects of the NDIS Act is to 'enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports'.[21] As a result, the focus of many aspects of the NDIS Act, NDIS Rules and Operational Guidelines is on facilitating participants to make their own decisions. However, some of the general principles which guide action under the NDIS Act and other mechanisms under the Act, such as the nominee provisions, may limit the scope for autonomous decision-making by participants.

5.14 The emphasis on the role of family, carers and others, and their involvement in providing informal support to participants, is an important element of the NDIS. The ALRC has heard that the appointment of nominees in trial sites has been low, with far greater involvement by family, carers and others as informal supporters.[22]

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17 See, eg, NDIS Evaluation, *Information about the Evaluation of the Trial of NDIS* <http://www.ndisevaluation.net.au/>.

18 Due to commence in 2015: *National Disability Insurance Scheme Act 2013* (Cth) s 208(1).

19 Due to commence in 2015: *Intergovernmental Agreement on the NDIS Launch*, 7 December 2012 [121]. See J Whalan AO, P Acton and J Harmer AO, above n 14, attachment C.

20 Parliamentary Joint Standing Committee on the National Disability Insurance Scheme, *Homepage* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme>.

21 *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e).

22 See discussion of informal supporters in Ch 4.

## Nominees

5.15 The NDIS Act provides for a nominee scheme which, while incorporating some provisions designed to encourage supported decision-making (such as the duty of nominees not to act if a participant is capable of acting) in many ways reflects the existing scheme under social security law upon which it was modelled (essentially still a substitute decision-making scheme).

5.16 There are two types of nominees under the NDIS—'plan nominees' and 'correspondence nominees'. A plan nominee may be appointed to prepare, review or replace a participant's plan, or manage the funding for supports under the plan.[23] The role of a correspondence nominee is narrower. A correspondence nominee may be appointed to do any other act that may be done by a participant under, or for the purposes of, the NDIS Act,[24] but in practice is confined to making requests to the NDIA or receiving notices from the NDIA on behalf of the participant.

### *Appointment*

5.17 The NDIS Act provides that the CEO of the NDIA may appoint a plan nominee or a correspondence nominee either at the request of the participant, or on their own initiative.[25]

5.18 The *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) (Nominee Rules) provide further detail about whether a nominee should be appointed, who should be appointed as a nominee, duties of nominees, and cancellation and suspension of nominees.[26] For example, r 3.1 provides:

> people with disability are presumed to have capacity to make decisions that affect their own lives. This is usually the case, and it will not be necessary to appoint a nominee where it is possible to support, and build the capacity of, participants to make their own decisions for the purposes of the NDIS.[27]

5.19 The Nominee Rules also acknowledge that the NDIS Act recognises and makes provision for the appointment of a nominee to 'act on behalf of, or make decisions on behalf of, a participant'. The Rules state that

> appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Appointments of nominees usually come about as a result of a participant requesting that a nominee be appointed.

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23 *National Disability Insurance Scheme Act 2013* (Cth) s 78.

24 Ibid s 79. See also: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.9, 3.10.

25 *National Disability Insurance Scheme Act 2013* (Cth) ss 66, 67. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11—3.15.

26 A number of other rules are also relevant, including for example, *National Disability Insurance Scheme (Children) Rules 2013* (Cth).

27 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.1.

> It is only in rare and exceptional cases that the CEO will find it necessary to appoint a nominee for a participant who has not requested that an appointment be made.[28]

5.20 In appointing a nominee, the CEO must take into consideration 'the wishes (if any) of the participant regarding the making of the appointment'[29] and have regard to a number of other matters.[30] In determining whether to appoint a particular nominee, there are also a range of matters the CEO must take into account.[31] Appointment of a nominee may be indefinite or for a particular period.[32]

5.21 Where requested by the participant, the CEO must cancel the appointment of a nominee who was appointed at a participant's request.[33] However, where a nominee was appointed on the initiative of the CEO, the CEO may cancel the appointment, but is not obliged to do so.[34]

### *Duties*

5.22 Nominees owe a duty to a participant 'to ascertain the wishes of the participant and act in a manner that promotes the personal and social wellbeing of the participant'.[35] Nominees also have a number of other duties, including a duty to:

- consult;
- develop the capacity of the participant; and
- avoid or manage conflicts of interest.[36]

5.23 Importantly, a plan nominee appointed on the initiative of the CEO is 'able to do an act on behalf of the participant only if the nominee considers that the participant is not capable of doing the act'.[37] A plan nominee appointed at the request of the participant has a duty to refrain from doing an act unless satisfied that: 'it is not possible for the participant to do, or to be supported to do, the act himself or herself'; or it is possible, but the participant does not want to do the act himself or herself.[38]

5.24 To a certain degree, the duties of nominees reflect those of supporters and representatives under the Commonwealth decision-making model, but require some amendment. For example:

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28 Ibid rr 3.1, 3.4.
29 *National Disability Insurance Scheme Act 2013* (Cth) s 88(2)(b).
30 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.14. See also *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).
31 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.5–4.8.
32 Ibid rr 4.9–4.11.
33 *National Disability Insurance Scheme Act 2013* (Cth) s 89. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 6.
34 *National Disability Insurance Scheme Act 2013* (Cth) s 90. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 6.
35 *National Disability Insurance Scheme Act 2013* (Cth) s 80. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3, 5.4.
36 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.8–5.14.
37 Ibid r 5.5.
38 Ibid r 5.6.

- duty to ascertain the wishes of the participant[39]—the ALRC proposes a duty to support the participant to express their will and preferences in making decisions;
- duty to develop the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary[40]—this duty should complement the ALRC's proposed duty to support the participant to make their own decisions;
- duty to consult in relation to doing acts under, or for the purposes of, the NDIS Act[41]—to reflect the supported rather than substitute decision-making role played by supporters and representatives, this duty might be modified to be a duty to facilitate consultation, rather than to consult per se.

5.25 The need for amendment of some of these duties and the potential application of other duties to the roles of supporter and representative is discussed in more detail later in this chapter.

## Reform of decision-making under the NDIS

5.26 In order to ensure consistency with the *UN Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles, and given concerns about the current nominee provisions, the ALRC proposes that the NDIS Act and Rules be reviewed and amended.

5.27 The ALRC proposes amendment of the objects and principles provisions of the NDIS Act and that the existing NDIS nominee scheme be replaced with the proposed Commonwealth decision-making model in Chapter 4. This would encourage the implementation of supported decision-making in this key area of Commonwealth law.

5.28 Many of the ideas underlying supported decision-making have already been incorporated in some respects into the NDIS Act, Rules and Operational Guidelines. However, in order to implement the proposed model, these should be reviewed to reflect the idea that all participants, with the appropriate level of support, should be entitled to make decisions expressing their will and preferences in the context of the NDIS.

5.29 Accordingly, the NDIS Act, Rules and Operational Guidelines should be amended to provide a mechanism for the appointment of supporters by participants. In circumstances where a participant may desire, or require, fully supported decision-making, there should also be provision for the appointment of a representative.

5.30 Stakeholders strongly endorsed the need for supported decision-making in the NDIS to enable participants 'to obtain support to make and implement their own

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39 *National Disability Insurance Scheme Act 2013* (Cth) s 80. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3, 5.4.

40 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.10.

41 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr, 5.8, 5.9.

decisions'.[42] This is likely to be of particular significance for a number of groups of people with disability. The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance emphasised, for example, the importance of supported decision-making arrangements 'for people living in regional and rural communities, where local family and neighbourhood networks can be particularly strong and supportive'.[43]

5.31 The application of the Commonwealth decision-making model may go some way to avoiding the appointment of guardians and other substitute decision-makers 'in lieu of appropriate support, assistance, information or case management'.[44] The interaction between supporters and representatives and state and territory appointed decision-makers is discussed in more detail below.

5.32 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the NDIS Act should not diminish the involvement of and respect for, informal support, including in relation to decision-making. Provisions which recognise and facilitate the involvement of informal supporters in the NDIS are important, and are consistent with the National Decision-Making Principles.[45] However, as outlined in Chapters 2 and 3, the ALRC considers there are significant benefits to making provision for formal supported decision-making.

5.33 The ALRC does not intend to be overly prescriptive about how the Commonwealth supporter model might operate in the context of the NDIS. For example, while proposing that participants should be entitled to appoint a supporter or representative, the ALRC does not intend to prescribe practice.

5.34 The ALRC has not examined funding mechanisms or practical matters involving funding and resources. Whether there is a general duty to provide support and, if so, who should bear the cost of support are significant issues. In the context of the NDIS, one potential option, which might address the issue of funding for supporters and representatives, may be to include funding for these decision-making arrangements as part of participant packages of support.[46] On the one hand, it may be inappropriate to use individual participant funding for decision-making support, which should arguably be provided by the NDIA or Government in order to ensure compliance with

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42 Office of the Public Advocate (Vic), *Submission 06*. See also: MHCA, *Submission 77*; NSW Public Guardian, *Submission 50*; NCOSS, *Submission 26*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

43 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

44 Office of the Public Advocate (Qld), *Submission 05*.

45 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) principles (e), (f). *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.14(b)(iv), 3.14(b)(v), 4.8(b)(ii)(A), 4.8(c), 5.8(b).

46 Participants develop a plan with the NDIA which must include a participant's statement of goals and aspirations and a statement of participant supports. The statement of participant supports sets out the supports that will be provided or funded by the NDIS. There are two types of supports—general supports that will be provided to, or in relation to, the participant, and reasonable and necessary supports. There are a range of criteria and tests for determining whether something is a reasonable and necessary support and should be funded by the NDIS: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.11. See also, *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth); and various NDIS, *Operational Guidelines on Planning and Assessment—Supports in the Plan*.

international obligations under the CRPD with respect to the provision of supports. The Nominee Rules provide that 'it is expected that the Agency will assist nominees in fulfilling' a duty to develop the capacity of participants,[47] may provide a basis for arguing such responsibility was envisaged to a certain extent in the drafting of the NDIS Rules. On the other hand, provision of support to make decisions with respect to the NDIS might be exactly the type of reasonable and necessary support that should appropriately be independently funded under the NDIS.

5.35 The next section outlines how decision-making could and should work under the NDIS. In particular, the ALRC makes a number of proposals and asks questions in relation to:

- amendment of the objects and principles in the NDIS Act;
- supporters;
- representatives;
- safeguards; and
- education, training and guidance.

## Objects and principles

**Proposal 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.

5.36 The ALRC proposes amendment of the existing objects and principles clauses contained in ss 3–5 of the NDIS Act to reflect the National Decision-Making Principles. This would ensure the National Decision-Making Principles guide the application and interpretation of the legislation as a whole, and to the particular division with respect to supporters and nominees.

5.37 Stakeholders such as the Disability Advocacy Network Australia expressed the view that

> it should be an explicit object of legislation in the disability area, such as the NDIS Act, to promote the decision making capacity of people with disability, to build the capacity of people with disability to make decisions and participate in decision making, and to enable access to decision making support for all people with disability whose decision making capacity is impaired.[48]

5.38 Section 3 of the NDIS Act contains general objects of the Act. Section 4 contains general principles guiding actions under the Act, including that:

47 Ibid.
48 Disability Advocacy Network Australia, *Submission 36*.

- 'people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability';
- 'people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their support';
- 'people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity';
- 'people with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs'; and
- 'the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected'.[49]

5.39 Section 5 of the NDIS Act contains general principles guiding action of people who may do acts or things on behalf of others, including:

- people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves; and
- the judgements and decisions that people with disability would have made for themselves should be taken into account.[50]

5.40 While the spirit and intent of the objects and principles provisions in many ways reflect the CRPD and National Decision-Making Principles, the ALRC suggests some amendment is required.

5.41 The ALRC does not intend to be overly prescriptive about necessary changes. However, by way of example, the focus under s 4(8) of the NDIS Act should be on the right of participants to express their will and preferences and to exercise choice and control with respect to decision-making. This would require removal of references to people with disability being 'able to determine their own best interests', and being 'equal partners in decisions'. Such amendments would reflect the proposed shift from substitute decision-making to supported decision-making; the shift away from 'best interests' towards 'will and preferences'; and the idea that decision-making authority should remain with the participant.

5.42 The ALRC welcomes stakeholder feedback on this proposal and on other changes necessary to the objects and principles under the NDIS Act to give effect to the National Decision-Making Principles.

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49 *National Disability Insurance Scheme Act 2013* (Cth) s 4.
50 Ibid s 5.

## Supporters

**Proposal 5–2** The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include supporter provisions consistent with the Commonwealth decision-making model.

5.43 The Commonwealth decision-making model proposed by the ALRC would introduce the concept of formal supported decision-making in the NDIS. While there is currently no provision for the nomination of formal supporters under the NDIS Act, the model would, in part, formalise the informal role already recognised and played by the people most likely to be nominated as supporters, such as family members.

5.44 As articulated in Chapters 2 and 3, the central idea is that participants should be supported to make their own decisions in the context of the NDIS. A participant would be entitled to appoint a supporter to support them to make NDIS-related decisions. Importantly, even where a participant appoints a supporter, ultimate decision-making authority remains with the participant. Where a participant chooses to appoint more than one supporter, it would be a matter for the participant to determine what specific roles each supporter might play.

### Appointment

5.45 The NDIS represents a significant shift in funding for, and provision of, disability services in Australia. In addition to existing mechanisms such as the Sector Development Fund,[51] the ALRC considers that supporters would play a key role in ensuring prospective participants and participants receive appropriate support to engage with the NDIS.

5.46 A participant or prospective participant should be able to appoint a supporter or supporters at any time during their engagement with the NDIS. Appointment by a participant is the only mechanism by which a supporter may be appointed.[52] Making provision for the appointment of supporters may also limit instances of carers, family members, service providers or others seeking appointment of a nominee or guardian under state or territory law because they incorrectly assume it is necessary, or simply to facilitate registration as a participant with the NDIS.[53]

5.47 As discussed in Chapter 4, the most important elements of the proposed supporter regime are recognition that where a supporter is appointed, ultimate decision-making authority remains with the participant; and that any decision made by a

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51 'The Sector Development Fund helps people with disability, families and carers, service providers, and the disability workforce to transition to the NDIS. A wide range of activities will be funded during the launch period and in the lead up to national roll out of the Scheme': National Disability Insurance Scheme, *Sector Development Fund* <www.ndis.gov.au/sector-development-fund>.

52 See discussion in Ch 4 in relation to potential alternative mechanisms for appointment of a representative.

53 See, eg, Australian Guardianship and Administration Council, *Submission 51*.

participant with the support of a supporter is recognised by the NDIA, service providers and others as the decision of the participant.

5.48 The other two elements of the Commonwealth decision-making model relevant to appointment is that it suggests the NDIS Act and Rules should be amended to provide for the appointment of a supporter by a prospective participant or participant at any time. The ALRC is interested in stakeholder feedback on the appropriateness of permitting prospective participants appoint a supporter for the purposes of engaging with the NDIA.

5.49 The ALRC suggests that a participant should be entitled to appoint whomever they wish as their supporter. Given many stakeholders emphasised the importance of independent advocacy in supporting participants in the context of the NDIS,[54] there may be no reason why individual advocates or advocate organisations could not be appointed as a participant's supporter. Only a participant would have the authority to appoint a supporter and must have the power to suspend or revoke the appointment at any time.

## Role and duties

### *Potential roles of a supporter*

5.50 Under existing arrangements, a plan nominee's role may encompass decisions relating to the preparation, review or replacement of the participant's plan; or management of funding for supports under the plan.[55] The scope of the role of a correspondence nominee is narrower and more closely reflects the role potentially played by a supporter in that they may make requests to the NDIA or receive notices from the NDIA, on behalf of the participant.[56]

5.51 The ALRC suggests that the potential roles of a supporter under the NDIS might include those set out in Proposal 4–4. For example, a supporter should be able to liaise with the NDIA on behalf of the participant or prospective participant to obtain information relevant to assessment, planning, or the management of NDIS funds. A supporter may attend planning meetings and support the participant to make decisions about what their goals and aspirations are, and what supports are required. A supporter should also endeavour to ensure the participant's decisions are given effect to.

### *Supporter duties*

5.52 The proposed duties of a supporter amend and expand upon the duties of nominees under the existing system.

5.53 The key duty currently owed by nominees, which the ALRC considers should apply to supporters, is the duty to develop the capacity of the participant. The Nominee Rules provide that nominees are required to 'apply their best endeavours to developing

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54 See, eg, MHCA, *Submission 77*; Disability Advocacy Network Australia, *Submission 36*.

55 *National Disability Insurance Scheme Act 2013* (Cth) s 78; *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.7.

56 The matters the correspondence nominee is able to deal with cannot be limited further by the instrument of appointment: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.8.

the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary'.[57] The ALRC welcomes stakeholder submissions on the appropriateness of imposing such a duty on supporters, recognising that the identity of the supporter is likely to affect their ability to fulfil this duty.

5.54 In addition, the Nominee Rules currently provide that 'it is expected that the Agency will assist nominees in fulfilling this duty'[58] and the ALRC suggests that the NDIA should also play a role in assisting supporters to fulfil any such duty.

5.55 The duties currently owed by nominees that should apply to supporters, but require some amendment, include the duty to:

- ascertain the wishes of the participant;
- act in a manner that promotes the personal and social wellbeing of the participant;
- consult; and
- act only where a participant is unable to do so.[59]

5.56 Nominees currently owe a duty to ascertain the wishes of the participant. The ALRC proposes that this duty extend to supporting the participant to express their will and preferences in making a decision or decisions in relation to the NDIS.

5.57 Nominees owe a duty to act in a manner that promotes the personal and social wellbeing of the participant. The ALRC considers that it is appropriate to add financial and cultural wellbeing to this list, reflecting the potential role supporters may play in supporting participants to make decisions relating to NDIS funds, and the importance of culturally sensitive and appropriate support.[60] This idea of sensitivity to cultural and linguistic circumstances is not currently a duty owed by nominees. However, in deciding who to appoint as a nominee, the CEO is to have regard to the degree to which the proposed nominee is 'sensitive to the cultural and linguistic circumstances of the participant'.[61]

5.58 A nominee currently has a duty to consult 'any court-appointed decision-maker or any participant-appointed decision-maker' and 'any other person who assists the participant to manage their day-to-day activities and make decisions (for example, a person who cares for the participant)' in relation to doing acts under, or for the purposes of, the NDIS Act.[62] If more than one person is appointed as plan nominee, each of them also owes a duty to consult with the others.[63] In order to reflect the supported rather than substitute decision-making role played by supporters, the ALRC

57 Ibid r 5.10.
58 Ibid r 5.11.
59 *National Disability Insurance Scheme Act 2013* (Cth) s 80. *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3–5.6, 5.8–5.14.
60 See, eg, MDAA, *Submission 43*.
61 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(b)(iv).
62 Ibid r 5.8.
63 Ibid r 5.9.

considers this duty might be appropriately modified to be a duty on supporters to facilitate consultation with these same categories of people.

5.59 The new duties supporters should owe include the duty to support the participant to make the decision or decisions in relation to which they were appointed and to express their will and preferences, and to act honestly, diligently and in good faith. As discussed below, safeguards should be in place to ensure, for example, that supporters do not abuse their position for their own self-interest.

5.60 While there is currently no duty of nominees to support the participant to make decisions, this type of duty may have been intended under the NDIS Rules. That is, in deciding who to appoint as a nominee, the CEO is to have regard to the degree to which the proposed nominee is willing and able to 'involve the participant in decision-making processes', and 'assist the participant to make decisions for himself or herself'.[64] It is important that there be a duty of supporters to support a participant to make decisions and to express their will and preferences.

5.61 The other new duty proposed is the duty to act honestly, diligently and in good faith.[65] The ALRC welcomes stakeholder feedback on the proposed supporter roles and duties articulated above as well as in relation to whether there should be additional duties placed on supporters in the context of the NDIS.

## Representatives

**Proposal 5–3** The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include representative provisions consistent with the Commonwealth decision-making model.

5.62 In certain circumstances, a participant may require fully supported decision-making. While this should only occur in line with the National Decision-Making Principles, as a last resort, the ALRC proposes the introduction of Commonwealth representatives as a mechanism for the provision of fully supported decision-making under the NDIS.

5.63 A representative under the Commonwealth decision-making model is an individual or organisation appointed by a participant, or through some other mechanism to support a participant to make a decision or decisions in relation to their participation in the NDIS. The role of a representative is to support a participant to express their will and preferences in making decisions; where necessary, to determine the will and preferences of a participant and give effect to them or, as a last resort, consider the human rights relevant to the situation in making a decision. Such decisions may relate to the planning process, the participant's plan, supports funded by the NDIS, interaction with service providers, or similar matters.

64 Ibid rr 4.8(b)(C), 4.8(b)(D).
65 See Ch 4.

5.64 Many of the elements contained in the proposed model are already incorporated into the NDIS Act, Rules or Operational Guidelines. For example, consistent with the ALRC's approach, nominees are appointed as a last resort, and there are duties on nominees to ascertain the wishes of the participant and to act in a manner that promotes the personal and social wellbeing of the participant.

## Appointment

5.65 The NDIS Act provides that the CEO of the NDIA may appoint a plan nominee or a correspondence nominee at the request of the participant, or on the initiative of the CEO.[66] There are a range of matters the CEO of the NDIA must take into account in determining whether to appoint a particular nominee.[67] In addition, the CEO has the power to make an appointment for a particular period[68] and power to limit the scope of the appointment.[69]

5.66 Stakeholders expressed particular concern about provisions which enable the CEO of the NDIA or their delegate to appoint a nominee on the initiative of a delegate, as distinct from at the request of the participant.[70] For example, the Physical Disability Council of NSW submitted that the provision 'is not consistent with person centred practice'. [71] The Disability Advocacy Network Australia expressed concern that power is 'largely unfettered' and gives the CEO or delegate

> considerable freedom to appoint or cancel appointment of a nominee with or without the agreement of the participant or respect for the participant's wishes, with or without regard for any existing guardianship, power of attorney or other substitute decision-making arrangement for the participant, and most importantly with or without first seeking to support and enable the participant to make the required decisions for him/her-self. This appointment power appears to give little regard to enabling the decision-making capacity of participants.[72]

5.67 Children with Disability Australia submitted that the CEO of the NDIA should not have power to appoint a representative, and 'if the circumstances exist where the CEO believes a nominee should be appointed other than at the participant's initiative it should be dealt with by the relevant systems for obtaining administration or guardianship orders'.[73]

5.68 The preferable appointment method for a representative is appointment by a participant. However, as discussed in more detail in Chapter 4, there are a number of other potential options for appointment, including appointment by a court, tribunal or

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66 *National Disability Insurance Scheme Act 2013* (Cth) ss 66, 67. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11–3.15.
67 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.5–4.8.
68 Ibid rr 4.9–4.11.
69 Ibid r 3.8.
70 See, eg, Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*. A similar concern was expressed in relation to child's representatives: Children with Disability Australia, *Submission 68*.
71 Physical Disability Council of NSW, *Submission 32*.
72 Disability Advocacy Network Australia, *Submission 36*.
73 Children with Disability Australia, *Submission 68*.

other body with Commonwealth jurisdiction, and retaining the CEO's power to appoint, but in more limited circumstances than at present.

5.69 Regardless of the way in which a representative is appointed, if there is an external mechanism for appointment, stakeholders such as OPA (Vic) submitted that

> the participant's preference of nominee should be respected unless there are very good reasons for not doing so (such a reason would be that the appointment of the person would jeopardise the personal and social wellbeing of the participant).[74]

5.70 The ALRC is interested in stakeholder feedback on the most appropriate mechanisms in the context of the NDIS to appoint a representative for a person who requires full decision-making support.

## Role and duties

### *Potential roles of a representative*

5.71 Under the current nominee provisions, the role of a plan nominee may encompass decisions relating to the preparation, review or replacement of the participant's plan; or management of funding for supports under the plan. However, the Nominee Rules provide for limitations on the matters that a plan nominee is appointed to deal with:

> For example, the appointment might be restricted so as to prevent the nominee from specifying the goals, objectives and aspirations of the participant. In such a case, the nominee might still have authority with respect to the management of funding under a plan. Alternatively, the CEO might appoint 2 or more plan nominees, and, in each instrument of appointment, limit the matters in relation to which each person is the plan nominee.[75]

5.72 Despite this provision, some stakeholders have expressed concern about the existing role played by plan nominees which tends to be 'a global appointment', and relies on the discretion of the nominee to limit the use of their power; in particular the power to make substitute decisions when a person cannot be supported to make their own decisions'.[76]

5.73 The scope of the role of a correspondence nominee is narrower and more closely reflects the role potentially played by a supporter. For example, a correspondence nominee may make requests to the NDIA or receive notices from the NDIA, on behalf of the participant.[77]

5.74 The ALRC considers that a representative should perform some or all of the roles articulated in Proposal 4–7. These mirror the potential role of supporters and are discussed in more detail below.

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74 Office of the Public Advocate (Vic), *Submission 06*.
75 Ibid.
76 Office of the Public Advocate (SA), *Submission 17*.
77 The matters the correspondence nominee is able to deal with cannot be limited further by the instrument of appointment: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.8.

5.75 In line with the National Decision-Making Principles, the ALRC suggests that in introducing the concept of representative under the NDIS, consideration be given to potential categories of representatives and ensuring that any appointment is decision-specific and limited in scope and time. For example, it may be appropriate to separate representative roles between those who provide general support in relation to interaction with the NDIA and planning, and those who are involved in financial decisions.[78]

### *Representative duties*

5.76 Representatives under the NDIS will play a key role in providing support to participants requiring full decision-making support. As a result, representatives should be subject to the duties and responsibilities articulated in Proposal 4–8. The ALRC considers that a representative should have the same duties as a supporter, and a number of additional duties. It is important that representatives owe specific additional duties under the NDIS Act and Rules, even where they are an existing state or territory appointed decision-maker (an issue discussed further below) and are therefore subject to duties under state and territory legislation.

5.77 The key duties the ALRC proposes that a representative should owe under the NDIS Act and Rules include:

- providing of support to a participant to express their will and preferences in making decisions;
- where it is not possible to determine what the wishes of the participant, determining what the person would likely want based on all the information available;
- where the first two dot points are not possible, considering the human rights relevant to the situation;
- acting in a manner promoting the personal, social, financial and cultural wellbeing of the person who requires decision-making support;
- providing of support to the participant to consult with 'existing appointees', family members, carers and other significant people in their life when making a decision; and
- developing the capacity of the person who requires decision-making support to make their own decisions.

5.78 The application of many of these duties to support is discussed above. There are a number of additional duties appropriate for NDIS representatives, who provide fully supported decision-making support. One such duty is to support the participant to express their will and preferences. This is not currently reflected in the duties of nominees to 'ascertain the wishes of the participant', which does not necessarily require provision of support to express will and preferences. However, there is some

78 As suggested by Office of the Public Advocate (SA), *Submission 17*.

suggestion that this type of duty was intended under the NDIS Rules, as in deciding who to appoint as a nominee, the CEO is to have regard to the degree to which the proposed nominee is willing and able to: 'involve the participant in decision-making processes', 'assist the participant to make decisions for himself or herself' and 'ascertain what judgements and decisions the participant would have made for him or herself'.[79] Nonetheless, the ALRC considers it is necessary for a representative to have an explicit duty to support a participant to express their will and preferences.

5.79 While the focus of supported decision-making under the NDIS should be on supporting a participant to express their will and preferences, there is a need to make provision for circumstances in which a representative is providing fully supported decision-making. In such circumstances, the representative must determine what the person would likely want based on all the information available. This may require engagement with NDIA, service providers, family members and others to establish things such as the nature of decisions the participant has made in the past, and their values and beliefs. Where this is not possible, the representative must consider the human rights relevant to the situation.

## Interaction with state and territory systems

**Question 5–1** How should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules be amended to clarify interaction between supporters and representatives appointed in relation to the NDIS, other supporters and representatives, and state and territory appointed decision-makers?

5.80 One of the key difficulties in applying the Commonwealth decision-making model to the NDIS is determining the appropriate interaction between NDIS supporters and representatives, supporters and representatives in other areas of Commonwealth responsibility, and state and territory appointed decision-makers.

5.81 This issue is of particular relevance given the ongoing roll-out of the NDIS. AGAC provided a scenario which highlights the potentially difficult interaction between the NDIS and state and territory appointed decision-makers under the existing scheme:

> A person who is the subject of an administration (financial management) order appointing a Public Trustee makes an application for NDIS support themselves or through a nominee for funding a particular matter. The operators of the NDIS scheme are unaware that the person has been found to have a decision-making disability by a Tribunal and is incapable of managing their own financial and property affairs. The result has been that money has been paid out to such applicants directly to their bank accounts which the Public Trustee is under order to manage. Without the knowledge and intervention by the Public Trustee, this

79 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.8(b)(C), 4.8(b)(D), 4.8(b)(E).

> may be seen as a windfall by the applicant and spent for purposes other than that for which the grant was paid.[80]

5.82 It is also important to address stakeholder concerns about an increase in applications for the appointment of state or territory decision-makers since the introduction of the NDIS. For example, AGAC submitted that

> the introduction of the NDIS creates a number of decision making 'events' and a greater degree of scrutiny of informal substitute decision-makers or supporters and leads to an increase in the number of applications under guardianship legislation. In these and other hearings there have been discussions about the increased number and complexity of decisions that will need to be made as a result of the introduction of the NDIS. AGAC anticipates a commensurate increased call on the advocacy functions of the Public Advocates and Public Guardians and on the financial management role of the Public Trustees as well as on the Tribunals.[81]

5.83 This was echoed by the OPA (Qld):

> there are a number of points in the process of becoming and being a participant that may prompt the appointment of a guardian or other substitute decision-maker if appropriate support and assistance is not provided.[82]

5.84 The general issue of interaction under the NDIS is discussed below. Interaction involving management of NDIS funds is discussed separately later in the chapter. The ALRC is interested in stakeholder comment on the interaction issues which arise in the context of the NDIS, the two possible approaches discussed below, and other possible approaches.

## Current interaction

5.85 Under the NDIS Act and Rules there is limited recognition of state and territory appointed decision-making arrangements. The key points of interaction relate to the appointment of a nominee at the initiative of the CEO, the duty of nominees to consult, and the obligations of nominees who are also state or territory or participant appointed decision-makers.

5.86 The provision of the Nominee Rules requiring a plan nominee to act is stated as not being intended

> to affect any obligations or restrictions that impact on a plan nominee and which apply under State or Territory law (including obligations or restrictions that impact on them in their capacity as a court-appointed decision-maker or a participant-appointed decision-maker).[83]

5.87 Under s 88(4) of the NDIS Act, the CEO of the NDIA must, in considering whether to appoint a nominee, have regard to whether there is a person under Commonwealth, state or territory law who 'has guardianship of the participant', or 'is a

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80 Australian Guardianship and Administration Council, *Submission 51*.
81 Ibid.
82 Office of the Public Advocate (Qld), *Submission 05*.
83 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.7.

person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee'.[84] The Nominee Rules further provide that in such circumstances, the CEO must have regard to a number of things, including 'whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker'; and any relevant views of a 'court-appointed decision-maker or a participant-appointed decision-maker'.[85]

5.88 The matters the CEO must have regard to in deciding who to appoint as nominee include 'whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker', and their views.[86] The CEO is also to have regard to

> the presumption that, if the participant has a court-appointed decision-maker or a participant-appointed decision-maker, and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee.[87]

5.89 The OPA (Qld) submitted that, while there is currently a 'presumption' that an existing guardian would also be appointed as a nominee for a participant, this is not sufficient.[88] Similarly, the OPA (Vic) said that

> it is expected that state/territory-appointed guardians and administrators would be appointed as nominees under the NDIS where this would be appropriate, but a review is required to ascertain the extent to which this is happening in practice in the launch sites.[89]

5.90 Nominees also have a duty to consult with 'any court-appointed decision-maker or any participant-appointed decision-maker'.[90]

5.91 Section 207 of the NDIS Act deals with the concurrent operation of state and territory laws with the Act and states that 'it is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act'.[91]

5.92 The OPA (Qld) submitted that,

> given this position of nominees as 'de facto substitute decision makers' it is also important that the interaction between the [NDIS Act], the NDIS Rules and the state-based guardianship and administration legislation is further clarified.[92]

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84 *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).
85 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.14(b)(iii), 3.14(b)(v)(C).
86 Ibid r 4.6(c). See also *National Disability Insurance Scheme Act 2013* (Cth) ss 88(2), 88(4).
87 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(a).
88 Office of the Public Advocate (Qld), *Submission 05*.
89 Office of the Public Advocate (Vic), *Submission 06*.
90 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.8(a).
91 *National Disability Insurance Scheme Act 2013* (Cth) s 207.
92 Office of the Public Advocate (Qld), Submission 05.

## Possible models of interaction

5.93 There appear to be a range of possible approaches to interaction issues. In this section the ALRC discusses the possible application, in the context of the NDIS, of the two approaches outlined in Chapter 4.

### *First approach*

5.94 Under the first approach, which reflects the current position, it is possible to have an NDIS supporter or representative and a state or territory appointed decision-maker.

5.95 In circumstances where appointments of an NDIS supporter or representative do not overlap with that of a state or territory appointed decision-maker—for example, because they are appointed in relation to different decisions or areas—there is unlikely to be any conflict. Reducing the possibility of conflict with Commonwealth appointments may be strengthened by amendment of state and territory legislation to ensure state and territory appointments are, as much as possible, confined in scope and time.[93]

5.96 In circumstances there may still be some overlap in the areas of decision-making covered by the appointments. If there is conflict, s 109 of the *Australian Constitution* may require that the responsibility of a state or territory appointed decision-maker extend only to those areas not covered by the decision-making power of the Commonwealth representative. To facilitate this interaction, information sharing arrangements may be necessary for the representative and state or territory appointed decision-maker to fulfill their particular roles.

5.97 This could occur either as a result of formal mechanisms, or more informally.[94] The ALRC considers this aspect of the approach may address some concerns expressed by stakeholders in relation to the appointment of different individuals or organisations.[95]

5.98 The ALRC welcomes stakeholder comment on mechanisms to ensure sharing of information between Commonwealth representatives and state and territory appointed decision-makers where they are different.

### *Second approach*

5.99 Under a second possible approach, where a state or territory decision-maker has been appointed, a new assessment of the support needs of the participant should be undertaken for NDIS purposes. If the person requires fully supported decision-making, then a representative should be appointed, either by the person, or using a Commonwealth appointment mechanism.[96] The appointment of the existing state or

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93 See Proposal 10–1 (state and territory proposal).

94 As the ALRC understands is currently the case—with the sharing of information between the NDIA and the NSW Trustee and Guardian.

95 Financial Services Council, *Submission 35*.

96 See discussion of possible appointment mechanisms for representatives in Ch 4.

territory decision-maker as representative should be permitted and encouraged, but would not be automatic.

5.100 As suggested in Chapter 4, one of the considerations a decision-maker could have regard to in appointing a Commonwealth representative should be the desirability of appointing an existing Commonwealth representative or state or territory appointed decision-maker where one exists. This is likely to encourage appointment of state and territory decision-makers as representatives for NDIS purposes where appropriate. However, even where an existing representative or state or territory appointed decision-maker is appointed, the appointee would be subject to the provisions of the NDIS Act and Rules relating to their role and duties, as well as associated safeguards.

5.101 This model appears to be most consistent with the views of stakeholders such as the FSC which submitted that where a state or territory decision-maker has been appointed, they should automatically be the NDIS representative.[97] Similarly, the NSW Council for Intellectual Disability submitted that,

> if a guardian has been appointed with authority to make decisions about services, then that person should automatically be recognised as NDIS nominee. Similarly, if there is a nominee and a different person is appointed as guardian, the guardian should automatically take over as nominee.[98]

## Management of NDIS funds

**Question 5–2** In what ways should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules in relation to managing the funding for supports under a participant's plan be amended to:

(a) maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and

(b) clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?

5.102 Under the NDIS Act, a participant may request that NDIS funds be self-managed by the participant, the participant's plan nominee, a plan management provider nominated by the participant, or the NDIA.[99] Different options can be chosen for different supports. If a plan nominee has been appointed, then funding for supports must be managed in accordance with the terms of the appointment.[100] There are also currently a number of circumstances under which a participant must not manage plan funds, including if the CEO is satisfied that management of the plan would present an 'unreasonable risk to the participant'.[101]

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97 Financial Services Council, *Submission 35*.
98 NSW Council for Intellectual Disability, *Submission 33*.
99 *National Disability Insurance Scheme Act 2013* (Cth) ss 42(2), 43(1).
100 Ibid s 43(2).
101 Ibid s 44.

5.103 If a participant does not make a plan management request, outlining how they would like their NDIS funds managed, the funding for supports under the plan is managed by either a registered plan management provider specified by the NDIA, or the NDIA.[102] If this occurs, the CEO of the NDIA 'must, so far as reasonably practicable, have regard to the wishes of the participant in specifying who is to manage the funding for supports under the plan'.[103]

5.104 The introduction of supporters and representatives under the NDIS is likely to reduce the circumstances in which a participant does not make, or is not supported to make, a plan management request. However, in circumstances where they do not, these provisions may require amendment to remove the power of the CEO of the NDIA to determine who should manage the funding for supports. Alternatively, the provisions could be amended to remove the qualifier and require that, in such circumstances, the CEO is required to give effect to the will, preferences and rights of the participant.

5.105 Under the existing provisions of the NDIS, Queenslanders with Disability Network observed that

> the capacity of an individual to manage their own funds is a potentially contentious issue ... An individual with a disability may wish to manage their own supports, but the CEO may deem the person incapable of discharging this responsibility. These decisions may not be consistent with guardianship decisions made at a state level, and consequently the potential for appeal is high.[104]

5.106 The preferable approach is for participants to self-manage their funding for supports to the greatest extent possible, and that the NDIS legislation should be amended to reflect this.

5.107 Where the scope of the appointment of a state or territory appointed decision-maker does not cover management of NDIS funds, a participant should be able to self-manage their funds, or to appoint a supporter or representative to support them in making decisions about fund management. Participants should also be entitled to nominate a plan management provider, or the NDIA to manage their funds.

5.108 However, where a state or territory order which covers the management of finances is in place, some stakeholders have submitted that it should not be possible for participants to self-manage NDIS funds. For example, the FSC argued that where a state or territory decision-maker has been appointed, they should 'automatically be the person or entity responsible for managing the funding for supports'[105] and that 'the NDIS should pay amounts directly to product/service providers after due consultation with the relevant appointed decision-maker'.[106]

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102 Ibid s 43(4).
103 Ibid s 43(5).
104 Queenslanders with Disability Network, *Submission 59*.
105 Financial Services Council, *Submission 35*.
106 Ibid.

5.109 The ALRC is interested in stakeholder comments on ways in which the NDIS Act and Rules could be amended to maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and clarify the interaction between Commonwealth supporters or representatives and state and territory appointed decision maker, in relation to the management of NDIS funds.

# Safeguards

## General safeguards

5.110 In Proposal 4–9, the ALRC proposes that the appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

5.111 The ALRC does not intend to make a proposal with respect to the specific safeguards that may be required in the context of the NDIS, or comment on systemic issues relating to safeguards under the NDIS raised by stakeholders, including the provision of funding to support participants to seek review of NDIA decisions.[107]

5.112 However, a number of stakeholders, including the Disability Services Commission of Victoria, strongly advocated the development of independent oversight of the NDIS, consisting of a body or bodies with complaint handling and investigative powers, legislative responsibilities to conduct monitoring, review and inquiry functions; and responsibility for promoting access to advocacy and supported decision-making.[108]

5.113 There are a number of existing complaint, review and appeal mechanisms under the NDIS. For example, participants may seek internal review of a reviewable decision,[109] make a complaint to the Commonwealth Ombudsman, or seek review of a reviewable decision by the Administrative Appeals Tribunal (AAT).[110]

5.114 In the trial sites, existing state and territory quality assurance frameworks and safeguards also apply.[111] The Department of Social Services is currently developing a number of proposed options for a national quality assurance and safeguards framework or approach as part of the NDIS. It is anticipated that when the NDIS is fully rolled out, safeguards will include:

- individualised strategies built into participant plans to help the participant, their family and support network to reduce the risk of harm, through mechanisms such as advocates, guardians and nominees;
- arrangements that organisations put in place to protect participants, such as: staff supervision; internal complaints processes; quality frameworks;

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107 See, eg, Law Council of Australia, *Submission 83*; NCOSS, *Submission 26*.
108 See, eg, MHCA, *Submission 77*; Disability Services Commissioner Victoria, *Submission 39*.
109 *National Disability Insurance Scheme Act 2013* (Cth) s 99, 100.
110 Ibid s 103.
111 'Intergovernmental Agreement, Schedule A: Bilateral Agreement for NDIS Launch between the Commonwealth and New South Wales' (7 December 2012).

- system level safeguards such as:
  - external review of decisions and actions that directly impact on a person, such as access to relevant tribunals or commissions; community visitors schemes; and police checks and working with children checks
  - community based safeguards that are available to all members of the community, such as: practitioner registration requirements; ombudsman offices; and anti-discrimination, human rights and consumer protection law.[112]

5.115 The ALRC suggests that the safeguard issues outlined in this Discussion Paper be considered in the course of developing the national quality assurance and safeguards framework or approach as part of the NDIS.

## Education, training and guidance

5.116 Education, training and guidance for all people involved in the decision-making under the NDIS is vitally important to ensure the effective operation of the supported decision-making model.

5.117 The NDIA has developed a number of approaches to education, training and community engagement (including through video, quotes, cameos, stories, and webinars) and has produced a range of guidance material for people with disability, family and carers, service providers, and participants.[113]

5.118 The NDIA also offers disability support organisations capacity building strategy grants to 'provide and promote local mutual support activities for people with disability' with the aim of leading to 'increased capacity of people with disability and their families to exercise choice and control, engage with the NDIS and other community supports as well as actively participate economically and socially'.[114]

5.119 In terms of decision-making mechanisms stakeholders such as the Office of the Public Advocate (SA) have emphasised the need to ensure the NDIS Act and NDIS Rules are applied appropriately in practice:

> Close attention will need to be applied to the implementation of the NDIS Nominees Rules, and the extent that they encourage support to enable people's capacity as opposed to potentially disempowering participants by transferring effective decision making to plan nominees. NDIS itself can play a role in educating nominees on their role so that this does not happen, and expecting nominees to attempt to support a participant make their own decision before taking on a substitute role.[115]

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112 National Disability Insurance Scheme, *Safeguards* <www.ndis.gov.au/participants-0>.

113 See, eg, National Disability Insurance Scheme, *Homepage* <www.ndis.gov.au>.

114 National Disability Insurance Scheme, *Disability Support Organisations—Capacity Building Strategy Grants* <http://www.ndis.gov.au/document/759>.

115 Office of the Public Advocate (SA), *Submission 17*.

5.120 National Disability Services suggested that it also be timely

> to develop and provide education material to NDIA staff, families, guardians and participants about the principles of supported decision-making and the law around legal capacity.[116]

5.121 The Mental Health Council of Australia highlighted the need for

> capacity building measures, programs or processes at the individual or community levels to empower consumers and communities to actively participate in supported decision-making. These could include programs to educate consumers and carers about the NDIS.[117]

5.122 Accordingly, consistent with Proposal 4–11, people who may require decision-making support, and supporters and representatives (or potential supporters and representatives) should be provided with information and advice to enable them to understand their roles and duties. In addition, the ALRC proposes that Australian Public Service employees who engage with supporters and representatives are provided with regular, ongoing and consistent training in relation to the roles of supporters and representatives. The ALRC notes that NDIA employees, service providers, plan management providers, and other experts and third parties engaged in the NDIS would benefit from such training.

5.123 The focus of training and guidance could include topics such as: the introduction of the supporter and representative model under the NDIS and differences between the new model and existing nominee provisions; interaction with state and territory decision-making systems; and supported decision-making in the context of the NDIS.

## Issues outside the scope of this Inquiry

5.124 Stakeholders raised a range of other concerns about the NDIS, some of which extend beyond the Inquiry's scope. They are nonetheless important and indicate systemic and practical concerns with the structure and operation of the NDIS. These include, for example:

- eligibility and becoming a participant under the NDIS;[118]
- the operation of the NDIS for people with particular types of disability, for example psychosocial disability;[119]
- the interaction between the NDIS and other systems, particularly with respect to funding responsibility;[120]

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116 National Disability Services, *Submission 49*.
117 MHCA, *Submission 77*.
118 See, eg, Women's Legal Services NSW, *Submission 57*; Physical Disability Council of NSW, *Submission 32*; Mental Health Coordinating Council, *Submission 07*; MHCA, *Submission 77*.
119 See, eg, MHCA, *Submission 77*. See also, Mental Health Council of Australia, *Providing Psychological Support through the NDIS,* March 2014.
120 See, eg, Office of the Public Advocate (Qld), *Submission 05*.

- registration and oversight of providers of support;[121] and
- issues in relation to decreased funding of state and territory services, and potential gaps where people with disability are not eligible for the NDIS.[122]

5.125 While these concerns are important, the issues do not relate directly to the concepts of legal capacity of decision-making ability and the ALRC does not intend to make proposals in these areas.

121 See, eg, Ibid.
122 See, eg, MHCA, *Submission 77*.

# 6. Supporters and Representatives in Other Areas of Commonwealth Law

## Contents



## Summary

6.1 In Chapter 4, the ALRC proposes a new model for supported and fully supported decision-making in areas of Commonwealth legislative responsibility (the Commonwealth decision-making model). Chapter 5 discussed the application of the model to the National Disability Insurance Scheme (NDIS).

6.2 This chapter discusses how the Commonwealth decision-making model might be applied to other existing legislative schemes that already contain some decision-making mechanism or make some provision for supporters and representatives, (however they are described). These schemes concern individual decision-making in relation to:

- social security, specifically under the *Social Security (Administration) Act 1999* (Cth);
- aged care, under the *Aged Care Act 1997* (Cth); and
- eHealth records, under the *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act).

6.3 The chapter also discusses how the model might be applied to individual decision making in relation to personal information under the *Privacy Act 1988* (Cth); and the provision of banking services.

6.4 In most of these areas, the ALRC proposes that legislation should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model and suggests how this might be done. In relation to banking, the ALRC proposes that banks should be encouraged to recognise supporters, including through new guidelines reflecting supported decision-making principles.

6.5 As discussed with respect to the Commonwealth decision-making model and the NDIS, one overarching issue is the interaction between the various Commonwealth decision-making schemes and state and territory appointed decision-makers. In each area, the interaction of supporters and representatives, recognised under specific Commonwealth legislation with other Commonwealth supporters and representatives and with state and territory appointed decision-makers will have to be considered.[1]

# Social security

6.6 The legislative, policy and administrative framework for social security in Australia is set out in the *Social Security Act 1991* (Cth), the *Social Security (Administration) Act 1999* (Cth) and the *Social Security (International Agreements) Act 1999* (Cth).[2] This section discusses how the Commonwealth decision-making model may be applied in social security law.

## Individual decision-making in social security

6.7 There are three key decision-making mechanisms in the context of social security law: autonomous decision-making by social security payment recipients; informal supported decision-making; and substitute decision-making by nominees.

6.8 In many circumstances, family members, friends and others may provide informal support to people with disability to make social security-related decisions without any formal recognition or appointment. The significant role of 'informal and supportive decision-making arrangements' in the context of social security was emphasised by a number of stakeholders.[3]

6.9 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the *Social Security (Administration) Act* should not diminish the involvement or respect for, informal support, including in relation to decision-making.

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1 See Ch 10.

2 *Social Security (Administration) Act 1999* (Cth) s 3 defines social security law to include these three Acts. There are equivalent provisions for family assistance (family tax benefit, child care) in *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) Pt 8 ss 219TA—219TR.

3 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20.*

6.10 The *Social Security (Administration) Act* contains a nominee scheme, and was the model for the nominee scheme under the *National Disability Insurance Scheme Act 2013* (Cth). Specifically, the Act makes provision for a 'principal'[4] to authorise another person or organisation to enquire or act on the person's behalf when dealing with the Department of Human Services (DHS).[5] There are two types of arrangements:

- correspondence nominees—a person or organisation authorised to act and make changes on the principal's behalf;[6] and
- payment nominees—a person or organisation authorised to receive a principal's payment into an account maintained by the nominee.[7]

6.11 Only one person can be appointed for each arrangement; however the same person can be appointed as both correspondence and payment nominee.[8]

6.12 A principal may appoint their own nominee, however where a question arises in relation to a principal's capacity to consent to the appointment of a nominee, or any concerns arise in relation to an existing arrangement, DHS must 'investigate the situation'.[9] The *Guide to Social Security Law*[10] provides that in circumstances where 'a principal is not capable, for example, due to an intellectual/physical constraint…of consenting to the appointment of a nominee', a delegate may appoint one.[11] The Guide also provides that 'where a principal has a psychiatric disability, a nominee can be appointed in these instances where there is a court-appointed arrangement such as a Guardianship Order'.[12]

6.13 Nominees have a range of functions and responsibilities.[13] The primary duty of nominees is to 'act at all times in the best interests of the principal'.[14]

6.14 With respect to issues of liability, a principal is protected against liability for the actions of their correspondence nominee, and correspondence nominees are not subject to any criminal liability under the social security law in respect of: any act or omission of the principal; or anything done, in good faith, by the nominee in his or her capacity

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4 A 'principal' for the purposes of the nominee provisions is a social security payment recipient who has had a nominee appointed to receive either correspondence and/or payments on their behalf: *Social Security (Administration) Act 1999* (Cth) s 123A.

5 Social security law is administered by the Department of Human Services (DHS) through Centrelink.

6 *Social Security (Administration) Act 1999* (Cth) ss 123C, 123H; see also, Department of Social Services, Guide to Social Security Law (2014) [8.52], [8.53].

7 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123F; Department of Social Services, Guide to Social Security Law (2014) [8.5.1], [8.5.3].

8 *Social Security (Administration) Act 1999* (Cth) s 123D(1).

9 Department of Social Services, Guide to Social Security Law (2014) [8.5.1], [8.5.2].

10 The Guide to Social Security Law, produced by the Department of Social Services provides guidance to decision-makers in implementing this legislation: Department of Social Services, Guide to Social Security Law (2014).

11 'In these cases, a delegate may appoint a nominee on behalf of the principal, with attention to supporting evidence, and where the delegate is fully satisfied that the nominee is required and will act in the principal's best interests. The decision made by the delegate to appoint a nominee in these circumstances must be fully documented': Ibid [8.5.1], [8.5.2].

12 Ibid.

13 *Social Security (Administration) Act 1999* (Cth) ss 123H–123L, 123O.

14 Ibid s 123O.

as nominee.[15] However, if a correspondence nominee fails to satisfy a particular requirement, the principal is taken to have failed to comply with that requirement. This may then have adverse consequences in terms of compliance and payments.[16]

## The Commonwealth model and social security law

**Proposal 6–1** The *Social Security (Administration) Act 1999* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

6.15 To ensure compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles, and given concerns about the current nominee provisions,[17] the ALRC proposes that the *Social Security (Administration) Act* be amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model.

6.16 The application of the Commonwealth decision-making model in social security law would contribute to the development of consistent decision-making structures across key Commonwealth areas of law. The desirability of such consistency was encouraged by stakeholders such as the Law Council of Australia.[18]

6.17 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the *Social Security (Administration) Act* should not diminish the involvement or respect for, informal support, including in relation to decision-making. However, as outlined in Chapter 4, the ALRC considers there are significant benefits to making provision for formal supported decision-making—a view shared by a range of stakeholders both broadly and in the context of social security law.[19]

6.18 While, broadly speaking, the role played by correspondence nominees is analogous to the role envisaged for supporters under the Commonwealth decision-making model, the existing nominee system does not make provision for formal supported decision-making. Accordingly, significant amendments would need to be made to the *Social Security (Administration) Act* to incorporate the Commonwealth decision-making model.

6.19 The ALRC does not intend to prescribe a comprehensive new decision-making scheme for social security law. However, the ALRC outlines below some key ways in which the Commonwealth decision-making model might operate in the context of social security.

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15 Ibid ss 123M, 123N.
16 See, eg, Ibid s 123J.
17 See, eg, Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.
18 Law Council of Australia, *Submission 83*.
19 See, eg, in relation to supported decision-making and social security law: Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20.*

### *Objects and principles*

6.20 Section 8 of the *Social Security (Administration) Act* contains general principles of administration. However, there are no principles relating to decision-making. The ALRC suggests that s 8 could be amended to incorporate principles relating to decision-making and supported decision-making, or that principles could be inserted into the part of the Act which will contain provisions relating to supporters and representatives.

### *Supporters*

6.21 Under the Commonwealth decision-making model, a principal would be entitled to appoint one or more supporters to support them to make social security-related decisions. Ultimate decision-making power and responsibility would remain with the principal. Centrelink would need to recognise any decision made by a principal with the assistance of a supporter as being the decision of the principal.

6.22 A principal may appoint whomever they wish as their supporter, including for example a family member, friend or carer. In the context of social security, the ability to appoint a supporter may also assist advocacy organisations to support people with disability. For example, stakeholders such as the Multicultural Disability Advocacy Association of NSW emphasised the need for an 'authority form' to facilitate provision of support to clients from culturally and linguistically diverse or non-English speaking backgrounds to engage with Centrelink.[20] It may also address some of the privacy-related difficulties encountered by those who support people with disability, given one of the potential roles of a supporter is to handle the relevant personal information of the principal.

6.23 In many respects, correspondence nominees under the current system reflect the role potentially played by a supporter, including making enquiries and obtaining information to assist the principal, completing forms, and receiving mail. The key difference under the model would be that the principal formally retains ultimate decision-making responsibility. The role of a supporter is to support the principal to make a decision, rather than the supporter themselves making a decision.

6.24 As a result, rather than having a duty to act in the best interests of the principal, supporters would have duties to: support the principal to express their will and preferences; act in a manner promoting the personal, social, financial, and cultural wellbeing of the principal; act honestly, diligently and in good faith; support the principal to consult with other relevant people; and develop the capacity of the principal to make their own decisions. These duties may address concerns expressed by stakeholders that the current nominee provisions 'are generally disempowering of the person with the disability, as they place no obligation on a nominee to act in ways that genuinely involve the person or that assist them to exercise their legal capacity'.[21]

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20 MDAA, *Submission 43*.

21 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

6.25 In addition, a principal would be entitled to revoke the appointment of a supporter at any time. This differs from the current system, under which there does not appear to be legislative provision for a principal to request cancellation of a nominee arrangement, an issue raised with concern by a number of stakeholders.[22]

### *Representatives*

6.26 Consistent with the Commonwealth decision-making model, a principal would also be entitled to appoint a representative to support them to make social security related decisions.

6.27 There may also be other circumstances in which a representative might be appointed—for example, where a person may not be in a position to appoint their own representative, but requires fully supported decision-making.

6.28 Chapter 4 discusses possible alternative appointment mechanisms in these circumstances, including appointment by a court, tribunal or other body at a Commonwealth level or, in limited circumstances, by Centrelink. However, concerns expressed in relation to the powers of the CEO of the National Disability Insurance Agency to appoint a nominee may also apply to the similar powers of Centrelink delegates.[23]

6.29 The key amendment to the *Social Security (Administration) Act*, applying the Commonwealth decision-making model with respect to representatives, would be to provide that representatives have a duty to consider the will, preferences and rights of the principal. This would replace the current duty of nominees to act in the best interests of the principal.

6.30 Finally, the ALRC proposes that the appointment and conduct of representatives should be subject to appropriate and effective safeguards. The ALRC does not intend to be overly prescriptive in proposing what safeguards should apply under social security law. However, these safeguards might include: mechanisms for review and appeal of the appointment of representatives; potential monitoring or auditing of representatives by Centrelink; and the adoption of existing safeguards. For example, one of the existing safeguards that could apply to representatives is the power of DHS to require provision of a statement from payment nominees outlining expenditure of the principal's payments by the nominee.[24]

### *Education, training and guidance*

6.31 The ALRC considers education, training and guidance for all parties involved in the decision-making under social security law is of vital importance in ensuring the effective operation of this model of decision-making. This is particularly important in

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22 Section 123E of the *Social Security (Administration) Act 1999* (Cth) outlines the specific power to revoke a nominee appointment, but does not appear to make provision for a request by a principal. See, eg, Law Council of Australia, *Submission 83.*

23 For powers see, Department of Social Services, Guide to Social Security Law (2014) [8.5.1], [8.5.2].

24 *Social Security (Administration) Act 1999* (Cth) s 123L. It is a strict liability offence not to comply which attracts a penalty of 60 penalty units. See also Department of Social Services, Guide to Social Security Law (2014) [8.5.3].

light of stakeholder concerns about existing difficulties in navigating the social security system, interacting with Centrelink, and obtaining information.

6.32 Accordingly, the ALRC considers it is necessary for Centrelink to develop and deliver consistent, regular and targeted education and training as well as associated guidance for:

- supporters and representatives, and potential supporters and representatives;
- Centrelink payment recipients who require decision-making support; and
- Centrelink employees and others involved decision-making or engagement with Centrelink customers.

6.33 The focus of education, training and guidance could include topics such as: the introduction of the supporter and representative model under social security law and differences between the new model and existing nominee provisions; interaction with state and territory decision-making systems; and supported decision-making in the context of social security.

### *Other issues*

6.34 Stakeholders also raised a range of systemic issues concerning social security. Briefly, stakeholders consistently emphasised the complexity of the social security system and the difficulties people with disability face in navigating the system; difficulties arising in relation to eligibility, participation requirements and the consequences of breach of certain requirements; and appeal and review processes. Stakeholders also highlighted the particular difficulties for people with disability who are Aboriginal or Torres Strait Islander, from a culturally and linguistically diverse community, or who live in a rural, regional or remote community.[25]

6.35 While these are important issues in the lives of people with disability, the issues do not relate directly to individual decision-making, and the ALRC does not intend to make proposals in these areas.

## Aged care

6.36 The following section outlines how the National Decision-Making Principles and the Commonwealth decision-making model may apply to aged care. Aged care is an increasingly important area of federal responsibility in the context of Australia's ageing population. The Australian Government is responsible for the funding and regulation of most residential aged care and home care packages,[26] under the *Aged*

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25 See, eg, Legal Aid Qld, *Submission 64*; Vicdeaf, S*ubmission 56*; Central Australian Legal Aid Service, *Submission 48*; MDAA, *Submission 43*; Equal Opportunity Commission of South Australia, *Submission 28*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. See also: National People with Disabilities and Carers Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (2009).

26 On 1 July 2012, the Australian Government assumed full funding, policy and operational responsibility for the Home and Community Care services for older people in all states and territories except Victoria and WA. The state and territory governments will continue to fund and administer HACC services for

*Care Act*,[27] as well as social security payments, such as the age pension and the carer payment.

6.37 Dementia related policy imperatives and elder abuse concerns have produced a raft of reports on aged care issues.[28] The Australian Government has responded to them with the Living Longer Living Better reforms to aged care.[29] Changes starting from 1 July 2014 include income testing for home care packages, new accommodation payment arrangements for residential aged care, and the removal of the distinction between high and low care in residential care.[30] Consultation on the exposure drafts of subordinate legislation slated for commencement on 1 July 2014 began in March 2014.[31]

6.38 In referring to the Living Longer Living Better reforms, Caxton Legal Centre submitted that it is concerned about the 'omission of the CRPD' as well as the weakening of human rights principles through the exclusion of the Residents' Lifestyle Principle in the new Quality of Care Principles.[32]

6.39 The Commonwealth decision-making model answers the calls in academic commentary, reports and in the submissions to the Inquiry for clear, national guidance for substitute decision-making in aged care that is compliant with the CRPD.[33]

## Individual decision-making in aged care

6.40 At present, decisions in aged care, ranging from personal care and visitation to accommodation and medical treatment are made in various ways: by the aged care recipients themselves; informally by their families or carers; or by formally appointed substitute decision-makers like guardians.

6.41 Informal decision-making for an aged care recipient seems to be widespread and accepted in aged care. The Victorian Law Reform Commission report on guardianship

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people under the age of 65 or under 50 for Aboriginal and Torres Strait Islander people. In May 2013, Victoria has agreed to transition responsibility for HACC for older people to the Commonwealth from 1 July 2015 and in August 2013, WA has agreed to do the same from 2016–2017.

27 From 1 July 2014, the Australian Aged Care Quality Agency (instead of the Department of Social Services) will be responsible for the quality review of home care services. The Quality Agency was established by the *Australian Aged Care Quality Agency Act 2013* (Cth). From 1 January 2014, the Australian Aged Care Quality Agency has replaced the Aged Care Standards and Accreditation Agency to take on the accreditation of residential aged care homes. Accreditation is conducted in accordance with the *Quality Principles 2013* (Cth), *Quality Agency Reporting Principles 2013* (Cth) and other legislative instruments issued pursuant to the *Aged Care Act 1997* (Cth).

28 'Caring for Older Australians' (Inquiry Report No 53, Productivity Commission, 2011); Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014).

29 See *Aged Care (Living Longer Living Better) Act 2013* (Cth) and associated legislation.

30 Department of Social Services, *Reform Overview* <http://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/reform-overview>.

31 Department of Social Services, *Get Involved* <http://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/get-involved>.

32 Caxton Legal Centre, Submission 67.

33 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 Australian Social Work 26; 'Caring for Older Australians', above n 28, rec 15.10; Office of the Public Advocate (Qld), *Submission 05*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Law Council of Australia, *Submission 83*.

noted that many people with impaired decision-making capacity live in facilities like nursing homes with only the informal consent of a family member or carer.[34] The Australian Guardianship and Administration Council (AGAC) submitted such 'informal decision making' or 'de facto arrangements' were initially approved as 'less restrictive alternatives' when compared to formal guardianship appointments but that informal decision-making lacks safeguards against abuse as required by art 12(5) of the CRPD.[35]

6.42 On the other hand, government agencies and service providers prefer the formality of legal arrangements for aged care decisions. AGAC's experience has been that Commonwealth agencies tend to assume that most people with disability have formally appointed guardians and when forms are designed on this basis, state and territory tribunals have been periodically 'inundated by applications for appointment of guardians or administrators' to meet the specific purposes of asset assessment[36] or an application under the Continence Aids Payment Scheme.[37]

6.43 The *Aged Care Act* is ambiguous about informal and formal substitute decision-making for people who may require decision-making support with respect to aged care. Section 96–5 of the Act provides for a person, other than an approved provider to represent an aged care recipient who, because of any 'physical incapacity or mental impairment' is unable to enter into agreements relating to residential care, home care, extra services, accommodation bonds and accommodation charges. Section 96–6 states that in making an application or giving information under the Act, a 'person authorised to act on the care recipient's behalf' can do so.

6.44 There seems to be a distinction between 'representation' for binding contracts and 'authorisation' for informal correspondence. However, there is inconsistency in the use of the 'representative' throughout the Commonwealth laws and legal frameworks for aged care recipients. The Act contains references to a 'legal representative' to imply a guardianship arrangement;[38] 'representative' to refer to an advocate;[39] and an undefined 'appropriate person'.[40]

6.45 Stakeholders emphasised the right to autonomy of aged care consumers, and the importance of supporting them in decision-making. The Centre for Rural and Regional Law and Justice, and the National Rural Law and Justice Alliance stressed the value of supported and co decision-making arrangements in aged care, which is particularly relevant in the regional and rural context.[41]

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34 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 15, 318.
35 Australian Guardianship and Administration Council, *Submission 51*.
36 As part of an application for residential aged care.
37 Australian Guardianship and Administration Council, *Submission 51*.
38 *Aged Care Act 1997* (Cth) s 52F–2.
39 Ibid s 81.1(1)(c)(ii).
40 Ibid s 44.8A.
41 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. The submission also drew attention to the difficulties in accessing in-home support and respite services, which can greatly exacerbate the 'disabling effects of ageing' and, thereby, create greater difficulties for the person in the exercise of legal capacity.

6.46 Stakeholders reflected on the need to balance duty of care and the dignity of risk in aged care decision-making. The Illawarra Forum recommended change to the legislation so that 'risk management strategies' do not result in older people with dementia being 'locked up' in aged care.[42]

6.47 The Mental Health Coordinating Council expressed concern about the chemical restraint of people with mental illness who are deemed to be 'challenging' in aged care facilities. The Council argued,

> Supported decision-making is extremely important for this group of particularly vulnerable people, who the system characteristically 'medicates' and 'manages'. It is critical that the mental health and age care services work closely together so that a vulnerable and isolated person does not fall between service gaps and that older people are appropriately cared for in mental health and age care facilities using principles of recovery and enablement.[43]

6.48 The Office of the Public Advocate (SA) suggested an amendment of the *User Rights Principles 1997* (Cth), made under the *Aged Care Act*, to minimise and eliminate the use of restrictive practices in aged care.[44] OPA (SA) recommended a clear definition of each restrictive practice, a requirement that non-coercive measures be considered and a distinct authority for restrictive practices to be used. Restrictive practices are discussed in more detail in Chapter 8.

## The Commonwealth model and aged care

**Proposal 6–2** The *Aged Care Act 1997* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

6.49 The ALRC proposes that the *Aged Care Act* be amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model.

6.50 While the ALRC does not intend to prescribe a comprehensive new decision-making scheme for aged care, some key ways in which the Commonwealth decision-making model might operate in this area are outlined below.

### *Objects*

6.51 Division 2 of the *Aged Care Act* lists the objects of the Act, in providing for the funding of aged care. These objects include such matters as encouraging aged care services that 'facilitate the independence of, and choice available to' recipients and to help recipients 'to enjoy the same rights as all other people in Australia'. The extensive set of objects does not, however, make any direct reference to decision-making.

6.52 The ALRC suggests s 2–1 of the Act could be amended to incorporate principles relating to decision-making and supported decision-making, or that a principles

42 The Illawarra Forum, *Submission 19*.
43 Mental Health Coordinating Council, *Submission 07*.
44 Office of the Public Advocate (SA), *Submission 17*.

provision could be inserted into the part of the Act which will contain provisions relating to supporters and representatives.

### *Supporters and representatives*

6.53 The definition of 'representative' in the *User Rights Principles* appears to conflate a decision-maker chosen by the care recipient, for example, a partner (a supporter) with a formally appointed decision-maker, such as a holder of an enduring power of attorney (representative).[45]

6.54 The proposed model will provide new approaches for the involvement and regulation of representatives in decisions by aged care consumers. Supported decision-making in the aged care context means that people who may require decision-making support can make as many of their own decisions as possible, with the assistance of a 'supporter', whether it is about where they live or what services they receive. For fully supported decision-making in aged care, the 'will, preferences and rights' standard would replace the existing 'best interests' test, in compliance with the CRPD.

6.55 The Commonwealth decision-making model would apply from the first trigger for decision-making by an aged care consumer. Under the framework, a potential aged care consumer of residential or home care services who has impaired decision-making ability would make decisions about assessment of his or her care needs by the Aged Care Assessment Team[46] with the assistance of a supporter or in consultation with a representative.

6.56 Often, the decision to undergo assessment of care needs is made under pressure when a crisis has arisen for the potential aged care consumer. There are likely to be benefits for both consumers and service providers, where the consumer has a supporter with whom to make a decision.

6.57 The next significant decision for the aged care consumer may be whether to enter a Resident agreement or Home care package agreement. These agreements are legally binding documents that outline the services to be provided, fees charged, and the rights and responsibilities of both parties.

6.58 It will be important for the Commonwealth decision-making model to augment existing state and territory systems with a clear, structured approach to decision-making that will mirror the rights and responsibilities of consumers and service providers of aged care.[47] Advocacy and safeguarding of rights are critical to preventing elder abuse. Under an effective, nationally coordinated model, the aged care consumer will receive assistance from supporters whose role and duties are specified. They will know that they are ultimately responsible for the decision made with the assistance of a supporter. Where a representative makes a decision for the aged care consumer, the

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45 *User Rights Principles 1997* (Cth) para 23.25.

46 The Aged Care Assessment Service (ACAS) in Victoria.

47 See, Australian Government Department of Social Security, *Charter of Residents Rights and Responsibilities*; Australian Government Department of Social Security, *Charter of Rights and Responsibilities for Home Care*.

decision will be based on the will and preferences of the person requiring support and the representative will be subject to safeguards in the system.

6.59 Where the rights and responsibilities of the aged care consumer are clearly set out under such a model, the service provider will be assured that a consumer who has a supporter, will have had the agreement explained to them in an appropriate manner and understand what is signed. If a representative signs an agreement, the service provider will know that the contract is in accordance with the wishes of the consumer and that it is legally binding.

6.60 A suite of accreditation standards and guidelines made under the *Aged Care Act* would need to be revised to specifically acknowledge and implement the supporter and representative model. For instance, the Resident Care Manual states that a representative may be a guardian or a person nominated by the care recipient as his or her representative.[48] Currently, the accredited provider must be satisfied that the nominated person has a connection with the resident, and is concerned for the 'safety, health and well-being' of the resident.[49] The inclusion of the supporter and representative scheme in the Act would apply the more specific and subjective standard of the 'will, preferences and rights' of the person to these aged care decisions.

6.61 The Home Care Packages Program Guidelines provide that shared decision-making between the consumer, an appointed representative and the home care provider should take place where the consumer has 'cognitive impairment'.[50] The Commonwealth decision-making model would give structured and consistent guidance so that an aged care consumer is presumed to have the ability to make decisions, is entitled to support in making those decisions; and, if a representative is appointed, to have a representative make decisions that accord with the will, preferences and rights of the consumer.

## eHealth records

6.62 The following section discusses the PCEHR Act, which contains provisions dealing with decision-making concerning the collection, use and disclosure of personally controlled electronic health records—referred to as 'eHealth records'.

6.63 An eHealth record is an electronic summary of a person's health records, which the individual and their healthcare providers can access online when needed. The eHealth record system was rolled out nationally in July 2012, allowing people seeking health care in Australia to register for an eHealth record. Healthcare Provider Organisations can also register to participate in the eHealth record system, and authorise their healthcare providers to access the eHealth record system.

6.64 As the system develops over time, having an eHealth record will give healthcare providers access to a summary of key health information, as long as the person gives initial consent when confirming access settings for the eHealth record. This will

48 Department of Social Services, 'The Residential Care Manual' (2014) 6.
49 Ibid.
50 Department of Health and Ageing, 'Home Care Packages Program Guidelines' (August 2013) 3.1.4.

include information such as medications, hospital discharge summaries, allergies and immunisations.[51]

## Individual decision-making and eHealth records

6.65 Under the legislative framework for eHealth, there are protections against the mishandling of information.[52] Individuals can control their own eHealth record by choosing to restrict which healthcare providers can access it and what information is included through exercising 'access controls'.[53] Unauthorised collection, use or disclosure of eHealth record information is both a contravention of the PECHR Act and an interference with privacy under the *Privacy Act 1988* (Cth).[54]

6.66 The PCEHR Act contains detailed schemes for 'nominated representatives' and 'authorised representatives'. In the terminology used by the ALRC, the former are analogous to 'supporters' and the latter to 'representatives'.

### *'Nominated representatives'*

6.67 The nominated representative provisions are intended to support the involvement of people other than healthcare professionals in assisting consumers in managing their healthcare. Nominated representatives may be family members, carers, neighbours or any other person nominated by a consumer.[55]

6.68 For a person to be a nominated representative, there must be an agreement between the consumer and the proposed nominated representative. This agreement does not have to be in writing. The consumer must also notify the System Operator that the other person is her or his nominated representative.[56]

6.69 Consumers remain able to access and control their eHealth record themselves, and access by a nominated representative is subject to any access controls set by the consumer.

6.70 For example, in some cases a nominated representative may have 'read-only' access to a consumer's eHealth record. In other cases, a consumer may allow a nominated representative to do anything the consumer can do, including setting access controls, and granting access to healthcare provider organisations.

> This flexibility in setting access controls is designed to take into account the many circumstances where a person may not be able to, or may not wish to, manage their own [eHealth record] but where they do not have a formal legally recognised representative to act on their behalf.[57]

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51 See Department of Health, *EHealth–General Individuals FAQs* <http://www.ehealth.gov.au/internet/ehealth/publishing.nsf/Content/faqs-individuals-gen>.

52 *Personally Controlled Electronic Health Records Act 2012* (Cth) pt 4.

53 See, eg, Ibid s 61.

54 Ibid s 73.

55 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.

56 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7.

57 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.

6.71 A nominated representative must always act in the 'best interests' of the consumer, subject to the consumer's directions.[58]

***'Authorised representatives'***

6.72 People who may have impaired decision-making ability are able to have an eHealth record. To facilitate this, an authorised representative is able to register a consumer for an eHealth record and manage the access controls on behalf of the consumer.

6.73 A person may be an authorised representative of a person over 18 years old if the System Operator is satisfied that a consumer is not capable of making decisions for themselves, and that another person is authorised by an Australian law, or by a decision of an Australian court or tribunal, to act on behalf of the consumer.[59]

6.74 If there is no such person, the System Operator may appoint someone else if satisfied that person an appropriate person to be the authorised representative.[60] This provision is said to allow the System Operator, in making appointments, to 'take into account a range of other circumstances for people without capacity, or with only limited capacity'.[61]

6.75 For the purposes of the PCEHR Act and the eHealth system, an authorised representative is treated as if she or he were the consumer. That is, the authorised representative can do anything authorised or required of the consumer, and anything done by an authorised representative in relation to the system is taken as if it were done by the consumer.[62]

6.76 An authorised representative must always act in the best interests of the consumer, having regard to any directions from the consumer expressed when they had capacity to act on their own behalf.[63] A consumer may have more than one authorised representative.[64]

## The Commonwealth model and eHealth records

**Proposal 6–3** The *Personally Controlled Electronic Health Records Act 2012* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

6.77 The existing scheme for authorised and nominated representatives contained in the PCEHR Act is detailed and tailored to the operation of the voluntary national system for the provision of access to electronic health information.

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58 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7(6).
59 Ibid s 7(4).
60 Ibid s 6(4)(b).
61 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.
62 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 6(7).
63 Ibid s 6(9).
64 Ibid s 6(8).

6.78 The scheme is designed, among other things, to ensure that people who have impaired decision-making ability are able to have an eHealth record; and to enable people to share their health information with those who need it. For example, an older person may want their son or daughter to be able to view key health information, such as currently prescribed medications and test results, in order to provide care and assistance to them.

6.79 The ALRC does not intend to prescribe a comprehensive new decision-making scheme for the PCEHR Act. Individual decision-making under the PCEHR Act is relatively limited—being confined to decisions about the collection, use and disclosure of health information—as compared to, for example, decision-making under the *Aged Care Act*, which often involves significant decisions about the provision of residential and home care services and the entering of contractual arrangements.

6.80 However, the existing PCEHR Act provisions concerning nominated and authorised representatives should be reviewed and amended in the light of the decision-making principles and the Commonwealth decision-making model.

6.81 Broadly, nominated representatives under the PCEHR Act are analogous to 'supporters' in the Commonwealth decision-making model. They are nominated by the person concerned, and are subject to directions by the consumer, who may also continue to make decisions under the PCEHR Act.

6.82 Apart from adopting consistent terminology, possible changes to these nominated representatives provisions might include providing that, in making decisions, supporters have obligations to:

- consider the will, preferences and rights of the person represented (rather than the current best interests test);
- consult with existing appointees, family members, carers and other significant people;
- perform the role diligently and in good faith.

6.83 Authorised representatives provide substitute decision-making concerning eHealth records and, therefore, perform a role analogous to that of 'representatives' in the proposed Commonwealth supporter and nominee model. Changes to these PCEHR Act provisions may include incorporating the 'will, preferences and rights' approach to decision making; the proposed guidelines for determining decision-making ability; and the proposed factors for determining whether a person or organisation is suitable for appointment.

6.84 The NSW Council for Intellectual Disability (NSWCID) observed that

> so far as possible, people with intellectual disability should be supported to make their own decisions in relation to the creation of and access to their e-health record. Where

> maximum support proves inadequate, there needs to be a system of authorised representatives.[65]

6.85 The Council cautioned that if it were 'unduly time-consuming or complex to create an authorised representative for an individual, the strong likelihood would be that families and doctors would be deterred from taking this course and the person with disability would be denied the considerable advantages to their health of having an e-health record'.[66]

6.86 There may be arguments that no change to existing provisions of the PCEHR Act is necessary because the system already strikes a balance between safeguards for the privacy and related rights of the person and allows representatives to be appointed without undue administrative complexity.

6.87 In the ALRC's view, it is important to encourage the implementation of supported decision-making in this area of Commonwealth responsibility. There is, however, no intention to create unnecessary formality. Decisions under the PCEHR Act involve only the handling of personal information. Therefore, there may be a case for supporter and representative provisions that are more minimal than those proposed in the Commonwealth decision-making model.

## Information privacy

6.88 The *Privacy Act* is Australia's key information privacy law. The Act is concerned with the protection of personal information held by certain entities, rather than with privacy more generally. Personal information is defined in s 6(1) of the Act as information or opinion about an identified individual, or an individual who is reasonably identifiable, whether or not true and whether or not in material form.

6.89 The *Privacy Act* provides 13 'Australian Privacy Principles' (APPs) that set out the broad requirements on collection, use, disclosure and other handling of personal information.[67] The APPs bind only 'APP entities'—primarily Australian Government agencies and large private sector organisations with a turnover of more than $3 million. Certain small businesses are also bound, such as those that provide health services and those that disclose personal information to anyone else for a benefit, service or advantage.[68] Generally, individuals are not bound by the *Privacy Act*.[69]

6.90 Privacy of health information may be a special concern for people with disability. Health and genetic information is 'sensitive information' that is subject to

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65 NSW Council for Intellectual Disability, *Submission 33*.

66 Ibid.

67 *Privacy Act 1988* (Cth) sch 1.

68 'APP entity' is defined in Ibid s 6(1). Small businesses are not, in general, APP entities, with some exceptions as set out in s 6D.

69 There are some exceptions. For example, an individual who is a reporting entity under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), will be treated as an APP entity under the *Privacy Act 1988* (Cth).

stronger protection under the APPs.[70] Separate Commonwealth legislation protects healthcare identifiers[71] and eHealth records.[72]

6.91 The major issue for stakeholders was to ensure that personal information is able to be shared appropriately in order to support people with disability. National Disability Services, for example, stated:

> The key challenge is often to transfer sufficient personal information (such as medication requirements or worker safety issues) that will enable the provision of high quality, tailored and safe support, while also protecting the right to privacy.[73]

6.92 There is a public interest in families and friends being involved in the care and treatment of people with a mental illness, for example, and this clearly involves the sharing of information.[74] The NSWCID observed that, for a person with an intellectual disability, there may be 'numerous times in a month when an agency needs to obtain information about the person from a range of sources and provide information to a range of agencies or individuals'.[75] The ACT Disability, Aged and Carer Advocacy Service noted:

> If [supported decision-making] frameworks are to reduce or replace the use of guardianship, consideration needs to be given to how relevant information can be shared with decision supporters while balancing the right of people with disability to privacy.[76]

## Individual decision-making and the *Privacy Act*

6.93 The *Privacy Act* makes no express provision for supporters or representatives to be recognised as acting on behalf of an individual in relation to decisions about the handling of personal information held by APP entities.

6.94 Some state privacy legislation does provide for representatives. The *Health Records and Information Privacy Act 2002* (NSW), for example, provides for the position of an 'authorised representative' to act on behalf of an individual who is 'incapable of doing an act authorised, permitted or required' by the Act.[77]

6.95 An authorised representative may not do an act on behalf of an individual who is capable of doing that act, unless the individual expressly authorises the authorised representative to do that act.[78]

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70 *Privacy Act 1988* (Cth) s 6(1).
71 *Healthcare Identifiers Act 2010* (Cth).
72 *Personally Controlled Electronic Health Records Act 2012* (Cth).
73 National Disability Services, *Submission 49*.
74 Public Interest Advocacy Centre, *Submission 41*.
75 NSW Council for Intellectual Disability, *Submission 33*.
76 ADACAS, *Submission 29*.
77 *Health Records and Information Privacy Act 2002* (NSW) s 7. An individual is defined as incapable 'if the individual is incapable (despite the provision of reasonable assistance by another person) by reason of age, injury, illness, physical or mental impairment of: (a) understanding the general nature and effect of the act, or (b) communicating the individual's intentions with respect to the act'.
78 Ibid s 8(3).

6.96 An 'authorised representative' for these purposes means a person appointed under an enduring power of attorney, a guardian, a person having parental responsibility (if the individual is a child), or person who is 'otherwise empowered under law to exercise any functions as an agent of or in the best interests of the individual'.[79] Essentially, therefore, the *Health Records and Information Privacy Act 2002* provides recognition for representatives, but not for supporters, as those terms are used in this Discussion Paper.

6.97 The ALRC has considered previously whether the *Privacy Act* should include provision for representatives. In its 2008 report, *For Your Information: Australian Privacy Law and Practice*, the ALRC recommended that the *Privacy Act* should be amended to include the concept of a 'nominee'. An agency or organisation would be able to establish nominee arrangements and then 'deal with an individual's nominee as if the nominee were the individual'.[80] The ALRC recommended that nominee arrangements should include, at a minimum, the following elements:

> (a) a nomination can be made by an individual or a substitute decision maker authorised by a federal, state or territory law;
>
> (b) the nominee can be an individual or an entity;
>
> (c) the nominee has a duty to act at all times in the best interests of the individual; and
>
> (d) the nomination can be revoked by the individual, the nominee or the agency or organisation.[81]

6.98 The ALRC concluded that establishing nominee arrangements would 'provide flexibility for individuals to decide who can act as their "agent" for the purposes of the *Privacy Act*, and also operate as a useful mechanism in situations where an individual has limited, intermittent or declining capacity'.[82]

6.99 The rationale for the original ALRC recommendations was to address problems faced by individuals and their representatives in gaining access to benefits and services due to perceived or real conflicts with the *Privacy Act*. That is, organisations refusing to provide information or deal with supporters 'because of the *Privacy Act*'. Similar concerns were expressed in this Inquiry.[83]

6.100 The ALRC's 2008 recommendations would have provided recognition for both supporters and representatives.

6.101 The ALRC envisaged that a nominee could be either nominated by the individual or a substitute decision-maker appointed under some other law. While it would not be necessary for an authorised substitute decision-maker to be registered as a nominee for the agency or organisation to recognise that person, the nominee

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79 Ibid s 8.
80 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 70–1.
81 Ibid Rec 70–2.
82 Ibid [70.96].
83 See, eg, NSW Council for Intellectual Disability, *Submission 33*; ADACAS, *Submission 29*.

arrangements were seen as a convenient way for the decision-maker to be recognised for ongoing dealings with the agency or organisation.[84]

## The Commonwealth model and the *Privacy Act*

**Proposal 6–4** The *Privacy Act 1988* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

6.102 Successive Australian Governments have not responded to the ALRC's recommendations concerning decision-making arrangements under the *Privacy Act*.[85] There seems good reason to revisit this issue in the context of the present Inquiry.

6.103 The *Privacy Act* does not prevent a supporter from providing assistance to the individual where this is done with the consent of the individual. Where the assistance requires the supporter to have access to the personal information of the individual, the individual can provide consent for the agency or organisation to disclose the information to the supporter. Sometimes it should be quite clear, for example, that a requested disclosure of personal information would be covered by APP 6.[86]

6.104 There are concerns, however, that such arrangements are not implemented consistently, or recognised by agencies and organisations.[87] The NSWCID submitted:

> So far as possible, people with intellectual disability should be given the support that they need to make their own privacy decisions. If this is not adequate, there needs to be a legislative system of substitute consent and/or administrative safeguards that provides reasonable safeguards on the privacy of the individual whilst also recognising that other rights of the individual may be imperilled if personal information cannot be gathered and promptly used as occasions arise.[88]

6.105 If the privacy rules covering this sort of information exchange are 'cumbersome or complex', then optimal support of people with intellectual disabilities will not occur.[89] Other stakeholders referred to the desirability of uniform Commonwealth, state and territory privacy regulation.[90]

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84 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [70.101].

85 Many other recommendations made in the 2008 privacy report were implemented following the enactment of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

86 That is, the disclosure is for the purpose the information was collected, or the individual has consented to the disclosure of the information: *Privacy Act 1988* (Cth) sch 1, cl 6.

87 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [70.104].

88 NSW Council for Intellectual Disability, *Submission 33*.

89 The NSWCID referred to the *Health Records and Information Privacy Act 2002* (NSW) as a good model for dealing with 'incapacity issues': Ibid.

90 See, eg, Mental Health Coordinating Council, *Submission 07*. The ALRC has previously recommended an intergovernmental cooperative scheme that provides that the states and territories should enact legislation regulating the handling of personal information in the state and territory public sectors that is consistent with the *Privacy Act*: ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Recs 3–4, 3–5.

6.106 The advantages of recognising supporters in Commonwealth laws are discussed in Chapter 4. In particular, formalisation of support is likely to create greater certainty for third parties about the role of supporters, and facilitate the provision of support to people who need it. In the context of information privacy, this is likely to allow third parties to interact with supporters with greater confidence, allowing for timely collection, use and disclosure of information.

6.107 There is a downside to this approach, in that legislative arrangements may work against flexible practices by encouraging the perception that a supporter must be formally appointed in order to be recognised. However, more informal arrangements may not be implemented consistently or recognised by APP entities. Some form of legislative underpinning may be more effective in establishing recognition of supporters.

6.108 In the ALRC's view, the *Privacy Act* should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model. The new provisions would apply potentially to an individual's relationships with the full range of APP entities—Commonwealth government agencies and private sector organisations.

6.109 The *Privacy Act* should permit APP entities to establish a supporters and representatives scheme, but this should not be mandatory. APP entities need to retain the flexibility to develop practices and procedures consistent with their broader operations. Agencies and organisations also may be subject to other obligations—such as the bankers' duty of confidentiality or particular legislative provisions—which place limits on decision-making by supporters. Each agency and organisation must consider the extent to which it is able to recognise and act upon decisions made by a supporter.

6.110 Incorporating the Commonwealth decision-making model within the *Privacy Act* may facilitate assistance for people in making and communicating decisions concerning control of their personal information by recognising supporters, including family and carers, as being able to act on their behalf. At the least, supporters should be recognised and be made subject to a duty to support an individual's will and preferences in relation to the handling of their personal information.

6.111 However, some circumstances will require a more rigorous process for appointment and verification than others, due to the potential consequences of the disclosure of personal information or the transaction involved. For example, a bank or other financial institution might establish an arrangement that has effect for the purposes of disclosing account balances and banking transactions, but does not extend to a supporter withdrawing funds from an account on behalf of the individual, without putting further integrity measures in place.

## Banking services

6.112 Banking is another area of Commonwealth legislative responsibility,[91] in relation to which the application of the decision-making model might be considered.

6.113 Article 12(5) of the CRPD requires States Parties to take all appropriate and effective measures to ensure the equal right of persons with disabilities to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit.[92]

6.114 In practice, a tension emerges between these rights and the need to protect people from financial abuse and exploitation in conducting their banking and financial activities. There is also a need to ensure the legal validity of financial transactions.

6.115 An issue in relation to banking is the refusal of some banks to allow people with disability to access or operate a bank account independently, and hesitancy in recognising informal supporters. Such refusals may reflect bank concerns about capacity or financial exploitation.[93] In this context, the Australian Bankers' Association (ABA) has commented that

> Financial exploitation of a vulnerable person is a deeply challenging area for banks. Every customer's situation is unique and banks have an obligation to protect their customers' privacy, maintain the bank's duty of confidentiality, and to not unnecessarily intrude into their customers' lives.[94]

6.116 The ABA issues non-binding industry guidelines that are relevant to the ability of people with disability to engage with the banking industry and to make decisions in that context.[95] In particular, the ABA has issued guidelines on responding to requests from a power of attorney or court-appointed administrator (the ABA guidelines).

6.117 The ABA guidelines explain how powers of attorney and court-appointed administrator arrangements apply to banks' relationships with their customers; and outline a framework that banks can use to consistently deal with requests from attorneys and administrators.[96]

6.118 The ABA guidelines note that it 'is not the role of bank staff (or a bank) to determine a customer's capacity'.[97] They outline the roles of administrators and

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91 See, eg, *Banking Act 1959* (Cth); *Australian Prudential Regulation Authority Act 1998* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth).

92 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(5).

93 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 190.

94 Australian Bankers' Association, *Financial Abuse Prevention* (12 November 2013) <http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>.

95 ABA industry guidelines provide assistance to banks in recognising financial abuse, advocate raising awareness among bank employees about this risk, and outline strategies for dealing with a situation of potential financial abuse: Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013.

96 Australian Bankers' Association Industry Guideline, *Responding to Requests from a Power of Attorney or Court-Appointed Administrator*, June 2013, 1.

97 Ibid 2.

guardians, how to recognise their authority, and highlight differences in the role, authority and responsibilities of guardians and administrators between jurisdictions.[98]

## Encouraging supported decision making

**Proposal 6–5** The Australian Bankers' Association should encourage banks to recognise supported decision-making. To this end, the ABA should issue guidelines, reflecting the National Decision-Making Principles and recognising that:

(a) customers should be presumed to have the ability to make decisions about access to banking services;

(b) customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;

(c) customers are entitled to support in making and communicating decisions; and

(d) banks should recognise supporters and respond to their requests, where possible and consistent with other legal duties.

6.119 There may be some reluctance on the part of banks to allow people who need decision-making support to access banking services independently and to recognise the role of supporters. Banks may tend to recognise only formal, substitute decision-making appointments. The ABA guidelines state, for example:

> Banks have a contractual obligation to act in accordance with the customer's mandate. If a customer has set up a power of attorney, or a court has appointed an administrator to represent a customer's interests, then these authorities are considered to be in line with the customer's mandate. It is important to recognise and respond to requests from these authorities as if they were made from the customer themselves.[99]

6.120 In the ALRC's view, people who need decision-making assistance should not necessarily have to access banking services only through an administrator or the holder of a power of attorney.

6.121 Submissions referred to difficulties faced by people with disability in obtaining access to banking services, including because supporters are not recognised. Pave the Way, for example, stated that banks often refuse to allow people with disability to have their own bank account:

> This is a problem that is regularly experienced by families who are trying to open an ordinary bank account for their family member who has a disability. We are aware of numerous examples of banks being willing to open an account for a child without disability but refusing to open an account for a child with disability. Similarly banks

98 Ibid 4–5, 7.
99 Ibid 6.

> regularly refuse to open accounts for adults with disability. While it appears that there is no actual legal impediment to banks offering this service, some banks express concern about capacity and others cite an obligation to protect vulnerable people. When facing this problem some families decide to seek an administration order.[100]

6.122 The Equal Opportunity Commission of South Australia referred to a decision of the Equality Opportunity Tribunal (SA), which found that a finance company had discriminated against a loan applicant on the basis of disability. The Commission stated that the decision is 'a reminder of the risk that service providers may take in making assumptions about a person based on a disability, without adequately assessing a person's capacity'.[101]

6.123 The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance submitted that recognition of supported decision-making arrangements could better enable people with disabilities to 'exercise equal legal capacity in their use of financial services'. While the reluctance of banks to recognise informal arrangements was said to be understandable, provision for supported decision-making could help provide certainty for banks, while still ensuring that 'support for people with disabilities in the exercise of legal capacity is tailored to their needs, as required by Article 12 of the [CRPD]'.[102]

6.124 Banking may not be an area in which the full Commonwealth decision-making model can easily be applied. It may not be practical, for example, to impose any legislative requirement on banks to set up their own systems for recognising supporters and responding to requests from these supporters.

6.125 The nomination of a supporter does not involve the limitations and protective formalities of, for example, a power of attorney.[103] As discussed in Chapter 2, the 'paradigm shift' towards encouraging supported, rather than substitute, decision-making, is a relatively new development. Fully recognising supported decision-making arrangements would constitute a break with existing banking practices, which are based on contract and agency law, with potentially unforeseen legal consequences.

6.126 Nevertheless, here may be room to encourage a more flexible approach on the part of banks, without being prescriptive, and recognising that banks bear risks in relation to voidable transactions.

6.127 The ALRC proposes that the ABA provide additional guidance on how banks may meet the needs of people who require decision-making support to access banking services. This would be consistent with the ABA's *Code of Banking Practice*, which states that banks 'recognise the needs of older persons and customers with a disability

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100 Pave the Way, *Submission 09*.

101 Equal Opportunity Commission of South Australia, *Submission 28*. (Referring to *Jackson v Homestart Finance* [2013] SAEOT 13).

102 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

103 Eg, in relation to an appointment by written instrument, independent witnesses and so on.

to have access to transaction services, so we will take reasonable measures to enhance their access to those services'.[104]

6.128 The new guidance should reflect the National Decision-Making Principles, including the Representative Decision-Making Guidelines.[105] In particular, banks should be encouraged to recognise that customers:

- should be presumed to have the ability to make decisions about access to banking services;
- may remain capable of making and communicating decisions concerning banking services, where they have access to necessary support; and
- are entitled to support in making and communicating decisions and banks should, where possible and consistent with other duties, recognise supporters and respond to their requests.

104 Australian Bankers' Association, *Code of Banking Practice* (2013) [7].
105 See ch 3.

# 7. Access to Justice

## Contents



## Summary


7.1 This chapter discusses issues concerning decision-making ability that have implications for access to justice. People with disability may be involved in court processes in a number of different roles, including as parties and witnesses in criminal and civil proceedings. The issues discussed include those affecting people with disability as:

- defendants in criminal proceedings—the concept of unfitness to stand trial;
- parties to civil proceedings—the appointment and role of litigation guardians;
- witnesses in criminal or civil proceedings—in giving evidence as a witness; and
- potential jurors—qualification for jury service.

7.2 In each of these areas there are existing tests of a person's capacity to exercise legal rights or to participate in legal processes that the ALRC proposes should be reformed consistently with the National Decision-Making Principles, based on art 12 of the CRPD and other sources.[1]

## Access to justice issues

7.3 The Issues Paper observed that a range of personal and systemic issues may affect the ability of people with disability to participate fully in court processes. These include:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;
- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and
- misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses.[2]

7.4 Article 13 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) stipulates that States Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including by:

- providing procedural and age-appropriate accommodations to facilitate their role as direct and indirect participants, including as witnesses, in all legal proceedings; and
- promoting appropriate training for those working in the field of administration of justice, including police and prison staff.

7.5 In its 2014 report, *Equal Before the Law: Towards Disability Justice Strategies*,[3] the Australian Human Rights Commission (AHRC) identified the barriers people with disabilities face in achieving equality before the law. It recommended that each jurisdiction in Australia, in addressing these barriers, should develop a Disability Justice Strategy, incorporating the following core set of principles and actions:

> - Appropriate communications—Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.

1 See Ch 3.

2 IP 44 (2013), citing Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice', (2009) *Justice Issues*, Law and Justice Foundation, Paper No 10.

3 Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies' (2014).

- Early intervention and diversion—Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.
- Increased service capacity—Increased service capacity and support should be appropriately resourced.
- Effective training—Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.
- Enhanced accountability and monitoring—People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.
- Better policies and frameworks—Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.[4]

7.6 The access to justice issues addressed in the context of this ALRC Inquiry are narrower in scope. The focus of the Inquiry is on laws and legal frameworks affecting people who may need decision-making support.

7.7 In this chapter, the ALRC examines how a range of Commonwealth laws and legal frameworks affecting people involved in court proceedings might be reformed to reflect the National Decision-Making Principles.[5] By providing models in Commonwealth laws, the ALRC also seeks to inform and provide a catalyst for reform of state and territory laws.

7.8 One theme is the tension between laws that are intended to operate in a 'protective' manner—including in order to ensure, for example, a fair trial—and increasing demands for equal participation, in legal processes, of people who may require decision-making support.

## Unfitness to stand trial

7.9 At common law, a person who is considered 'unfit' to stand trial cannot be tried. The justification for this rule has been stated in various ways, including as being to:

- avoid inaccurate verdicts—forcing the defendant to be answerable for his or her actions when he or she is incapable of doing so could lead to an inaccurate verdict;

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4 Ibid 7.

5 Administrative tribunals are another important element of the federal civil justice system. However, the issues discussed in this chapter do not arise in the same way in tribunal proceedings, which involve merits review of government decisions, and are generally less formal and adversarial than in the courts. There is no equivalent, for example, of rules about the competency of witnesses: see Matthew Groves, 'Do Administrative Tribunals Have to Be Satisfied of the Competence of Parties Before Them?' (2013) 20 *Psychiatry, Psychology and Law* 133.

- maintain the 'moral dignity' of the trial process—requiring that a defendant is fit to stand trial recognises the importance of maintaining the moral dignity of the trial process, ensuring that the defendant is able to form a link between the alleged crime and the trial or punishment and be accountable for his or her actions; and
- avoid unfairness—it would be unfair or inhumane to subject someone to the trial process who is unfit.[6]

7.10 In addition to avoiding incorrect verdicts, the UK Law Commission expressed the rationale for the unfitness to stand trial rules as being that it would be 'an abuse of the process of the law to subject someone to a trial when he or she is unable to play any real part in that trial'.[7]

7.11 At common law, there is a 'presumption' of fitness to stand trial. That is, if the defence raises the issue, the onus is on the defence to prove, on the balance of probabilities, that the defendant is unfit to stand trial.[8] If the issue is raised by the prosecution, and contested, then the issue must be proved beyond reasonable doubt.[9] In addition, some Australian jurisdictions have enacted express statutory presumptions of fitness.[10]

## The test of unfitness

7.12 The presumption of fitness means that it is more correct to refer to a test of 'unfitness' to stand trial.[11] The test may arise as an issue before or during the trial. When the defendant is present for trial, it may appear that he or she is unfit to plead. Alternatively, he or she may enter a plea and thereafter, it may appear that he or she is unfit to be tried. All Australian jurisdictions have enacted legislation dealing with fitness to stand trial.[12]

7.13 At common law, the test of unfitness to stand trial is, simply stated, whether an accused has sufficient mental or intellectual capacity to understand the proceedings and

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6 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 52. See also Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 3–5.

7 'This goes further than merely requiring that a person understands the trial process; it is concerned with whether or not he or she can meaningfully engage in the trial': Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 4.

8 *R v Podola* [1960] 1 QB 325. Queensland Advocacy observed that the diversion scheme under ch 7, pt 2 of the *Mental Health Act 2000* (Qld) 'presumes incapacity' in relation to people on existing Forensic Orders or Intensive Treatment Orders and 'therefore (some would argue positively) discriminates against people with mental illness and intellectual disability': Queensland Advocacy Incorporated, *Submission 45*.

9 *R v Robertson* (1968) 3 All ER 557.

10 Eg, *Crimes (Mental Impairment and Unfitness to Be Tried Act) 1997* (Vic) s 7(1); *Criminal Law Consolidation Act 1935* (SA) s 269I; *Crimes Act 1900* (ACT) s 312. The Commonwealth has not enacted such a statutory presumption: *Crimes Act 1914* (Cth) s 20B.

11 See, eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 53.

12 See, Thomson Reuters, *The Laws of Australia* [9.3.1960].

to make an adequate defence.[13] The Victorian Supreme Court in *R v Presser* set out six factors relevant to the test:

- an understanding of the nature of the charges;
- an understanding of the nature of the court proceedings;
- the ability to challenge jurors;
- the ability to understand the evidence;
- the ability to decide what defence to offer; and
- the ability to explain his or her version of the facts to counsel and the court.[14]

7.14 The common law test of unfitness to stand trial has been criticised in a number of recent inquiries in Australia and overseas. In particular, the common law may place an undue emphasis on a person's intellectual ability to understand specific aspects of the legal proceedings and trial process,[15] and too little emphasis on a person's decision-making ability. The rules on unfitness to stand trial are characterised as 'protective'[16]—ensuring that a person cannot be tried for a crime unless capable of defending themselves.

7.15 However, in practice, the rules can lead to adverse outcomes for the individuals concerned, who may be subject to detention, for an uncertain period, in prison or in secure hospital facilities—although most jurisdictions have legislated to divert such people away from the criminal justice system.[17] The risk is that incentives exist for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness.

7.16 The Anti-Discrimination Commissioner (Tasmania) observed that as a result of being determined unfit to stand trial, a person may 'end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts'. They 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed'.[18]

> Once a person is issued with a forensic order that follows a finding of being unfit to plead it is extremely difficult to be discharged from the order. This is due in

13 In *R v Pritchard*, the test was stated as being whether the defendant is 'of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any of [the jury] to whom he may object—and to comprehend the details of the evidence ...': *R v Pritchard* (1836) 173 ER 135, [304].

14 *R v Presser* (1958) 45 VR.

15 But is not comprehensive in this regard—eg, there is no reference in common law tests to the defendant's ability to give their own evidence: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 29.

16 Thomson Reuters, *The Laws of Australia* [9.3.1950].

17 See, Ibid [9.3.2010]–[9.3.2030].

18 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.

> part to a medical approach to disability and a view that if you have an illness for life, you will have an order for life.[19]

7.17 In some cases, the defendant's interests may not be served in being found unfit to stand trial if the outcome is that he or she is put on a supervision order, particularly for less serious offences. Such defendants may later be unable to have their supervision orders revoked because they continue to breach the conditions of the order or commit offences. Further, they remain at risk of the order being varied from non-custodial to custodial if they continue to pose a danger to the community.[20]

> A person who is able to understand the process involved in a plea of guilty will often be better off being dealt with by a criminal sanction, rather than being placed on an indefinite supervision order.[21]

7.18 The key criticisms raised in recent inquiries into this issue have included that:

- the test, by focusing on intellectual ability, generally sets too high a threshold for unfitness and is inconsistent with the modern trial process;[22]
- the test is difficult to apply to defendants with mental illness because the criteria were not designed for them;[23]
- a defendant may not be unfit to stand trial even where the court takes the view that he or she is not incapable of making decisions in his or her own interests.[24]

7.19 Stakeholders raised concerns about the test of unfitness to stand trial. Brain Injury Australia observed that, in practice, the threshold for standing trial is low and 'practitioners regularly take instructions from clients with mild mental illness or intellectual disabilities'. On the other hand, people with an acquired brain injury may fail to meet the test:

> This could be due to some typical effects of [acquired brain injury], including: difficulty processing information; inability to understand abstract concepts; impaired decision-making ability; memory loss or impairment (which may impede not only the defendant's ability to recall the events the subject of the charge, but also their ability to follow the trial); deficits in spoken or received language; problems learning new information; and dependence (the failure to assume responsibility for one's actions).[25]

7.20 The Victorian Law Reform Commission (VLRC) is conducting a review of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) (CMI Act).[26]

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19 Ibid.

20 Office of Public Prosecutions Victoria, *Submission to Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990* (Vic).

21 Ibid. For such people, a higher threshold of unfitness to stand trial may therefore be advantageous.

22 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 27.

23 Rather, it was developed through experience with defendants who were deaf and mute and, by extension, defendants with an intellectual disability: Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

24 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 28.

25 Brain Injury Australia, *Submission 02*.

26 The VLRC is due to report in June 2014.

This review includes consideration of the *Presser* test, which is incorporated in the CMI Act.[27] In relation to the criticisms highlighted above, the VLRC observed:

> An accused person with a mental illness, for example, may have no trouble having a factual or an intellectual understanding of their right to challenge a juror, but their delusional beliefs may hinder them from making decisions to exercise that right (or having a 'decision-making capacity'). On the other hand, an accused person with a cognitive impairment or intellectual disability may have more trouble than an accused person with a mental illness to understand this right. This raises the question of whether the current criteria are suitable for people with a mental illness and whether the threshold for unfitness to stand trial is currently set at the right level for these people.[28]

7.21 In its Consultation Paper, the VLRC asked, among other things, whether the test for unfitness to stand trial should include a consideration of a defendant's decision-making capacity, effective participation in the trial, or capacity to be rational.[29]

7.22 Similar questions were examined by the Law Commission of England and Wales (Law Commission) in its 2010 Consultation Paper, *Unfitness to Plead*.[30] The Law Commission made provisional proposals for reform of the test of unfitness. These proposals would replace the current test with a new legal test which assesses whether the defendant 'has decision-making capacity for trial' and takes into account 'all the requirements for meaningful participation in the criminal proceedings'.[31]

> The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings.[32]

7.23 In determining the defendant's decision-making capacity, the court would be required to take account of the 'complexity of the particular proceedings and gravity of the outcome' and, in particular, how important any disability is likely to be in the context of the decisions the defendant must make in the proceedings.[33]

7.24 The Law Commission proposed that a defendant should be found unfit to stand trial if he or she is unable:

> (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial,
>
> (2) to retain that information,

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27 *Crimes (Mental Impairment and Unfitness to Be Tried Act) 1997* (Vic) s 6.

28 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

29 Ibid Questions 1–7.

30 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010). A final report on this topic is expected towards the end of 2014.

31 Ibid Proposal 1.

32 Ibid Proposal 3.

33 Ibid Proposal 4.

(3) to use or weigh that information as part of decision making process, or

(4) to communicate his or her decisions.[34]

7.25 The formulation of this test was based on provisions of the *Mental Capacity Act 2005* (UK), which defines capacity for the purposes of decisions about a person's personal welfare, property and financial affairs and the appointment of substitute decision-makers.[35]

7.26 The Law Commission anticipated that if a person meets its proposed test, the person would also satisfy the requirements of the existing test,[36] because the common law criteria set a higher threshold for unfitness to stand trial than a test based on decision-making ability.[37]

7.27 In contrast, the New South Wales Law Reform Commission (NSWLRC) has recommended that the common law criteria for unfitness to stand trial, represented by the *Presser* standards, should not be fundamentally changed. In response to stakeholder concerns, the NSWLRC recommended that the standards simply be updated and incorporated into statute,[38] as in most Australian jurisdictions.[39]

7.28 However, as part of this reform, the NSWLRC recommended that the test for unfitness to stand trial should expressly refer to a person's ability to use information as part of a 'rational' decision-making process.[40]

7.29 While the criminal justice system rightly places weight on 'the right of defendants to make their own decisions (even if those decisions might appear misguided to an impartial observer)', the NSWLRC said that defendants cannot be said to be effectively participating in a trial if they are unable to make rational decisions, for example 'because they cannot distinguish between delusion and reality'.[41]

7.30 The NSWLRC also recommended that the test for unfitness to stand trial should include reference to the 'overarching principle' that the defendant must be able to have a fair trial. This was said to be the 'touchstone' for assessing whether or not the defendant's degree of incapacity is sufficient to do those things required by the test.[42]

7.31 This approach could be a significant step away from the common law because the defendant would not necessarily be required to be meet all the criteria in the test:

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34 Ibid 54.
35 *Mental Capacity Act 2005* (UK) s 3.
36 Based on the criteria in *R v Pritchard* (1836) 173 ER 135.
37 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 62.
38 In the *Mental Health (Forensic Provisions) Act 1990* (NSW).
39 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) xv–xvi.
40 In the UK, the Law Commission considered, but rejected, the idea that it should be required that any decision made by the defendant be rational: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Proposal 2.
41 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) 31.
42 Ibid xvi.

> If the defendant was unable, for example, to give evidence effectively, he or she might still be fit for trial if it is possible for a fair trial to be held. Conversely, the list of considerations need not be comprehensive. If the court considers that the defendant lacks an essential capacity that is not listed in the statutory considerations, and cannot be afforded a fair trial, then the defendant can be found unfit.[43]

## Assistance and support

7.32 Existing tests of unfitness to stand trial do not consider the possible role of assistance and support for defendants. Law reform bodies have, however, considered the role of such assistance and support, and the possible implications for assessments of whether a person is unfit to stand trial.

7.33 The Law Commission proposed that decision-making capacity should be assessed with a view to ascertaining whether a defendant could stand trial 'with the assistance of special measures and where any other reasonable adjustments have been made'.[44] It explained:

> The inclusion of the consideration of special measures as part of the test will serve to further the development of special measures on a case by case basis and ensure that the courts adapt to the needs of a particular defendant.[45]

7.34 The Law Commission observed that, if the possibility of having 'special measures' to assist the defendant, were to be a factor in a reformed test of unfitness, this would 'presumably increase the prospects of some defendants who would currently be found unfit to plead being able to stand trial'.[46]

7.35 The NSWLRC made a similar recommendation about modifications to trial processes. It recommended that, in determining whether a person is unfit for trial, the matters that a court must consider should include:

> (a) whether modifications to the trial process can be made or assistance provided to facilitate the person's understanding and effective participation
>
> (b) the likely length and complexity of the trial, and
>
> (c) whether the person is legally represented.[47]

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43 Ibid 26.

44 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Proposal 5.

45 Ibid.

46 Ibid 88.

47 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) rec 2.2.

## Reform of the test

**Proposal 7–1** The *Crimes Act 1914* (Cth) should be amended to provide that a person is unfit to stand trial if the person cannot:

(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; and

(d) communicate decisions in some way.

**Proposal 7–2** The *Crimes Act 1914* (Cth) should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial.

**Question 7–1** What other elements should be included in any new test for unfitness to stand trial, and why? For example, should there be some threshold requirement that unfitness be due to some clinically-recognised mental impairment?

7.36 The common law test of unfitness to stand trial is based primarily on a person's intellectual ability to understand specific aspects of the legal proceedings. The Law Commission described the existing criteria as placing 'emphasis on an ability to understand rather than the ability to function or to do something (in other words, mental capacity)'. At common law, fitness to stand trial is

> a global concept which can be said to cover a general state, and is not context-specific or time-specific. It has tended to be construed as being about the accused's cognitive ability which is, to all intents and purposes, seen in the abstract.[48]

7.37 This comes close to requiring that a person must be considered as lacking decision-making ability on the basis of having an (intellectual) disability—and, on that basis, is inconsistent with the approach taken by the CRPD and the National Decision-Making Principles.

7.38 Rather, in the ALRC's view, any test for unfitness to stand trial should be based on a person's decision-making ability in the context of the particular criminal proceedings which he or she faces.

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48 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 38.

7.39 The proposal above would introduce a new test of unfitness to stand trial into the *Crimes Act 1914* (Cth), based on the guidelines for determining decision-making ability proposed by the ALRC in Chapter 3.

7.40 Interestingly, similar conclusions about the primary importance of decision-making ability have been reached by other law reform bodies that have considered the issues—even though these bodies were not expressly informed by the approach reflected in art 12 of the CRPD. The focus of these inquiries was more on the need to ensure fair trials[49] and the effective participation of defendants.[50]

7.41 The way in which the new test might operate in practice for people with disability was explained by the VLRC:[51]

> The new test would require an accused person to:
>
> - *Understand the information relevant to the decisions that they will have to make in the course of the trial*—for example, an accused person with an acquired brain injury who has very low cognitive ability and is unable to understand new or unfamiliar information would be unfit to stand trial.
> - *Retain that information*—for example, someone with Attention-Deficit Hyperactivity Disorder (ADHD) who cannot focus and finds it almost impossible to remember any new information given to them would be unfit to stand trial.
> - *Use or weigh that information as part of a decision-making process*—for example, an accused person who suffers from paranoid schizophrenia who has a factual understanding of the charge, but indicates to the court that he wants to plead guilty because he sees no point in pleading not guilty as everyone in court is part of a conspiracy, would be unfit to stand trial.
> - *Communicate their decisions*—for example, an accused person with autism who is able to understand information and process it but does not acknowledge others, may be unfit to stand trial.[52]

7.42 The ALRC recognises the proposed new test of unfitness to stand trial raises many issues that may need to be resolved before implementation. For example, the VLRC has observed that such a formulation may operate too widely because it has the potential to include defendants who have 'no recognised mental illness but are unable to use or weigh information as part of a decision-making process, for example, because of stress, overwhelming tiredness or poor education or social background'.[53]

7.43 For this reason, some commentators have suggested that the test should include some threshold requirement that, for example, impaired decision-making ability is due

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49 Eg, New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) 25–26.

50 Eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

51 Referring to the similar criteria in the Law Commission's provisional proposal: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 54.

52 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 60.

53 Ibid 61.

to 'mental or physical illness, whether temporary or permanent'[54] or some clinically recognised condition.[55]

7.44 The second proposal also reflects an element of the National Decision-Making Principles—that decision-making ability must be assessed in the context of available supports.

7.45 At present, the test for unfitness does not allow for this. The fact that a person may be able to be supported in understanding trial processes, and making decisions about, and participating in, the proceedings cannot affect their fitness to stand trial. From one perspective:

> the introduction of support measures to potentially increase the level of fitness of an accused person is desirable… the provision of support and education about court processes to an accused person who falls 'just short' of meeting the test for fitness is a humane option that may ultimately enable them to participate fully in their trial.[56]

7.46 On the other hand, in practice, there may be limited options for supporting a defendant who needs decision-making support through a criminal trial. Providing that available support should be taken into account in determining unfitness to stand trial may work against equality before the law—in that a person with support may be able to stand trial but another, with similar ability but without support, may not be tried.[57]

### *Modelling in Commonwealth law*

7.47 The ALRC proposes that the reformed test of unfitness to stand trial be modelled in Commonwealth law through amendments to the existing legislative provisions in the *Crimes Act*, which set out the processes for finding federal offenders unfit to be tried, and the consequences of such a finding.[58]

7.48 The ALRC recognises that, in practice, such a provision would have limited application. First, most criminal prosecutions occurring in Australia fall within the responsibilities of the states and territories. Secondly, most federal offenders are tried in state and territory courts.[59]

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54 Helen Howard, 'Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 *Journal of Criminal Law* 194, 201–202 cited in Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 61.

55 Scottish Law Commission, *Insanity and Diminished Responsibility*, Discussion Paper No 122 (2003) 49.

56 Victorian Institute of Forensic Mental Health, *Submission to Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990 (Vic)*.

57 Of course, as discussed below, it may or may not be in the interests of the defendant to be found unfit to stand trial.

58 *Crimes Act 1914* (Cth) ss 20B–20BI.

59 The use of state courts is made possible by ss 71 and 77(iii) of the *Australian Constitution*. The judicial power of the Commonwealth is vested in the High Court, in such other federal courts as the Parliament of Australia creates, and in such other courts as it invests with federal jurisdiction: *Australian Constitution* s 71. Parliament may make laws investing state courts with federal jurisdiction: Ibid s 77(iii).

7.49 The *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions.[60] The Act makes specific provision for the exercise of federal criminal jurisdiction by both state and territory courts.[61] Importantly, under the Act, state and territory laws, including those relating to 'procedure, evidence and the competency of witnesses' are applied to federal prosecutions in state and territory courts.[62]

7.50 Essentially this means that, even if the *Crimes Act* were amended to introduce a new test of unfitness to stand trial, if the matter is being heard in a state or territory court, the issue of unfitness would still be determined in accordance with the procedures applicable under state or territory law.[63]

7.51 The ALRC nevertheless considers that modelling a new approach to unfitness to stand trial in Commonwealth law will provide an opportunity to guide law reform at state and territory level, to reflect a new approach to determining decision-making ability in criminal justice settings.

## Limits on detention

**Proposal 7–3** State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.

7.52 A wide range of concerns have been raised about the processes and outcomes of unfitness determinations. These include concerns about the availability or otherwise of appropriate accommodation, support services, and diversion from the criminal justice system. For example, Queensland Advocacy Incorporated expressed a range of concerns about the scheme for diverting offenders to the Mental Health Court under the *Mental Health Act 2000* (Qld).[64] Many of these issues do not directly concern decision-making or are too particular to a state or territory jurisdiction to be a focus of this Inquiry.[65]

60 *Judiciary Act 1903* (Cth) s 39(2).
61 Ibid s 68(2).
62 Ibid ss 68(1), 79.
63 *Kesavarajah v R* (1994) 181 CLR 230.
64 Queensland Advocacy Incorporated, *Submission 45*.
65 Eg, concerns that Queensland law makes no provision for unfitness to stand trial in relation to summary offences: Qld Law Society, *Submission 53*.

7.53 Some outcomes of unfitness to stand trial rules have generated significant public concern, including, for example, in the cases of Marlon Noble and Rosie Anne Fulton.[66] These concerns have led the AHRC to call for a national audit of people held in prison after being found unfit to stand trial.[67]

7.54 The Safeguards Guidelines proposed by the ALRC state that decisions, arrangements and interventions in relation to people who need decision-making support should be least restrictive of the person's human rights; subject to mechanisms of appeal; and subject to monitoring and review. Some aspects of the limits on detention, and review of detention orders in relation to persons found unfit to stand trial are discussed below.

7.55 The consequences of a determination that a federal offender is unfit are set out in the *Crimes Act*.[68] These provisions apply to federal offenders being dealt with by state or territory courts—despite the operation of the *Judiciary Act* discussed above. In relation to proceedings for federal offences, the provisions of state or territory law give way to provisions of the *Crimes Act* to the extent of any inconsistency.[69] While state or territory law regulates the mode of determination of unfitness to stand trial, the consequences flowing from the determination will be regulated by Commonwealth law.[70]

7.56 Under the *Crimes Act*, where the issue of unfitness is raised on commitment for trial, the proceedings must be referred to the court to which the proceedings would have been referred had the defendant been committed for trial. If that court finds the defendant unfit to be tried, it must determine whether a prima facie case exists. Where no prima facie case exists, the person must be discharged.[71]

7.57 If a prima face case exists, the court must dismiss the charge if satisfied that it is inappropriate to inflict any punishment, or any punishment other than nominal punishment, having regard to the defendant's 'character, antecedents, age, health or mental condition', the triviality of the offence and the extent of any mitigating circumstances.[72] Otherwise, the court must determine, after considering medical

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66 Marlon Noble was charged in 2001 with sexual assault offences that were never proven. A decade after he was charged, the allegations were clearly shown to have no substance. Marlon spent most of that decade in prison, because he was found unfit to stand trial. Rosie Anne Fulton was held in Kalgoorlie prison for over 18 months after being charged with crimes related to a motor vehicle and being found unfit to stand trial due to her cognitive impairment. She was sent to Kalgoorlie prison because no other suitable accommodation was available for her: Australian Human Rights Commission, *'Send Rosie Anne Home'* <www.humanrights.gov.au/news/stories/send-rosie-anne-home>.

67 Australian Human Rights Commission, *Jailed without Conviction: Commissioners Call for Audit* <https://www.humanrights.gov.au/news/stories/jailed-without-conviction-commissioners-call-audit>.

68 *Crimes Act 1914* (Cth) pt IB div 6.

69 *Australian Constitution* s 109.

70 *R v Ogawa* [2011] 2 Qd R 350, [89]–[114]. The Queensland Law Society suggested that consideration be given to the adoption of state procedures for dealing with defendants charged with indictable Commonwealth offences, so that consistency of process is achieved: Qld Law Society, *Submission 53*.

71 *Crimes Act 1914* (Cth) s 20B(1).

72 Ibid s 20BA(2).

reports whether, on the balance of probabilities, the person will become fit to be tried within 12 months.[73]

7.58 The court may order a person who is likely to become fit to be tried within 12 months to be detained in a hospital, otherwise the proceedings must resume as soon as practicable. If the court finds that the defendant is not likely to become fit, it must determine whether the defendant is 'suffering from a mental illness, or a mental condition, for which treatment is available in a hospital' and, if so, whether he or she objects to being detained in hospital.[74]

7.59 The court must order detention in hospital if the person is found to be mentally ill and does not object to being detained in hospital, or in prison or some other place. However, this period of detention must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.[75] Further, before that time, the court may order the person's release from custody, either unconditionally or subject to conditions lasting not more than three years, if in the court's opinion this is more appropriate than continuing detention.[76]

7.60 Under the *Crimes Act*, where a person is found unfit to stand trial, the Attorney-General of Australia must, at least once every six months, consider whether or not the person should be released from detention based on medical or other reports.[77] The Attorney-General must not order release unless satisfied that the person is not a threat or danger either to himself or herself or to the community.[78]

7.61 These provisions of the *Crimes Act* were inserted in 1989.[79] While the ALRC has no detailed information about how the provisions operate in practice, or the outcomes they produce for federal offenders who are found unfit to stand trial, the *Crimes Act* appears to provide safeguards that do not exist in all state and territory jurisdictions.

7.62 Some jurisdictions do not provide statutory limits on the period of detention for those found unfit to stand trial. For example:

- in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial;[80]
- in the Northern Territory, the *Criminal Code* (NT) provides that supervision orders for persons found not fit to stand trial are 'for an indefinite term';[81] and

73 Ibid s 20BA(4)–(5).
74 Ibid s 20BB(2).
75 Ibid s 20BC(2).
76 Ibid s 20BC(5).
77 Ibid s 20BD.
78 Ibid s 20BE.
79 *Crimes Legislation Amendment Act (No 2) 1989* (Cth).
80 *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 19.
81 *Criminal Code Act 1983* (NT) sch 1, s 43ZC.

- in Victoria, custodial supervision orders are for an indefinite period,[82] although the *Crimes (Mental Impairment and Unfitness to Tried) Act 1997* (Vic) also requires the court to set a 'nominal term' for the purposes of review.[83]

7.63 The Anti-Discrimination Commissioner (Tasmania) provided data from Tasmania's Forensic Tribunal, which illustrates that, for forensic patients placed on a mental health order for offences other than murder, the period of detention under an order is substantially more than it would have been if they had been found guilty of the offence.[84]

7.64 All jurisdictions have review mechanisms for people held in detention because they are unfit to stand trial, to determine whether a person should be released. Reviews are conducted by different bodies, including courts, mental health and other tribunals and, in the case of the Commonwealth, the Attorney-General.

7.65 However, some jurisdictions may have inadequate review mechanisms for those detained. For example, in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not provide for review. Rather, the person is essentially detained at the 'Governor's pleasure'.[85]

7.66 In the ALRC's view, state and territory legislation governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention. This would at least ensure that a person is no longer a forensic prisoner after some reasonable maximum period. If he or she is a threat or danger to themselves or the public at that time, they should be the responsibility of mental health authorities, not the criminal justice system.[86]

7.67 Regular periodic review of detention orders is also essential. For example, in Victoria, the *Crimes (Mental Impairment and Unfitness to Tried) Act 1997* (Vic) provides judges with the flexibility to decide how often to review, or further review, custodial supervision orders. The VLRC has recommended that legislation should require regular, automatic review of each custodial supervision order at an interval of no longer than every two years.[87]

## Conducting civil litigation

7.68 At common law, the capacity test for a person to participate in civil proceedings is the same as that required for a person to enter into legal transactions.[88] There is a presumption of capacity 'unless and until the contrary is proved'.[89]

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82 *Crimes (Mental Impairment and Unfitness to Be Tried Act) 1997* (Vic) s 27.
83 Ibid s 28. The nominal terms are generally equivalent to the maximum term of imprisonment available for the offence.
84 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.
85 *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 35.
86 In this context, the *Crimes Act* requires state or territory mental health authorities to be notified when a person is due to be released because the period of that person's detention has ended: *Crimes Act 1914* (Cth) s 20BH.
87 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 431.
88 *Goddard Elliot v Fritsch* [2012] VSC 87, [555].
89 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [26].

7.69 The focus of the test is on the capacity of the person to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given.[90]

7.70 The test is issue-specific. That is, capacity must be considered in relation to the particular proceedings and their nature and complexity. This contrasts with the test of unfitness to stand trial in criminal law.

> The civil test takes a functional approach to capacity in that it assesses a person's ability to make a particular decision at a particular moment in time, and not a person's ability to make decisions more generally.[91]

7.71 The test is able to take into account the level of legal representation. In particular, the level of capacity required to be a litigant in person is higher than where the person is required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation. Therefore, 'a person who does not have the mental capacity to represent themselves may have sufficient capacity to be able to give instructions to a lawyer to represent them'.[92]

## Litigation representatives

**Proposal 7–4** The rules of federal courts should provide that a person needs a litigation representative if the person cannot:

(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 the decisions;

(c) use or weigh that information as part of a decision-making process; and

(d) communicate the decisions in some way.

**Proposal 7–5** The rules of federal courts should provide that available decision-making support must be taken into account in determining whether a person needs a litigation representative.

7.72 Where a person does not have capacity to conduct litigation, a litigation representative may be appointed. A litigation representative may also be known as a litigation guardian, case guardian, guardian *ad litem*, next friend, tutor or special representative.[93] In broad terms, a litigation representative acts in the place of the person and is responsible for the conduct of the proceedings.[94]

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90 *Goddard Elliot v Fritsch* [2012] VSC 87, [557].

91 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 52.

92 *Goddard Elliot v Fritsch* [2012] VSC 87, [558].

93 The term 'litigation guardian' is used in the High Court and Federal Circuit Court, 'litigation representative' in the Federal Court and 'case guardian' in the Family Court.

94 The ALRC has chosen to use the term litigation representative, which is also used by the Federal Court, because the current duties of people acting in this role are consistent with the ALRC's usage of the term

7.73 The circumstances in which a litigation representative may be appointed are set out in rules of court. In general, a litigation representative is appointed by the court, on the application of a party or an interested person, such as a parent or guardian or, sometimes, the person's own lawyer.

7.74 Litigation representatives can also be removed or substituted by the court, on the application of a party or on its own motion. There are no other review mechanisms for the conduct of a litigation representative, except to the extent that the representative's conduct may be reviewed under state and territory guardianship laws, if the representative is also a guardian or administrator.

7.75 Under federal court rules, a person may be assessed as needing a litigation representative if the person:

- is 'under disability' (High Court);[95]
- is 'under a legal incapacity' because of being a 'mentally disabled person' and 'not capable of managing the person's own affairs in a proceeding' (Federal Court);[96]
- is 'with a disability' and 'does not understand the nature or possible consequences of the case; or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case' (Family Court);[97]
- 'does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding' (Federal Circuit Court).[98]

7.76 The way in which some of these federal court rules are drafted is clearly inappropriate and inconsistent with contemporary conceptualisations of capacity and disability. In particular, some rules adopt elements of a 'status-based' approach that is inconsistent with the CRPD.

7.77 While the common law capacity test for civil proceedings may be used to interpret the application of rules of court dealing with the appointment of litigation representatives, the rules could more closely reflect the common law—and its focus on capacity in relation to the particular transaction or proceedings, rather than 'disability'.

7.78 The ALRC proposes that—as with the new test in criminal proceedings proposed above—the rules of federal courts concerning the appointment of litigation representatives should reflect the guidelines for determining decision-making ability in the National Decision-Making Principles.

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'representative' elsewhere in this Discussion Paper—notably, in relation to 'supporters' and 'representatives' in Ch 4.

95 *High Court Rules 2004* (Cth) r 20.08.

96 *Federal Court Rules 2011* (Cth) r 9.61, Dictionary.

97 *Family Law Rules 2004* (Cth) r 6.08, Dictionary.

98 *Federal Circuit Court Rules 2001* (Cth) r 11.08.

7.79 Arguably, there is little difference between the proposal and the position that applies at common law in determining whether a person has capacity to conduct civil litigation.[99]

7.80 The National Decision-Making Principles recognise that there is a spectrum of decision-making ability—and that ability should be assessed by reference to the decision to be made—and that ability may evolve or fluctuate over time. In contrast, the existing test for capacity to conduct litigation is 'once and for all' (that is, for the course of the proceedings)—except to the extent that a person represented can apply to the court to have their litigation representative removed. However, this may be sensible administratively and for practical reasons concerning the efficient resolution of disputes.

7.81 A more major change than the proposed test of decision-making ability is to require courts to consider the available decision-making support in determining whether a person needs a litigation representative.

7.82 Existing rules do not expressly enable the availability of support to be taken into account in assessing whether a litigation representative should be appointed. However, in some ways this is simply a manifestation of the existing approach of assessing capacity in the context of the particular transaction or proceedings.

7.83 Implementation of these proposals is more likely than not to result in more people being involved in civil litigation without having a litigation representative formally appointed.

7.84 An overarching purpose of federal civil practice and procedure provisions is to facilitate the just resolution of disputes, according to law, and 'as quickly, inexpensively and efficiently as possible'.[100] From some perspectives this reform may be seen as making the resolution of some disputes less 'efficient'.

7.85 Arguably, lawyers and courts need to know from whom they should take instructions and applications—that is, for the interests of a party to be represented by one voice. Facilitating and ensuring the participation of litigants with impaired decision-making ability may be considered too complex for lawyers and courts to manage.

7.86 Another relevant factor is that, under an adversarial system, courts are not easily able to facilitate the participation of persons with impaired decision-making ability in legal proceedings. The problems unrepresented litigants face in civil justice settings have been well documented over the years.[101]

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99 The Law Commission of England and Wales has made this point in relation to the similarity between the capacity test under the *Mental Capacity Act 2005* (UK) and that which applies at common law: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 51.

100 *Federal Court of Australia Act 1976* (Cth) s 37M.

101 See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [5.148]–[5.157]; Productivity Commission, 'Access to Justice Arrangements', Draft Report. (2014) Ch 14.

7.87 However, in the ALRC's view, such concerns are outweighed by the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings.

## The role of litigation representatives

**Proposal 7–6** The rules of federal courts should provide that litigation representatives:

(a) must support the person represented to express their will and preferences in making decisions;

(b) where it is not possible to determine the wishes of the person, must determine what the person would likely want based on all the information available;

(c) where (a) and (b) are not possible, must consider the human rights relevant to the situation; and

(d) must act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented.

**Proposal 7–7** Federal courts should issue practice notes explaining the duties of litigation representatives to the person they represent and to the court.

7.88 Under federal court rules, a person who is found to need a litigation representative may only conduct proceedings through that representative. Relevant rules of court provide as follows:

- 'A person under disability shall commence or defend a proceeding by litigation guardian' (High Court);[102]
- 'A person under a legal incapacity may start, or defend, a proceeding only by the person's litigation representative' (Federal Court);[103]
- 'A person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian' (Family Court);[104]
- 'A person who needs a litigation guardian may start, continue, respond to or seek to be included as a party to a proceeding only by his or her litigation guardian'. (Federal Circuit Court).[105]

7.89 There is no obligation under common law or court rules for a litigation representative to make decisions that reflect the will, preferences and rights of the person represented. Rather, at common law, a litigation representative has a 'duty to

102 *High Court Rules 2004* (Cth) r 21.08.1.
103 *Federal Court Rules 2011* (Cth) r 9.61.
104 *Family Law Rules 2004* (Cth) r 11.09.
105 *Federal Circuit Court Rules 2001* (Cth) Rule 6.08.

see that every proper and legitimate step for that person's representation is taken'[106]—which seems akin to a 'best interests' test.

7.90 A litigation representative has no obligation to consult or facilitate the participation of the person represented, except to the extent that such duties may be imposed by state or territory guardianship legislation (if the person is also a guardian or administrator).

7.91 In her submission, the Hon Chief Justice Diana Bryant AO observed that the role of a litigation representative has been described as:

> an invidious one in the sense that the person is taking on the decision-making responsibilities of the litigant whilst having to ensure that their own interests do not conflict with those of the litigant. *That means that the case guardian has to make decisions which are often unpalatable to the individual litigant*.[107]

7.92 Clearly, this is far from the preferred will and preferences approach to supported decision-making proposed by the ALRC. Further, case law makes it clear that the role of a litigation representative is not only to 'protect' the person represented. The Full Court of the Federal Court has held that the purpose of the power to appoint a litigation representative is 'to protect plaintiffs and defendants who would otherwise be at a disadvantage, as well as to protect the processes of the court'.[108]

7.93 Case law also emphasises concerns about protecting the rights of the other parties in the litigation. It has been said that requiring litigation representatives helps to ensure, in some cases, that 'parties to litigation are not pestered by other parties who should be to some extent restrained' and that a 'defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend'.[109]

7.94 In the ALRC's view, litigation representatives should be required to act, so far as is practicable, in accordance with the National Decision-Making Principles.[110] To this end, the rules of federal courts should provide, among other things, that in making decisions, litigation representatives have a duty to consider the will, preferences and rights of the person represented; to promote their personal, social and financial wellbeing; and to consult with others.

7.95 The ALRC recognises that, in practice, other problems relating to litigation representatives may be of equal or greater significance, but are not a focus of this Inquiry. For example, submissions raised concerns about:

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106 *Read v Read* [1944] SASR 26, 28.

107 Quoting *Anton & Malitsa* [2009] FamCA 623, [2]: D Bryant, *Submission 22* (emphasis added).

108 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [25].

109 *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511, [31], [65].

110 As discussed in Ch 3, the Inquiry is only concerned with issues surrounding the decision-making ability of adults. The ALRC is not, for example, making any proposals with respect to the duties of case guardians representing children in Family Court proceedings.

- the cost and availability of litigation guardians for people who are unable to instruct legal counsel;[111]
- the lack of funding to meet the legal costs of case guardians in Family Court proceedings;[112]
- the difficulties in securing the nomination by the Attorney-General of case guardians in Family Court proceedings where another suitable person is not available;[113]
- the availability of legal representatives who are independent of guardians appointed by state tribunals.[114]

## Solicitors' duties

**Question 7–2** Should the Australian Solicitors' Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors' duties of confidentiality where:

(a) the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and

(b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative?

7.96 The National Decision-Making Principles require that people should be provided with the support necessary for them to make, communicate and participate in decision-making. In some cases, this support will include the appointment of a litigation representative. The barriers to obtaining this support may include solicitors' duties to their clients.[115]

7.97 Solicitors have a duty to act in the best interests of their clients,[116] and to follow a client's lawful, proper and competent instructions.[117] A solicitor who has concerns about his or her client's decision-making ability may be unwilling to act for a client who refuses, or is unable to agree to, investigations in relation to their ability or an application for the appointment of a litigation representative.

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111 Office of the Public Advocate (Vic), *Submission 06*.
112 D Bryant, *Submission 22*.
113 Ibid.
114 Queensland Advocacy submitted that 'a conflict of interest arises when a QCAT-appointed guardian (wrongly, although lawfully, in our view) rejects an adult's request to litigate a matter simply because in the Guardian's view it is not in that person's best interests': Queensland Advocacy Incorporated, *Submission 45*.
115 See, eg, Lauren Adamson, Mary-Anne El-Hage and Julianna Marshall, 'Incapacity and the Justice System in Victoria' (Discussion Paper, Public Interest Law Clearing House, 2013).
116 Law Council of Australia, *Australian Solicitors' Conduct Rules* (2011) r 4.1.1.
117 Ibid r 8.1.

7.98 Solicitors must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement, subject to limited exceptions—which do not include seeking decision-making support.[118]

7.99 However, the duty of solicitors to the court and the administration of justice is paramount.[119] Once proceedings are commenced, solicitors have a clear and unambiguous duty to raise with the court any concerns about a client's capacity to conduct litigation.[120]

7.100 There is some case law establishing that concerns about a client's capacity may ground an exception to duties of confidentiality. In *R v P*, a solicitor had sought the appointment of a public guardian to have control of his client's estate and existing court proceedings, independently of his client's wishes. The New South Wales Court of Appeal held that:

> the solicitor's concern for the interest of the client, so long as it is reasonably based and so long as it results in no greater disclosure of confidential information than absolutely necessary, can justify the bringing of proceedings and such disclosure of confidential information as is absolutely necessary for the purpose of such proceedings.[121]

7.101 The Court also stated that the bringing of such actions is extremely undesirable because it involves the solicitor in a conflict between the duty to do what the solicitor considers in the client's best interests and the duty to follow the client's instructions (and maintain confidentiality).[122]

7.102 It has been suggested that, if there is no clear exception to solicitors' duties of confidentiality, they may 'cease acting for disadvantaged clients' resulting in clients 'moving from lawyer to lawyer or worse, being left unrepresented'.[123] However, there are also arguments against reform, including on the basis that, if a statutory exception were to be introduced,

> there may be a risk that lawyers would more readily make applications for the appointment of a substitute decision maker. Applications could potentially be made without the lawyer first trying to adequately support the client to enable the client to provide instructions themselves.[124]

7.103 One option for reform would be new legal professional rules to make it clear that solicitors may disclose information when there is reason to believe the client lacks

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118 Ibid r 9.

119 Ibid r 3.1.

120 *Pistorino v Connell & Ors* [2012] VSC 438, [6]. 'Once the matter is raised the court will inquire into the question ... In the exercise of jurisdiction the court is acting both to protect the interests of the person with a relevant disability and to protect the court's own processes'.

121 *R v P* [2001] NSWCA 473, [66]. The Law Society of NSW has stated that *R v P* is 'an important qualification to the duty of confidentiality owed by solicitors to clients': see 'When a Client's Capacity Is in Doubt: A Practical Guide for Solicitors' (Law Society of NSW, 2009) 9, App E.

122 *R v P* [2001] NSWCA 473, [64]. 'It is therefore preferable, if possible, if a family or health care professional makes the application [for the appointment of a substitute decision-maker]': 'When a Client's Capacity Is in Doubt: A Practical Guide for Solicitors', above n 121, 9.

123 Adamson, El-Hage and Marshall, above n 115, 3.

124 Ibid.

the ability to instruct. This would at least ensure that disclosure is not grounds for professional disciplinary action, but would not remove doubts about liability for breach of confidence or other liability under the general law.

7.104 One model is provided by the American Bar Association's Model Rules for Professional Conduct. These provide that:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities … and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.[125]

7.105 The Queensland Law Society submitted that such rules could 'provide greater clarity for practitioners along with professional certainty of being able to act to protect client's interests'.[126]

## Witnesses

7.106 People with disability face a range of barriers that may limit their ability to participate as witnesses. In relation to court processes, the barriers include rules on the competency of witnesses, and difficulties in accessing the necessary support and assistance in giving evidence. Aspects of these issues are discussed below.

7.107 More generally, the Judicial Commission of NSW has observed:

> People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.[127]

7.108 In 2012, Disability Rights Now reported to the United Nations that, in Australia, the 'capacity of people with cognitive impairments to participate as witnesses in court proceedings is not supported and this has led to serious assault, sexual assault and abuse crimes going unprosecuted'.[128]

7.109 In particular, it was said that people with cognitive disability face barriers to establishing credibility when interacting with the justice system because of the assumptions 'constantly made by police and court officers, such as prosecutors, judges

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125 American Bar Association, *Model Rules of Professional Conduct,* r 1.14.

126 Qld Law Society, *Submission 53*. See also Andrew Taylor, 'Representing Clients with Diminished Capacity' *Law Society Journal (February 2010)* 56, 58.

127 'Equality before the Law Bench Book' (Judicial Commission of New South Wales, 2006) 5301.

128 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 71.

and magistrates'.[129] In this Inquiry, the Anti-Discrimination Commissioner (Tasmania) submitted:

> The perception that a person with disability lacks credibility as a witness to or victim of crime often leads to the decision not to prosecute alleged perpetrators. This heightens the vulnerability of people with disability to further harm because the perpetrator is aware that charges are less likely be brought or prosecuted than if the victim were a person without disability.[130]

## Competency

**Proposal 7–8** The *Evidence Act 1995* (Cth) should be amended to provide that, in assessing whether a witness is competent to give evidence under s 13, the court may take the availability of communication and other support into account.

7.110 At common law, as a general rule, all witnesses who are able to comply with testimonial formalities—such as the giving of oaths—are competent to give evidence. There is no other common law test of physical or psychological competence, but a judge has discretion, in exceptional cases, to refuse to permit a witness to testify where the evidence is likely to be unreliable. Otherwise, matters of competence are relevant only to the witness's credibility and the weight that may be placed on the evidence given.[131]

7.111 The AHRC has observed that people with disabilities frequently experience prejudicial assessments of their competency to give evidence as a witness to criminal proceedings.[132] This is despite research suggesting that 'contrary to public perception, most people with intellectual disabilities are no different from the general population in their ability to give reliable evidence' (as long as communication techniques are used that are appropriate for the particular person).[133]

7.112 In Commonwealth law, the *Evidence Act 1995* (Cth) deals with the competence of witnesses. Similar or identical provisions apply in the other jurisdictions that have adopted the Uniform Evidence Acts.[134] Section 13 of the *Evidence Act* provides

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129 Ibid 78.

130 Anti-Discrimination Commissioner (Tasmania), *Submission 71*. The Commissioner also observed that 'the best way to ensure prosecution of the charge is to ensure that a person with disability receives adequate support to participate in the process'.

131 Thomson Reuters, *The Laws of Australia* [16.4.280].

132 'Equal Before the Law: Towards Disability Justice Strategies', above n 3, 21.

133 'Equality before the Law Bench Book', above n 127, 5301. The Bench Book cites Mark Kebbell, Christopher Hatton and Shane Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' (2004) 9 *Legal and Criminological Psychology* 23.

134 That is, NSW, Victoria, Tasmania, the ACT and the Northern Territory: *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT).

> (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
>
> (a) the person does not have the capacity to understand a question about the fact; or
>
> (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;
>
> and that incapacity cannot be overcome.

7.113 A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact, if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.[135] However, the person may give unsworn evidence after being informed by the court about the importance of telling the truth (and certain other matters set out in the Act).[136]

7.114 In this way, the test for competence to give evidence amounts to the capacity to understand the obligation to give truthful evidence.[137] The probative value of an unsworn statement will be assessed and the court may refuse to admit evidence that may be unfairly prejudicial to a party, misleading or confusing, or result in undue delays.[138]

7.115 The wording of s 13(3) implies that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence. The ALRC proposes that the *Evidence Act*—consistently with the National Decision-Making Principles—should expressly provide that competence must be determined in the context of the available support.

7.116 There may be concerns about fairness to parties in legal proceedings if competence is determined by reference to available support—the practical extent and effectiveness of which may be difficult to determine at the point in time that the court must rule on the competence of a potential witness. Another criticism of the ALRC proposal may be that, without some obligation being placed on courts to provide support, reform may have no practical effect.

## Assistance in giving evidence

**Proposal 7–9** The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers; and that the court may give directions with regard to this.

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135 *Evidence Act 1995* (Cth) s 13(3).
136 Ibid ss 13(4)–(5).
137 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) ch 7.
138 *Evidence Act 1995* (Cth) s 135.

**Proposal 7–10** The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support has the right to have a support person present while giving evidence, who may act as a communication assistant; assist the person with any difficulty in giving evidence; or provide the person with other support. The court should be empowered to give directions with regard to the provision of support.

7.117 Concerns about the extent to which existing laws and legal frameworks facilitate support for witnesses were expressed in submissions. The Office of the Public Advocate (Qld) submitted that the Commonwealth and Queensland state governments should consider implementing new practices to facilitate the giving of evidence by people with disability, 'by allowing questions to be explained and assistance to be given in communicating the answers'.[139] The Office of the Public Advocate (Vic) considered that greater 'witness support' should be provided to assist people with cognitive impairments and mental illness to navigate the justice system.[140]

7.118 Sections 30 and 31 of the *Evidence Act* provide examples of the assistance that may currently be provided 'to enable witnesses to overcome disabilities'.[141] Section 30 provides that a witness may give evidence about a fact through an interpreter and s 31 relates to 'deaf and mute witnesses'.

7.119 Section 31 states that a witness who cannot hear adequately may be questioned in 'any appropriate way'; and that a witness who cannot speak adequately may give evidence by 'any appropriate means' and the court may give directions concerning this.

7.120 Deaf Australia expressed concerns about the dated language[142] and drafting of s 31 and observed that the phrase 'may be questioned in any appropriate way' is open to interpretation and does not specify that the person's communication needs must be taken into consideration. It also suggested that use of the term 'communication support' should be considered, so as to include modes of support such as live-captioning and hearing loops.[143]

7.121 The Anti-Discrimination Commissioner (Tas) stated that the *Evidence Act 2001* (Tas) does not make adequate 'provision for regulating or adjusting court processes to accommodate people with disability'. For example, 'communication by way of gestures is not viewed as a witness statement, despite this being the only way some people can communicate'. The Commissioner observed that the existing provisions,

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139 The OPA (Qld) referred to laws in NSW, Western Australia and the UK as providing suitable models, referring to provisions of the *Civil Procedure Act 1986* (NSW); *Evidence Act 1906* (WA); and *Youth Justice and Criminal Evidence Act 1999* (UK): Office of the Public Advocate (Qld), *Submission 05*.

140 Office of the Public Advocate (Vic), *Submission 06*.

141 *Evidence Act 1995* (Cth) s 13 (note).

142 The word 'mute' refers to inability to speak. The current appropriate term is 'speech impaired': Deaf Australia, *Submission 37*.

143 Ibid. See also AFDS, *Submission 47*.

including ss 30–31, 'highlight that it is not easy for people with disability to have the process modified to increase their participation'.[144]

7.122 At the least, the ALRC considers that there is no reason to limit the application of provisions such as ss 30–31 to particular categories of witnesses needing support. Arguably, there should be express provision for any witness who needs support to give evidence in any appropriate way that enables them to understand questions and communicate answers.

7.123 More broadly, witnesses who need support in order to give evidence should be entitled to the assistance of a supporter. At the Commonwealth level, the *Crimes Act* does provide an extensive range of provisions protecting 'vulnerable persons' in their interactions with the justice system.[145]

7.124 These include provisions allowing vulnerable persons to choose someone to accompany them while giving evidence in a proceeding.[146] In relation to adults, the right applies only to 'vulnerable adult complainants'[147] and 'special witnesses'. A special witness includes a person who is 'unlikely to be able to satisfactorily give evidence in the ordinary manner', including 'because of a disability'.[148]

7.125 Section 15YO of the *Crimes Act* states only that the person chosen 'may accompany the person' and must not prompt the person or otherwise influence the person's answers; or disrupt the questioning of the person. Any words spoken by the accompanying person must be able to be heard by the judge and jury (if any) in the proceeding. It is unclear how much the person can support or assist the witness, beyond simply 'moral' or emotional support.

7.126 Some state and territory criminal procedure legislation makes broader provision for supporting witnesses. For example, in New South Wales, under the *Criminal Procedure Act 1986* (NSW), vulnerable persons have a right to the presence of another person while giving evidence. A vulnerable person for the purposes of these provisions means 'a child or a cognitively impaired person'.[149]

7.127 The *Criminal Procedure Act* states that, in criminal and certain other proceedings, a vulnerable person 'is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence'.[150] The supporter 'may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with

144 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.
145 *Crimes Act 1914* (Cth) pt IAD.
146 Ibid s 15YO.
147 A vulnerable adult complainant is a person who is a victim of slavery or human trafficking: Ibid s 15YAA.
148 Ibid s 15YAB(1).
149 *Criminal Procedure Act 1986* (NSW) s 306M. 'Cognitive impairment' is defined to include: (a) an intellectual disability; (b) a developmental disorder (including an autistic spectrum disorder); (c) a neurological disorder; (d) dementia; (e) a severe mental illness; (f) a brain injury.
150 Ibid s 306ZK(2).

an impairment or a disability, or for the purpose of providing the vulnerable person with other support'.[151]

7.128 The ALRC proposes that the *Crimes Act* should be amended to include more comprehensive provisions giving witnesses who need support the right to have a support person present while giving evidence. It should be made clear that such a person may act as a communication assistant, assisting the person with any difficulty in giving evidence associated with a disability.

7.129 There may be concerns about the effect of supporters on the fairness of proceedings—including perceptions that evidence is essentially being communicated to the court by the support person, rather than the witness, and about the opportunities for undue influence on the evidence. However, as with other rules of procedure and evidence, the permissible role of a supporter in the giving of evidence should be subject to judicial discretion and the overriding duty of the judicial officer to ensure that court proceedings are fair.

7.130 The ALRC acknowledges that the proposal does nothing to ensure that support is actually available. In South Australia, the Attorney-General has proposed that the *Evidence Act 1929* (SA) be amended to 'give people with complex communication needs a general entitlement to have a Communication Assistant present for any contact with the criminal justice system'; and to 'increase access to appropriate support persons for vulnerable witnesses'. For these purposes, a service, available throughout the criminal justice process, is proposed to be established in the non-government sector.[152]

7.131 In its 2013 report on the justice system and people with intellectual disability, the Parliament of Victoria's Law Reform Committee[153] highlighted the witness intermediary scheme in the UK, established under the *Youth Justice and Criminal Evidence Act 1999* (UK).

7.132 Under this scheme, the function of an intermediary is to assist intellectually disabled and other vulnerable witnesses by effectively acting as a 'go-between' to facilitate communication between the witness and the court. An Intermediary Registration Board oversees registration and standards for intermediaries.[154]

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151 Ibid s 306ZK(3).

152 Government of South Australia Attorney-General's Department, 'Draft Disability Justice Plan 2014-2016' (2014) Priority Actions 2.1–2.2.

153 Parliament of Victoria Law Reform Committee, 'Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers', Final Report, (2013).

154 Ibid 283. Intermediaries may include speech and language therapists, clinical psychologists, mental health professionals and special needs education professionals.

## Guidance for judicial officers

**Proposal 7–11** Federal courts should develop bench books to provide judicial officers with guidance about how courts may help to assist and support people with disability in giving evidence.

7.133 The *Evidence Act* and *Crimes Act* contain a range of other provisions that may be used to assist people who need support in giving evidence. In addition to those discussed above, the *Evidence Act* includes provisions protecting witnesses from improper questioning, and allowing the giving of evidence in narrative form.[155]

7.134 The *Crimes Act* also contains protective provisions that, among other things, may disallow inappropriate or aggressive cross-examination of vulnerable and special witnesses;[156] allow for the use of alternative arrangements for giving evidence, such as closed-circuit television[157] and the exclusion of members of the public from the courtroom;[158] and ensure vulnerable persons are not compelled to give further evidence unless it is necessary in the interests of justice.[159]

7.135 Legislative provisions are, however, only part of the solution to facilitating the participation of people with disability in the justice system. For example, Victoria Legal Aid observed that flexibility should be encouraged in Commonwealth court and tribunal proceedings to adapt procedures. In addition:

> It is important for courts and tribunals to recognise and be sensitive to the challenges that people with disabilities face when interacting with the justice system. Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach. Registry staff, judicial officers and tribunal members should be educated about the difficulties facing those with a disability and encouraged to exercise discretion in excusing trivial breaches and dispensing with standard protocols where appropriate.[160]

7.136 The law may be flexible enough to allow support and assistance to be provided but, in practice, the willingness or ability of courts to respond is likely to be circumscribed by limited resources and lack of awareness in the court and community about available options.[161]

7.137 Greater awareness of the measures that courts and judicial officers may take to assist witnesses who need support giving evidence may be desirable. One model is the Judicial Commission of NSW Equality before the Law Bench Book.[162] The Bench Book contains a section on people with disability and, among other things, discusses

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155 *Evidence Act 1995* (Cth) ss 41, 29(2).
156 *Crimes Act 1914* (Cth) s 15YE.
157 Ibid ss 15YI, 15YL.
158 Ibid s 15YP.
159 Ibid s 15YNC.
160 Legal Aid Victoria, *Submission 65*.
161 'Equal Before the Law: Towards Disability Justice Strategies', above n 3, 23.
162 'Equality before the Law Bench Book', above n 127.

the implications of different types of disability for people involved in court proceedings, examples of the barriers for people with disabilities in relation to court proceedings, and making adjustments for people with disability.[163]

7.138 The Bench Book is intended primarily to provide guidance for NSW judicial officers in performing their duties. Bench books may, however, serve a broader educative function within the justice system, as lawyers and parties may also refer to them as a guide to the available options.

## Forensic procedures

**Question 7–3** Should Commonwealth, state and territory laws be amended to avoid delays in obtaining consent to the taking of forensic samples from people who are incapable of giving consent, and who have been victims of crime? If so, how?

7.139 Barriers to obtaining consent for the taking of DNA and other forensic samples under Commonwealth, state and territory forensic procedures legislation,[164] may prejudice the investigation and prosecution of crimes against people with disability.

7.140 In particular, some legislation regulating the taking of intimate forensic samples from people deemed unable to provide consent may result in undue delay, which may compromise the value of DNA samples as evidence. This may be of particular concern where people with disability are victims of sexual assault.

7.141 Forensic procedure legislation generally provides that, where forensic samples are needed from a person who is not a suspect, and who is incapable of giving consent, the starting point is that the consent of a parent or guardian is required. However, the taking of DNA samples may be outside the scope of 'medical treatment' for the purposes of a guardian's decision-making powers.

7.142 Problems in obtaining forensic samples from victims may arise where:

- there is no guardian, and parents are unable or unwilling to consent; and
- there is a guardian, but the guardian does not have authority to authorise consent to the forensic procedure.

7.143 At a Commonwealth level, forensic procedures are regulated by pt ID of the *Crimes Act*.[165] Under the *Crimes Act*, a magistrate may order the carrying out of a forensic procedure on an 'incapable person'[166] if the consent of a guardian cannot

163 Ibid s 5.

164 Eg, *Crimes Act 1914* (Cth) pt ID; *Police Powers and Responsibilities Act 2000* (Qld) ch 17; *Forensic Procedures Act 2000* (Tas).

165 Eg, *Crimes Act 1914* (Cth) pt ID.

166 An 'incapable person' is defined to mean an adult who is incapable of understanding the general nature, effect and purposes of a forensic procedure; or of indicating whether he or she consents to it: *Crimes Act 1914* (Cth) s 23WA.

reasonably be obtained; or the guardian refuses consent and the magistrate is satisfied that there are reasonable grounds to believe that the parent or guardian is a suspect and the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence.[167] In determining whether to make the order, the magistrate must take into account, among other things, the seriousness of the alleged offence; the 'best interests' of incapable person; and 'so far as they can be ascertained, any wishes' of the incapable person with respect to the forensic procedure.[168]

7.144 Procedures in other jurisdictions may require investigators to obtain an emergency order from the state or territory guardianship tribunal, resulting in significant delay.

7.145 The existing Commonwealth provisions may help to address problems with the timeliness of obtaining consent, by allowing a magistrate to order a forensic procedure. Other approaches might involve amending:

- forensic procedures legislation to adopt a hierarchy of decision-makers similar to that found in some guardianship legislation dealing with medical treatment.[169]
- guardianship legislation dealing with consent to medical treatment to include reference to the taking of forensic samples.

## Jury service

7.146 Trial by jury is an important element of the justice system in Australia. Juries are made up of citizens randomly chosen from the electoral role. They serve as a means for members of the community to participate in the administration of justice, and to ensure that the application of the law is fair and consistent with community standards.

7.147 An essential characteristic of juries, as an institution, is that they be representative of the wider community.[170] Their representative nature depends on all those capable of serving, whatever their individual characteristics, having an opportunity to serve, unless there are defensible reasons for excluding them from jury membership.[171] There are longstanding concerns that, in practice, people with disability are prevented from serving on juries in Australia without sufficient reason:

> The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian community. This means that

167 Ibid s 23XWU(1).
168 Ibid s 23XWU(2).
169 That is, consent may be given for a person incapable of doing so, by a 'responsible person'—including a spouse or de facto partner; a parent; public advocate or guardian; or 'another person who has responsibility for the day-to-day care of the incapable person'. An example of this approach is found in Western Australian legislation dealing with 'identifying procedures': *Criminal Investigation (Identifying People) Act 2002* (WA) s 20(1)(b).
170 NSW Law Reform Commission, *Jury Selection*, Report No 117 (2007) 49, citing the High Court in *Cheatle v The Queen* (1993) 177 CLR 541, 560.
171 See Ibid 9–10.

> the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.[172]

7.148 State and territory legislation generally refers to disability as a ground for disqualification from serving as a juror; or implies that people with disability may be disqualified on the grounds that they are not capable of performing the duties of a juror.

7.149 These legislative and other barriers to jury service have been examined as part of a number of inquiries, including by the NSWLRC, the Law Reform Commission of Western Australia (LRCWA), and the Queensland Law Reform Commission (QLRC).[173] In South Australia, the Attorney-General has proposed 'further research and investigation on identifying and overcoming barriers to jury duty for people with disability'.[174]

7.150 Inquiries have recommended various legislative changes to facilitate jury service by people with disability and, in particular, amendments to provisions that implied disqualification on the basis of physical disability. For example:

- The NSWLRC recommended that people who are blind or deaf should be qualified to serve on juries, and not prevented from doing so on the basis of that physical disability alone; but that the Court should have power to stand aside a blind or deaf person if the person is unable to discharge the duties of a juror notwithstanding provision of reasonable adjustments.[175]
- The LRCWA recommended that a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability; but a physical disability that renders a person unable to discharge the duties of a juror should constitute a sufficient reason to be excused under the *Juries Act 1957* (WA).[176]
- The QLRC recommended that *Jury Act 1995* (Qld) should be amended to remove the ineligibility of persons with a physical disability, and should instead provide that prospective jurors should inform the Sheriff of any physical disabilities and special needs that they have; but that a person who has an intellectual, psychiatric, cognitive, or neurological impairment that makes the

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172 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August, 2012 81.

173 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006); Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Report No 99 (2010); Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011).

174 'Draft Disability Justice Plan 2014-2016', above n 152, Priority Action 1.5.

175 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(a)–(c). These recommendations have not been implemented.

176 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Report No 99 (2010) rec 56.1. This recommendation has been implemented.

person incapable of effectively performing the functions of a juror is ineligible for jury service.[177]

7.151 More recently, Disability Rights Now has recommended to the United Nations that, in Australia, 'all people with disability be made eligible for jury service'[178] and an Individual Communication has claimed that law and practice concerning jury qualification constitutes a violation of rights guaranteed under the CRPD, including rights to equal recognition under the law and access to justice.[179]

7.152 Submissions have highlighted this issue as being of continuing concern,[180] and expressed support for earlier law reform commission recommendations for change.[181] The Disability Discrimination Legal Service, for example, stated that:

> current national and state jury laws should be reformed to avoid exclusion of people with disabilities from participating in jury duty … the law should allow potential jurors with disabilities to participate in jury duty where such disabilities can be reasonably accommodated. This should replace the current legal position where prospective jurors with auditory and visual disabilities are readily challenged or stood down from a panel.[182]

## Juries in the Federal Court

7.153 At the Commonwealth level, only the *Federal Court of Australia Act 1976* (Cth) has provisions dealing with jury qualification and membership, and it is the focus of the discussion below.

7.154 Historically, juries have not been constituted in Federal Court proceedings. As discussed above, most federal offenders are tried in state and territory courts, and the Federal Court has not dealt with indictable criminal offences.

7.155 This position changed, however, with the criminalisation of 'serious cartel conduct' in 2009,[183] when jurisdiction to try indictable cartel offences by jury was conferred on the Federal Court. A procedural framework for the Federal Court to exercise jurisdiction over indictable offences—including jury provisions—was enacted.[184]

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177 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) recs 8–8, 8–9, 8–14. These recommendations have not been implemented.

178 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 82.

179 Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013. (Referring to CPRD arts 12, 13, 21, 29).

180 See, eg, Disability Discrimination Legal Service, *Submission 55*; Qld Law Society, *Submission 53*; Public Interest Advocacy Centre, *Submission 41*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; The Illawarra Forum, *Submission 19*.

181 Supporting NSWLRC recommendations: Public Interest Advocacy Centre, *Submission 41*. Supporting consideration of QLRC recommendations: Qld Law Society, *Submission 53*.

182 Disability Discrimination Legal Service, *Submission 55*.

183 Introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth)—now *Competition and Consumer Act 2010* (Cth) pt IV, div 1, subdiv B.

184 *Federal Court of Australia Act 1976* (Cth) pt III, div 1A, subdiv D.

7.156 The Federal Court also has the power, in civil proceedings to direct trial of issues with a jury.[185] However, this would only occur in an exceptional case, because the ordinary mode of trial is by judge alone,[186] and state or territory law relating to the qualification of jurors applies in Federal Court civil proceedings.[187]

7.157 Even though juries remain rare in Federal Court proceedings, the ALRC proposes that reform of jury qualification provisions be modelled in Commonwealth law through amendments to the *Federal Court of Australia Act*.

## Qualification to serve on a jury

**Proposal 7–12** The *Federal Court of Australia Act 1976* (Cth) should provide that a person is qualified to serve on a jury if the person can, in the circumstances of the trial for which that person is summoned:

(a) understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;

(b) retain that information to the extent necessary to make these decisions;

(c) use or weigh that information as part of the jury's decision-making process; and

(d) communicate the person's decisions to the other members of the jury and to the court.

**Proposal 7–13** The *Federal Court of Australia Act 1976* (Cth) should provide that decision-making support should be taken into account in determining whether a person is qualified to serve on a jury.

7.158 Under the *Federal Court of Australia Act*, the Sheriff must remove a person's name from the jury list[188] if satisfied that: the person is not qualified to be a juror; or the Sheriff would excuse the person from serving on the jury if the person were a potential juror.[189]

7.159 The Sheriff may, either on application or on his or her own initiative, excuse a potential juror from serving on the jury, if satisfied that they are, 'in all the circumstances, unable to perform the duties of a juror to a reasonable standard'.[190] In coming to a conclusion about a person's ability to perform the duties of a juror, the Act

185 Ibid s 40.
186 Ibid s 39. The exercise of this power has been considered in Federal Court defamation proceedings: Steven Rares, 'The Jury in Defamation Trials' (Paper Presented at the Defamation & Media Law Conference, Sydney, 25 March 2010).
187 *Federal Court of Australia Act 1976* (Cth) s 41(1).
188 A jury list is prepared for particular proceedings and contains the names and addresses of persons that the Sheriff selects from the jury roll for the applicable jury district, see, eg *Federal Court of Australia Act 1976* (Cth) s 23DM.
189 Ibid s 23DO.
190 Ibid ss 23DQ, 23DR.

requires that the Sheriff must have regard to the *Disability Discrimination Act 1992* (Cth).[191]

7.160 On their face, the jury provisions of the *Federal Court of Australia Act* are an advance on most state and territory legislation because they do not identify disability specifically as a ground for disqualification.

7.161 For example, the *Juries Act 2000* (Vic) disqualifies people who are unable to 'communicate in or understand the English language adequately' or who have a 'physical disability that renders the person incapable of performing the duties of jury service'.[192] The Disability Discrimination Legal Service observed that while 'this is not an express exclusion of persons with sensory disabilities' there have been no instances of blind or deaf jurors in the history of the Victorian justice system.[193]

7.162 Similarly, under the *Jury Act 1977* (NSW) persons who are ineligible to serve as jurors include 'a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror'.[194] The practice appears to be that information indicating a potential juror is blind or deaf is considered sufficient to ground a determination that a person is ineligible to serve as a juror.[195] In particular, blind and deaf jurors may be excluded from serving on juries because of concerns about comprehension and the presence of a 13th person in the jury room where an interpreter is used.[196]

7.163 It is not clear whether similar results would occur under the *Federal Court of Australia Act*. However, the fact that the Act provides little guidance on standards for juror qualification may work against the participation of people with disability. That is, people with disability may still be prevented from serving on a jury, depending upon the Sheriff's interpretation of the duties of a juror and factors considered in assessing whether these duties can be performed to a 'reasonable standard'.

7.164 The ALRC recognises there is likely to be 'some difficulty establishing a more specific objective standard' for determining juror qualification.[197] However, an approach consistent with the National Decision-Making Principles may facilitate a more inclusive approach to jury service, and help ensure that people with disability are not automatically or inappropriately excluded from serving on a jury. That is, the qualification of jurors should be assessed by reference to a person's actual decision-

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191 Ibid s 23DQ (Note). See, in particular, *Disability Discrimination Act 1992* (Cth) s 29 (Administration of Commonwealth laws and programs).

192 *Juries Act 2000* (Vic) sch 2, cl 3(a),(f).

193 Disability Discrimination Legal Service, *Submission 55*.

194 *Jury Act 1977* (NSW) s 6(b), sch 2.

195 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006); Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013.

196 See, eg, Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013.

197 Law Council of Australia, *Submission 83*.

making ability. Clearly, there should be no presumption that any particular physical or mental disability should be a disqualifying factor.

7.165 In particular, people who require communication devices or communication support workers to 'expressively communicate' may be subject to assumptions about their ability to serve on juries.[198] The Disability Discrimination Legal Service observed:

> With today's technology and continuing product development that addresses or alleviates sensory limitations, it is neither reasonable nor necessary to permit arbitrary exclusion from jury service on grounds of disability, English incapacity, or an imputed inability to discharge their duties as a juror, or satisfaction of the Sheriff.[199]

7.166 At present, the fact that a person may be supported in performing the duties of a juror does not seem to be able to be taken into account in determining whether a person is eligible to serve. The ALRC proposes that the *Federal Court of Australia Act*—consistently with the National Decision-Making Principles—should expressly provide that qualification to serve as a juror be determined in the context of the available support. Again, the proposal may be criticised on the basis that, unless support is actually available, there will be no change in jury selection practices.

7.167 Nor does the proposal deal with jury challenges on the basis of perceived disability (that is, peremptory challenges and challenges for cause). No reason need be stated for peremptory challenges, and where a person with a disability is challenged because of that disability, this will be subject to a ruling from the judge, who would have regard to the legislative provisions concerning qualification.

## Assistance for jurors

**Proposal 7–14** The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations.

7.168 The National Decision-Making Principles require that people should be provided with the support necessary for them to make, communicate and participate in decision-making. In some cases, this support will include the involvement of an assistant in the courtroom and in the jury room.

7.169 The 2006 recommendations of the NSWLRC referred to 'interpreters and stenographers' being allowed to assist a blind or deaf juror, including in the jury room during jury deliberations.[200] 'Interpreter' in this context was intended to extend to sign

198 Disability Discrimination Legal Service, *Submission 55*.
199 Ibid.
200 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(d)–(e).

languages, such as AUSLAN, and other communication support, and 'stenographer' to include a person providing 'computer-aided real time transcription'.[201]

7.170 The ALRC's proposal uses a more open-ended term, introducing the concept of a 'communication assistant'. The exact parameters of the permissible role of a communication assistant would need to be defined in the Act.

7.171 There is research suggesting that communication assistants would be able to effectively facilitate the participation of some deaf jurors. The NSWLRC and Macquarie University jointly funded a short pilot study to investigate whether people who are deaf could access court proceedings through sign language interpreters.[202] The 2007 report of the study concluded that it had demonstrated that:

- legal facts and concepts can be translated into Auslan;
- Auslan interpreting can provide effective access to court proceedings for a deaf juror;
- hearing people misunderstand court proceedings without being disadvantaged by hearing loss; and
- deaf people are willing and able to serve as jurors.[203]

## Jury secrecy

**Proposal 7–15** The *Federal Court of Australia Act 1976* (Cth) should be amended to provide:

(a) that communication assistants allowed by the trial judge to assist a juror should swear an oath faithfully to communicate the proceedings or jury deliberations;

(b) that communication assistants allowed by the trial judge to assist a juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements for the secrecy of jury deliberations; and

(c) for offences, in similar terms to those arising under ss 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

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201 Ibid 17–18.

202 The study used a judge's summing up in a criminal trial to determine the accuracy of the interpretation and the level of comprehension of potential deaf jurors as compared with a control group of hearing jurors: Ibid 14–15.

203 Jemina Napier, David Spencer and Joseph Sabolec, 'Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting: An Investigation' (Research Report 14, NSWLRC and Macquarie University, 2011) 62.

7.172 A common reason given for excluding people who require support from jury service is that an assistant may be seen as an 'additional' or 'thirteenth' member of the jury, in breach of the secrecy of jury deliberations.[204]

7.173 The rule of jury secrecy, also known as the exclusionary rule, prohibits a juror from discussing the deliberations in the jury room, based on public policy considerations requiring that the verdict of the jury should be final, ensuring that jurors are not subjected to pressure or harassment. However, the rule is a convention or rule of conduct rather than a rule of law,[205] and it is reinforced by statutory provisions that make it an offence to disclose or solicit information about jury deliberations.[206]

7.174 Although there are concerns about maintaining the secrecy of the jury room and allowing a thirteenth person (that is, a communication assistant) to be present, these concerns can be addressed.[207]

7.175 The NSWLRC recommended new legislative provisions requiring the taking of oaths by interpreters and stenographers, extending duties of secrecy to them, and creating new offences. The ALRC proposal above adapts these recommendations in the context of the *Federal Court of Australia Act*.

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204 Deaf Australia referred to a 2013 case in Queensland, in which a deaf person lodged a discrimination complaint against the Queensland Government after being excluded from jury duty. The Queensland Civil and Administrative Tribunal dismissed the complaint because of the 'thirteenth person' objection: Deaf Australia, *Submission 37*.

205 See *R v K* (2003) 59 NSWLR 431, [16]. The position is otherwise in the United States: see Peter McClellan 'Looking Inside the Jury Room' (Paper Presented at the Law Society of NSW Young Lawyers 2011 Annual Criminal Law Seminar, Sydney, 5 March 2011 ).

206 Eg, *Federal Court of Australia Act 1976* (Cth) ss 58AK, 58AL.

207 Public Interest Advocacy Centre, *Submission 41*.

# 8. Restrictive Practices

## Contents



## Summary


8.1 Restrictive practices involve the use of interventions and practices, such as restraint or seclusion, that have the effect of restricting the rights or freedom of movement of a person with disability.

8.2 Significant concerns have been expressed about the use of restrictive practices in Australia. While regulation of restrictive practices primarily occurs at a state and territory level, a combination of initiatives at a national level provide a timely opportunity to consider a national approach to reform of restrictive practices in a range of settings.

8.3 In this chapter, the ALRC proposes that the Australian Government and Council of Australian Governments (COAG) develop such a national approach, which should apply the National Decision-Making Principles and provide for supported decision-making in relation to consent to the use of restrictive practices, to the extent such practices are permitted.


## Restrictive practices in Australia

8.4 Restrictive practices involve the use of interventions and practices that have the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion.[1] People with disability who display 'challenging behaviour' or 'behaviours

1 See, eg, definitions in: Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, (2014) 4. *Disability Act 2006* (Vic) s 3(1). However, see also: Philip French, Julie Dardel and Sonya Price-Kelly, 'Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment' (People with Disability Australia, 2010) [2.48]—[2.51]. See also stakeholder submissions in relation to proposed changes to the definitions under the Proposed National Framework: NMHCCF and MHCA, *Submission 81*; NSW Council for Intellectual Disability, *Submission 33*; Physical Disability Council of NSW, *Submission 32*.

of concern'[2] may be subjected to restrictive practices in a variety of contexts, including: supported accommodation and group homes; residential aged care facilities; mental health facilities; hospitals; prisons; and schools.[3]

8.5 While restrictive practices may be used in some circumstances there are concerns that such practices can also be imposed as a 'means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support'.[4] Such practices may infringe a person's human rights.[5] As a result, there are significant concerns about the use of restrictive practices in Australia. For example, the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) has stated that it

> is concerned that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments, including schools, mental health facilities and hospitals.
>
> The Committee recommends that the State party take immediate steps to end such practices, including by establishing an independent national preventive mechanism to monitor places of detention—such as mental health facilities, special schools, hospitals, disability justice centres and prisons—in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions.[6]

8.6 The Australian Civil Society Parallel Report Group Response to the List of Issues as part of Australia's appearance before the UNCRPD in 2013 expressed concern that people with disability, especially cognitive impairment and psychosocial disability, are 'routinely subjected to unregulated and under-regulated behaviour

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2 The ALRC acknowledges that these terms are subjective and that in many circumstances such behaviour can be understood as 'adaptive behaviours to maladaptive environments' and may be a 'legitimate response to difficult environments and situations': Paul Ramcharan et al, 'Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers' (Research Report, Office of the Senior Practitioner, 2009) 2. See also: Physical Disability Council of NSW, *Submission 32*.

3 See, eg, Office of the Public Advocate (Qld), *Submission 05*; Office of the Public Advocate (Vic), *Submission 06*; Public Interest Advocacy Centre, *Submission 41*; Central Australian Legal Aid Service, *Submission 48*; Children with Disability Australia, *Submission 68*; National Association of Community Legal Centres and Others, *Submission 78*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 318.

4 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 241.

5 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3, 14—17, 19; Juan E. Mendez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/22/53, 1 February 2013). Several stakeholders called for ratification of the Optional Protocol on the Convention Against Torture: Central Australian Legal Aid Service, *Submission 48*; Public Interest Advocacy Centre, *Submission 41*. See also, Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)' (United Nations, 4 October 2013) [35]—[36]; Michael Williams, John Chesterman and Richard Laufer, 'Consent vs Scrutiny: Restrictive Liberties in Post-Bournewood Victoria' (2014) 21 *Journal of Law and Medicine*.

6 Committee on the Rights of Persons with Disabilities, above n 5, [35]–[36].

modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion'.[7]

8.7 The regulation of restrictive practices in Australia primarily arises under state and territory disability services and mental health legislation, and under a range of policy directives, statements and guidance materials. There is significant inconsistency in the regulation of restrictive practices across jurisdictions, and the numerous frameworks 'conspire to make the legal framework in this area exceedingly complex'.[8]

8.8 Restrictive practices regulation in jurisdictions such as Victoria, Queensland and Tasmania occurs through disability services legislation.[9] The approach in other jurisdictions includes policy-based frameworks, voluntary codes of practice, and regulation through the guardianship framework.[10] There is also relevant reform activity in relation to disability services legislation in a number of jurisdictions.[11]

8.9 In the context of the mental health system, jurisdictions such as Victoria and Queensland have detailed provisions relating to restrictive practices, combined with minimum standard guidelines[12] and a policy statement.[13] Legislative provisions are less detailed in other jurisdictions.[14] In NSW, the use of restrictive practices is regulated by a lengthy policy directive.[15] Mental health legislation is, however, an area of ongoing review and reform, with implications for the regulation of restrictive practices.[16]

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7 Disability Rights Now, 'Australian Civil Society Parallel Report Group Response to the List of Issues, CRPD 10th Session Dialogue with Australia, Geneva' (September 2013).

8 Michael Williams, John Chesterman and Richard Laufer, above n 5, 1.

9 *Disability Act 2006* (Vic); *Disability Services (Restrictive Practices) and Other Legislation Amendment Act 2014* (Qld); *Disability Services Act 2011* (Tas).

10 For example, in NSW, guidelines govern the use of restrictive practices in relation to adults: NSW Department of Family and Community Services, *Behaviour Support Policy*, Version 4.0 (March 2012). In addition, the use of a distinct number of restrictive practices requires completion of a documented plan, involving authorisation by an internal Restricted Practices Authorisation mechanism. Guardians appointed under the *Guardianship Act 1987* (NSW) may be authorised to consent to the use of restrictive practices for people over 16 years of age. Restrictive practices in relation to children are governed by *Children and Young Persons (Care and Protection) Act 1998* (NSW) and *Children and Young Persons (Care and Protection) Regulation 2012* (NSW). The WA Disability Services Commission is reviewing its 2012 Voluntary Code of Practice for the Elimination of Restrictive Practices in 2014.

11 For example, in NSW, consultation in relation to a draft of the Disability Inclusion Bill 2014 (NSW) which would replace the *Disability Services Act 1993* (NSW), concluded in February 2014. In December 2013, amendments to the *Disability Services Act 1993* (SA) contained in the *Disability Services (Rights, Protection and Inclusion) Amendment Act 2013* (SA) took effect, requiring prescribed disability service providers to have in place 'appropriate policies and procedures for ensuring the safety and welfare of persons using the service', which may include policies and procedures addressing restrictive practices.

12 *Mental Health Act 1986* (Vic) ss 81–82; Victorian Chief Psychiatrist's Guideline, *Seclusion in Approved Mental Health Services* (2011).

13 *Mental Health Act 2000* (Qld) pt 4A; Queensland Health Department, *Policy Statement on Reducing and Where Possible Eliminating Restraint and Seclusion in Queensland Mental Health Services* (2008). See also, Queensland Health Department, *Mental Health Act 2000 Resource Guide* (2012).

14 See, eg, *Mental Health Act 2009* (SA) ss 7(h), 90, 98; *Mental Health Act 1996* (WA) ss 116–124; *Mental Health and Related Services Act 1998* (NT) ss 61-62; *Mental Health (Treatment and Care) Act 1994* (ACT).

15 NSW Health, *Aggression, Seclusion & Restraint in Mental Health Facilities in NSW*, Policy Directive (June 2012).

16 In Tasmania, the new *Mental Health Act 2013* (Tas) which regulates restrictive practices commenced on 17 February 2014; and the new *Mental Health Act 2014* (Vic) commences on 1 July 2014. There are also

8.10 At a national level, in March 2014, Commonwealth, state and territory disability ministers endorsed the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (the National Framework). The National Framework outlines high-level principles and core strategies to reduce the use of restrictive practices in the disability services sector. It represents a commitment 'to the high-level guiding principles and implementation of the core strategies to reduce the use of restrictive practices in the disability service sector'.[17]

8.11 There are also relevant guidelines at a national or Commonwealth level including guidelines released by the Royal Australian and New Zealand College of Psychiatrists and the Australian Psychological Association,[18] and the Australian Government Department of Health.[19]

## Opportunity for national reform

8.12 Stakeholders expressed significant concern about the use of restrictive practices.[20] The ALRC accepts that the overall objective of reform to laws and legal frameworks with respect to restrictive practices should be to reduce, and where possible, eliminate the use of restrictive practices.[21]

8.13 Regulation of restrictive practices primarily occurs at a state and territory level. However, a combination of recent initiatives at a national level—the National Framework; the development of a national quality and safeguards system for the National Disability Insurance Scheme (NDIS); and the National Seclusion and Restraint Project—provide a timely opportunity to consider a national approach to reform of restrictive practices in a range of settings.

8.14 The National Framework contains high-level principles and strategies designed to reduce the use of restrictive practices in the disability services sector. In March 2014, the COAG Disability Reform Council indicated that 'the core strategies

several reviews of mental health legislation in a number of jurisdictions: ACT— the second exposure draft of the *Mental Health (Treatment and Care) Act 1994* (ACT) was drafted in 2013; WA—the Mental Health Bill 2013 (WA) was adopted by the Legislative Assembly on 10 April 2014; review of the Bill in the Legislative Council is pending; SA—the Department of Health has completed public consultation on the *Mental Health Act 2009* (SA) and its report to Parliament is expected in June 2014; Queensland—submissions to a review focusing on areas for improvements to the *Mental Health Act 2000* (Qld) closed in August 2013; NSW—a report was tabled in Parliament in May 2013: 'Review of the NSW Mental Health Act 2007: Report for NSW Parliament, Summary of Consultation Feedback and Advice' (NSW Ministry of Health, May 2013).

17 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, (2014) 2.

18 'Evidence-Based Guidelines to Reduce the Need for Restrictive Practices in the Disability Sector' (Australian Psychological Society, 2011).

19 See, eg, Department of Health, Decision-Making Tool: Supporting a Restraint Free Environment in Residential Aged Care (2012). See also: Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014).

20 See, eg, National Association of Community Legal Centres and Others, *Submission 78*; Central Australian Legal Aid Service, *Submission 48*; NSW Council for Intellectual Disability, *Submission 33*; Physical Disability Council of NSW, *Submission 32*; Office of the Public Advocate (Vic), *Submission 06*; Office of the Public Advocate (Qld), *Submission 05*.

21 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, (2014) 1–2.

embodied in the National Framework will guide governments in development of national quality and safeguards system for the NDIS'.[22]

8.15 Another factor is the proposed development of a national quality assurance and safeguards system in the context of the NDIS. During the roll-out of the NDIS, state and territory quality assurance and safeguards frameworks will apply.[23] However, as the NDIS is fully implemented and states and territories reduce or cease funding for disability services,[24] and in the light of the move away from block funding to individualised funding, there will be a need for a national approach to quality assurance and safeguards.

8.16 In developing the national quality assurance and safeguards system for the NDIS, the intention appears to have been to use the National Framework to shape the restrictive practices-related elements of that system.

8.17 Stakeholders discussed and highlighted a number of challenges in developing such a system, including for example, the need for registration and regulation of all service providers who receive NDIS funding. In particular, while the focus of the NDIS on participant control over funding is a positive change, the potential for new and unregistered services to enter the market poses challenges for maintaining standards and safeguards, particularly in relation to the use of restrictive practices.[25]

8.18 In addition, given the variety of settings in which restrictive practices are used, there is a need for a national or nationally consistent approach to regulation beyond the disability services sector and the NDIS. The ALRC suggests that rather than simply including regulation of restrictive practices within a broader national quality assurance and safeguards system for the NDIS, the Australian Government and COAG should also facilitate the development of a national or nationally consistent approach separate from the NDIS system.

8.19 The third notable development is the National Seclusion and Restraint Project, which aims to identify best practice in reducing or eliminating seclusion and restraint and may help produce an important evidence base upon which a national approach to reducing and eliminating the use of restrictive practices could be developed.[26]

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22 COAG Disability Reform Council, Meeting Communique, 21 March 2014.

23 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, (2014) 2–3; *Intergovernmental Agreement on the NDIS Launch*, 7 December 2012.

24 See, eg, statement by NSW Department of Family and Community Services that from 1 July 2018, 'the NDIS will fund all disability supports in NSW': NSW Department of Family and Community Services, *Disability Inclusion Bill 2014: Consultation Draft, Information Booklet* 6.

25 See, eg, Office of the Public Advocate (Qld), Submission 05.

26 The Project was established by the National Mental Health Commission in partnership with the Mental Health Commission of Canada and a number of key Australian bodies, including the Australian Human Rights Commission. The National Mental Health Commission has also 'engaged an interdisciplinary team of researchers from the University of Melbourne to look at best practice in reducing and eliminating the use of seclusion and restraint in relation to mental health issues and help identify good practice treatment approaches. The research team aims to identify what factors drive current practice in service delivery to evaluate how these factors can lead to best practice': National Seclusion and Restraint Project, Project Information <www.socialequity.unimelb.edu.au/seclusion-and-restraint/project-information/>.

8.20 A number of stakeholders expressed their support for a national regulatory approach or framework in relation to restrictive practices.[27] For example, the Public Interest Advocacy Centre (PIAC) submitted that it

> agrees that national regulation or framework for the regulation and reduction of restrictive practices is needed. PIAC considers that any regulation must ensure higher standards of treatment and very tight regulation of restrictive practices. PIAC notes that any regulation needs to reflect the principles reflected in the CRPD and the UN Principles.[28]

8.21 The National Mental Health Consumer and Carer Forum and the Mental Health Council of Australia (NMHCCF and MHCA) recommended the development and adoption of

> nationally consistent legislation governing restrictive practices, of which seclusion and restraint are included, be developed and adopted across all states and territories. This legislation should include standardised terminology and definitions and set clear and effective practice standards.[29]

8.22 The development of a national approach to the regulation of restrictive practices, separate from the NDIS system, could take a number of forms. It could, for example, build upon the foundation provided by the existing National Framework to provide further detail in addition to the high level principles and core strategies to guide state and territory approaches. It might involve the development of a new national framework and arrangements.

8.23 A number of stakeholders emphasised the need for binding regulation. For example, the Disability Discrimination Legal Service (DDLS) submitted that it would be 'insufficient' to simply have a framework and hope that the relevant organisations will abide by its 'guidelines'.[30] Instead, a binding form of regulation is necessary. Stakeholders such as the DDLS and the National Association of Community Legal Centres (NACLC) recommended that a national framework or approach 'be binding on organisations that receive federal funding, via inclusion in service agreements'.[31] Consistent with the NMHCCF and MHCA suggestion, regulation could also take legislative form.

8.24 The ALRC does not intend to make a specific proposal about the form any national or nationally consistent approach should take. Such a proposal would extend beyond the scope of this Inquiry.[32] Broadly, however, it is likely that an approach which incorporates legislation and national guidelines, codes of practice or policy

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27 Central Australian Legal Aid Service, *Submission 48*; Public Interest Advocacy Centre, *Submission 41*; Office of the Information Commissioner, Queensland, Submission 20; Carers Queensland Australia, *Submission 14*.

28 Public Interest Advocacy Centre, *Submission 41*.

29 NMHCCF and MHCA, *Submission 81*.

30 Disability Discrimination Legal Service, *Submission 55* attachment 1.

31 Ibid. See also: National Association of Community Legal Centres and Others, *Submission 78*; Carers Queensland Australia, *Submission 14*.

32 See Ch 1.

directives, as well as education, training and guidance material would be appropriate.[33] Such an approach may address the concerns of stakeholders about the focus of the National Framework being

> more on when and how to use restrictive practices rather than seeking to prevent their use, or looking at the environmental factors that may be causing an individual to behave in a way which introduces restraint as an option. The Framework is not premised on changing services, systems and environments as the starting point for changing individual behaviour, but remains focused on changing the person themselves.[34]

8.25 The interaction between the National Framework, the proposed NDIS national quality assurance and safeguards system, state and territory legislation, and any new national approach also needs to be considered.[35] Disability Rights Now suggested that, given the use of restrictive practices in a range of contexts, 'any framework on restrictive practices needs to recognise this, and be part of a wider overarching strategy addressing violence and abuse of people with disability in general'.[36]

8.26 A national or nationally consistent approach may provide a vehicle through which some of the systemic concerns of stakeholders, for example in relation to data collection, might be addressed.

## A national approach to regulation of restrictive practices

**Proposal 8–1** The Australian Government and the Council of Australian Governments should facilitate the development of a national or nationally consistent approach to the regulation of restrictive practices. In developing such an approach, the following should be considered:

(a) the need for regulation in relation to the use of restrictive practices in a range of sectors, including disability services and aged care;

(b) the application of the National Decision-Making Principles; and

(c) the provision of mechanisms for supported decision-making in relation to consent to the use of restrictive practices.

8.27 While not making a specific proposal about the exact form any national or nationally consistent approach should take, the ALRC considers that in developing such an approach, a number of key issues should be considered.

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33 See, eg, S Kumble and B McSherry, 'Seclusion and Restraint: Rethinking Regulation from a Human Rights Perspective' 17 *Psychiatry, Psychology and Law* 551–561.

34 Disability Rights Now, above n 7.

35 See, eg, Australian Psychological Society, Submission 60. See also Michael Williams, John Chesterman and Richard Laufer, above n 5.

36 Disability Rights Now, above n 7.

## Broad application

8.28 In order to be effective, the regulation of restrictive practices needs to cover the use of restrictive practices in a range of settings.[37] This is particularly important given that people with disability may be subjected to restrictive practices in a variety of contexts, including: supported accommodation and group homes; residential aged care facilities; mental health facilities; hospitals; prisons; and schools.[38] Broad application of any national or nationally consistent approach would address one of the key shortcomings of current approaches to restrictive practices, including the National Framework, which is limited to the disability services context.

8.29 A key additional area of Commonwealth law to which a national or nationally consistent approach should apply is aged care.[39] Concerns about restrictive practices in aged care were highlighted by a number of stakeholders. For example, the Office of the Public Advocate (Vic), highlighted concern about 'the high use of restrictive interventions on residents of aged care facilities' and stated that it 'would like to see greater regulation and on-site auditing of this practice'.[40] Similarly, in March 2014, the Senate Community Affairs References Committee recommended (in the context of aged care), that 'the Commonwealth develop, in consultation with dementia advocates and service providers, guidelines for the recording and reporting on the use of all forms of restraints in residential facilities'.[41]

## Encouraging supported decision-making

8.30 The ALRC proposes that any national or nationally consistent approach to the regulation of restrictive practices should reflect the National Decision-Making Principles and make provision for supported decision-making.

8.31 While limited to disability services, the National Framework incorporates guiding principles, including reference to a 'Person-Centred Focus' which states that

> people with disability (with the support of their guardians or advocates where required) are the natural authorities for their own lives and processes that recognise this authority in decision making, choice and control should guide the design and provision of services.[42]

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37 See, eg, Disability Discrimination Legal Service, Submission 55 attachment 1. See also P French, J Dardel and S Price-Kelly, 'Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment' [2009] *People with Disability Australia*.

38 See, eg, National Association of Community Legal Centres and Others, *Submission 78*; Children with Disability Australia, *Submission 68*; Central Australian Legal Aid Service, *Submission 48*; Public Interest Advocacy Centre, *Submission 41*; Office of the Public Advocate (Vic), *Submission 06*; Office of the Public Advocate (Qld), *Submission 05*.

39 In relation to aged care, see, eg, John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26.

40 Office of the Public Advocate (Vic), *Submission 06;* Office of the Public Advocate (Qld), *Submission 05.*

41 Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014) rec 14.

42 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, (2014) 7.

8.32 The National Framework also provides for 'maximum respect for a person's autonomy, including':

i. recognising the presumption of capacity for decision making;

ii. seeking a person's consent and participation in decision making (with support if necessary) prior to making a substitute decision on their behalf; and

iii. engaging the appropriate decision maker and seeking consent where appropriate, where a decision must be made on behalf of a person.[43]

8.33 The corresponding core strategy states that one of the key implementation areas is the 'availability of tools to assist people with disability and their guardians or advocates (where appropriate) to participate in decision making'.[44]

8.34 The ALRC considers that the National Framework provides a useful starting point for the potential application of the National Decision-Making Principles and supported decision-making in the context of restrictive practices.

8.35 People with disability have the right to make decisions about matters which affect their life, including in relation to the use of restrictive practices. As a result, any national approach must ensure that decisions about, and consent to, restrictive practices are ultimately those of the person on whom the practice is being used. In circumstances where the person requires decision-making support there should be provision for decision-making which incorporates a person-centred focus and provides for supported decision-making. For example, a person may require support to make decisions about, or consent to, the use of restrictive practices under a behaviour support plan. In the context of aged care, it may be necessary for a representative who has been appointed to fully support the person in relation to restrictive practices-related decisions, including expressing or constructing the will and preferences of the person with disability, or considering the human rights relevant to the situation.

8.36 Importantly, in Chapter 10, the ALRC proposes review of state and territory guardianship, mental health and disability services legislation—the key legislation under which restrictive practices are currently regulated. One aim of such review, in ensuring legislation is consistent with the National Decision-Making Principles, would be to encourage supported decision-making, and a shift from an objective best interests test to one relating to will, preferences and rights. As a result, in circumstances where a decision in relation to restrictive practices is made at a state or territory level by a substitute decision-maker, such as a guardian, ideally they should have regard to the will, preferences and rights of the person with impaired decision-making ability.[45]

8.37 Finally, consistent with the Safeguards Guidelines under the National Decision-Making Principles, restrictive practices must be least restrictive of the person's human

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43 Ibid.

44 Ibid 10.

45 For prior consideration of the role of state and territory appointed decision-makers in relation to restrictive practices, see, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); P French, J Dardel and S Price-Kelly, above n 37; Michael Williams, John Chesterman and Richard Laufer, above n 5.

rights; appealable; and subject to regular, independent and impartial monitoring and review.

8.38 This approach is consistent with that recommended by a number of stakeholders. NACLC, for example, expressed its support for the proposed National Framework but suggested that it could be strengthened by reference to guiding principles.[46] PIAC submitted that any national or nationally consistent approach should ensure that restrictive practices:

> are only implemented as a last resort; are implemented for the least amount of time possible; are recorded, monitored and reviewed; have tight safeguards in place that are focused on minimising risk to staff, patients, carers and family; and are undertaken with a focus on ensuring decency, humanity and respect at all stages.[47]

## Other issues

8.39 A number of stakeholders raised systemic issues in relation to the use and regulation of restrictive practices, including: the lack of facilities and resources; positive behaviour management; the role of psychologists and others in mitigation of 'challenging behaviours' and multi-disciplinary interventions; the need for education, awareness raising and training of relevant staff; the need for penalties and criminal sanction; and the need for a national approach to data collection.[48] While these concerns are important, the issues do not related directly to concepts of legal capacity or decision-making ability and the ALRC does not intend to make proposals in these areas.

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46 National Association of Community Legal Centres and Others, *Submission 78*.

47 Public Interest Advocacy Centre, *Submission 41*. See also: Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014) recs 14, 15.

48 See, eg, NMHCCF and MHCA, *Submission 81*; Australian Psychological Society, *Submission 60*; Disability Discrimination Legal Service, *Submission 55*; Central Australian Legal Aid Service, *Submission 48*; Physical Disability Council of NSW, *Submission 32*. See also: National Mental Health Commission, 'A Contributing Life, the 2013 National Report Card on Mental Health and Suicide Prevention' (2013).

# 9. Electoral Matters

## Contents



## Summary


9.1 Australia has obligations under the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) to guarantee that people with disability can 'effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity' to vote and be elected.[1]

9.2 This chapter discusses issues which arise in relation to Commonwealth electoral law for people who may require decision-making support. It has three parts. The first part focuses on the sections of the *Commonwealth Electoral Act 1918* (Cth) which relate to entitlements to enrol and vote and objections to enrolment. The ALRC proposes amendment to s 93(8)(a), commonly referred to as the 'unsound mind' provision, to provide that the relevant threshold is whether a person has decision-making ability with respect to enrolment and voting at the relevant election. The ALRC also proposes the introduction of a statutory test for determining whether a person meets the relevant threshold, focusing on the decision-making supports available; the development of additional guidance in relation to the determination; and that the Australian Electoral Commission (AEC) collect and make publicly available information about the new provisions. The ALRC asks a question about the evidence required to support an objection to enrolment.


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1 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 29. See also Ibid arts 4, 12; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2, 25, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Universal Declaration of Human Rights 1948* art 21.

9.3 The second part of the chapter relates to supported decision-making and voting. The ALRC proposes amendment to s 234(1) of the *Commonwealth Electoral Act* which provides a form of supported decision-making, and asks what further changes, if any, are required to the Act or relevant legal frameworks to facilitate the provision of support to people who may require decision-making support, including by secret ballot.

9.4 The third part of the chapter discusses compulsory voting and fines for failure to vote. There is a concern that people with disability who are on the electoral roll may be fined disproportionately for failing to vote. An elector may avoid a fine if they had a 'valid and sufficient reason' for failing to vote. The ALRC proposes that the Australian Electoral Commission develop guidance material to assist Divisional Returning Officers to determine whether a person with disability has a valid and sufficient reason for failing to vote.

## Entitlement to enrolment and to vote

9.5 This first part of the chapter focuses on s 93(8)(a) and pt IX of the *Commonwealth Electoral Act* which relate to persons entitled to enrolment and to vote and objections to enrolment. The ALRC makes a number of proposals. First, the ALRC proposes amendment to the threshold under s 93(8)(a) which deals with circumstances in which a person's name may not be placed or retained on the electoral roll. The ALRC then proposes amendment to the approach to and determination of voting eligibility and the need for research and data collection with respect to these provisions. The ALRC also discusses issues relating to the range of professionals entitled to provide a certificate required to support an objection to enrolment.

9.6 The combined effect of the ALRC's proposals in this section is that, even where an objection is made to the enrolment of an elector with disability:

- the threshold under s 93(8)(a) would be more appropriate and relevant to the particular election—whether the person has decision-making ability with respect to enrolment and voting at the relevant election;
- there would be a focus on the available decision-making assistance and supports in determining whether the person meets the necessary threshold;
- further guidance incorporating the National Decision-Making Principles would be available for medical practitioners and others undertaking assessments and providing medical certificates which must accompany a written objection; and
- there would be greater data about the operation and use of s 93(8)(a) of the *Commonwealth Electoral Act.*

## Threshold

**Proposal 9–1** Section 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person of 'unsound mind' who is 'incapable of understanding the nature and significance of enrolment or voting' is not entitled to have their name on the electoral roll or to vote in any Senate or House of Representatives election. This should be amended to replace the current wording with: 'does not have decision-making ability with respect to enrolment and voting at the relevant election'.

9.7 In this section, the ALRC proposes amendment to s 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth), which contains the threshold relevant to determining whether a person is entitled to have their name placed or retained on the electoral roll and to vote.

9.8 Section 93(8)(a) provides that a person is not entitled to have their name placed or retained on the electoral roll, or to vote at any Senate or House of Representatives election, where they are a person 'who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'.

9.9 To remove a person from the electoral roll based on this provision there are a number of steps:

- a written objection must be lodged by an enrolled elector;[2]
- the objection must be supported by a medical certificate;[3]
- the AEC must give the individual an opportunity to respond to the written objection;[4] and
- the Electoral Commissioner will determine the objection.[5]

9.10 There are a variety of avenues to challenge a decision to remove a person's name from the electoral roll.[6]

9.11 People with Disability Australia and the Australian Centre for Disability Law highlighted that provisions of this type 'all too often' seek to remove or limit a person's legal agency to exercise their rights:

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2 *Commonwealth Electoral Act 1918* (Cth) ss 114–116. The AEC cannot object on the grounds specified in s 93(8)(a).

3 Ibid s 118(4).

4 Ibid ss 116–118.

5 Ibid s 118. The Electoral Commissioner may make any inquiries he or she considers necessary to ascertain the facts relevant to the objection.

6 Including internal review and review by the Administrative Appeals Tribunal under the *Commonwealth Electoral Act 1918* (Cth) pt X, and under the *Disability Discrimination Act 1992* (Cth); the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and by the Commonwealth Ombudsman.

> Frequently, this is due to a conflated understanding of legal capacity with mental capacity. For example, provisions which make exception for people with 'unsound mind', 'disability', 'mental incapacity' or 'incompetence' are expressing the view that the existence of a cognitive impairment permits a limitation on the exercise of legal agency and thus recognition of legal capacity as a whole.[7]

9.12 The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) has recommended that Australia 'enact legislation restoring the presumption of the capacity of persons with disabilities to vote and exercise choice; and to ensure that all aspects of voting in an election are made accessible to all citizens with a disability'.[8]

9.13 Section 93(8)(a) itself has attracted a range of criticism.[9] For example, The Human Rights Law Centre stated that 'the exclusion of persons of "unsound mind" from the franchise is vague, stigmatising and overly broad, and does not reflect the true capacity of people with disabilities to make decisions about voting'.[10] Stakeholders also expressed the view that the provision is ambiguous.[11]

9.14 The Public Interest Advocacy Centre (PIAC) highlighted that, in some circumstances, 'people of "sound mind" do not understand the "nature and significance of enrolment and voting"',[12] but are still entitled to vote.[13]

9.15 The Australian Government Electoral Reform Green Paper highlighted that, while there are some concerns about the provision, as it makes provision for removal of a person's right to vote, it is a necessary provision in order to protect the integrity of the electoral system. It also emphasised that

> in practice however, no test for 'soundness of mind' is conducted when a person seeks to enrol or approaches a polling booth on election day. In practice the provision is 'used' when a person raises a concern with the AEC ... These concerns are generally raised by persons close to the elector in question.[14]

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7 PWDA, ACDL and AHRC, *Submission 66*.

8 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)' (United Nations, 4 October 2013).

9 See, eg, PWDA, ACDL and AHRC, *Submission 66*; The Human Rights Law Centre, *Submission 54*; Public Interest Advocacy Centre, *Submission 41*; Physical Disability Council of NSW, *Submission 32*. See also People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

10 The Human Rights Law Centre, *Submission 54*.

11 Ibid; Public Interest Advocacy Centre, *Submission 41*; Physical Disability Council of NSW, *Submission 32*. See also People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

12 Public Interest Advocacy Centre, *Submission 41*.

13 See also, People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

14 Australian Government, *Electoral Reform Green Paper—Strengthening Australia's Democracy*, (2009) 42.

9.16 There has also been Parliamentary consideration of the provision.[15] At a Commonwealth level, in 2012 the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) contained amendments to the provision. However, the Government accepted the recommendation of the Joint Standing Committee on Electoral Matters, which expressed the view that it was not satisfied that there was any 'pressing need to remove or substitute the phrase "unsound mind" or that it breaches any international obligations in relation to rights to electoral participation'.[16]

9.17 There are two key elements of s 93(8)(a). The first relates to removal of entitlement to enrolment and to vote because of disability ('by reason of being of unsound mind'). The second relates to the relevant threshold of mental or intellectual capacity required ('incapable of understanding the nature and significance of enrolment and voting'). This threshold is broad and is neither context nor time-specific. There is no statutory articulation of what the threshold requires, appearing to apply a global and once-off assessment of a person's mental or intellectual capacity, and as a result the provision is inconsistent with the approach taken by the CRPD and the National Decision-Making Principles.

### *Options for reform*

9.18 There are a number of possible options for amendment of s 93(8)(a). First, the phrase 'unsound mind' could be removed, but the second part of the formulation, 'is incapable of understanding the nature and significance of enrolment and voting' could be retained. The removal of the phrase 'unsound mind' is important in light of the challenges of language discussed in chapter 2, to comply with Australia's obligations under art 8 of the CRPD,[17] and to remove a phrase that stakeholders consider 'derogatory, judgemental and stigmatising'.[18] However, stakeholders have indicated this amendment alone is insufficient and that the rewording of only this phrase may broaden the disqualification.[19]

9.19 Secondly, it would be possible to replace the entire phrase with 'does not have decision-making ability with respect to enrolment and voting' or some other similar phrase. For example, People with Disability Australia and the Australian Centre for Disability Law have argued that the provision should be amended to include the

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15 At a state level, in relation to the equivalent provision, the Victorian Electoral Matters Committee stated that it 'encourages the [Victorian Electoral Commission] to work directly with the Department of Justice and Chief Parliamentary Counsel (Department of Premier and Cabinet) to develop an appropriate terminology': Electoral Matters Committee, 'Inquiry into the Conduct of the 2010 Victorian State Election and Matters Related Thereto' (May 2012) [7.49].

16 Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral and Referendum (Improving Electoral Procedure) Bill 2012 (Cth)' (August 2012). The Bill was amended to exclude the provisions relating to unsound mind and subsequently passed and given Royal Assent on 27 March 2012.

17 Article 8 contains a duty to undertake to adopt immediate, efficient and appropriate measures to combat stereotypes and prejudice in relation to people with disability in all areas of life: *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 8.

18 The Human Rights Law Centre, *Submission 54*.

19 Joint Standing Committee on Electoral Matters, above n 16, [2.89].

threshold 'a lack of capacity to exercise choice' in relation to electoral questions,[20] reflecting the reasoning of Gleeson CJ in *Roach v Electoral Commission*:

> the rationale for excluding persons of unsound mind is obvious, although the application of the criterion of exclusion may be imprecise, and could be contentious in some cases. The rationale is related to the capacity to exercise choice.[21]

9.20 A third option may be to replace the entire phrase with 'does not have decision-making ability with respect to enrolment and voting at the relevant election'. The inclusion of 'at the relevant election' recognises that capacity can fluctuate and is context and time-specific and the threshold should make provision for that by requiring consideration of the specific decision-making ability required to be enrolled and vote at a particular election. This formulation incorporates the views of stakeholders such as PIAC, which submitted that 'any determination as to whether a person lacks capacity to vote should be decision-specific, and only apply to voting at a particular election as opposed to a blanket disqualification from the electoral process'.[22]

9.21 Finally, an option suggested by some stakeholders would be to remove the provision entirely and allow all people to remain on the electoral roll, but make provision for impaired decision-making ability to be considered as a valid and sufficient reason for failure to vote under s 245(4) of the *Commonwealth Electoral Act*, and for waiver of the associated fine.[23] Waiver of fines is an important mechanism to ensure that people with disability do not accumulate debts. This mechanism allows people with fluctuating capacity to remain on the electoral roll and not be penalised if they fail to vote, but can do so if they are able. However, this needs to be balanced with the fact that voting is compulsory and there is a need to ensure the integrity of the electoral system. The joint judgment of Gummow, Kirby and Crennan JJ in *Roach v Electoral Commission* states that s 93(8)(a) of the *Commonwealth Electoral Act*

> plainly is valid. It limits the exercise of the franchise, but does so for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government.[24]

9.22 Concern about the integrity of the electoral system if such an approach was taken has also been expressed by the AEC and the Joint Standing Committee on Electoral Matters.[25]

9.23 Further, voting is compulsory in Australia (unlike in Canada which is the jurisdiction highlighted by stakeholders in support of this approach) and such a

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20 People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009. See also: Public Interest Advocacy Centre, *Submission 41*.

21 *Roach v Electoral Commissioner* [2007] HCA 43, 9.

22 Public Interest Advocacy Centre, *Submission 41*. See also People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

23 See, eg, Nina Kohn, 'Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections' (2008) 1 *Canadian Journal of Elder Law* 29.

24 *Roach v Electoral Commissioner* [2007] HCA 43, 88.

25 Joint Standing Committee on Electoral Matters, above n 16, [2.93].

controversial proposal would change the nature of voting and voter exclusion in Australia with implications beyond this Inquiry. Most democratic countries have some capacity-related qualifications for voting. In light of this, the ALRC does not consider it appropriate to remove s 93(8)(a) entirely.

9.24 The ALRC's view is that the third approach is the most appropriate. The ALRC considers it is necessary to amend the provision to remove the reference to 'by reason of being of unsound mind'. While it has a particular historical evolution,[26] this phrase is inconsistent with the CRPD and the National Decision-Making Principles. As the ALRC is asked to provide a model in Commonwealth laws, it is not appropriate to retain such a phrase in Commonwealth legislation. Further, any test for capacity with respect to enrolment and voting should be based on a person's decision-making ability in the context of the particular electoral decision which they face, in a particular election. As a result, the ALRC also proposes to substitute 'incapable of understanding the nature and significance of enrolment and voting', with 'does not have decision-making ability with respect to enrolment and voting at the relevant election'. This ensures the threshold is not a status-based assessment, and is consistent with the National Decision-Making Principles, to the extent that the threshold relates to ability with respect to a particular decision, at a particular time, rather than more broadly. There would need to be a number of ancillary changes to the *Commonwealth Electoral Act* to reflect this amendment.

9.25 The ALRC recognises the proposed new threshold raises many issues that may need to be resolved before implementation. For example, requiring consideration of decision-making ability with respect to enrolment and voting at a relevant election requires consideration of how such a threshold would operate in practice, including for example to take account of fluctuating capacity.

## Test and assessment

**Proposal 9–2** The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that a person lacks decision-making ability with respect to enrolment and voting at the relevant election if they cannot:

(a) understand the information relevant to decisions that they will have to make associated with enrolment and voting at the relevant election;

(b) retain that information for a sufficient period to make the decision;

(c) use or weigh that information as part of the process of making decisions; and

(d) communicate their decision in some way.

26 See discussion in Ch 2.

**Proposal 9–3** The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that decision-making assistance and support should be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.

**Proposal 9–4** The Australian Electoral Commission should develop a guide to assessing ability for the purposes of determining whether a person 'does not have decision-making ability with respect to enrolment and voting at the relevant election' consistent with the National Decision-Making Principles.

9.26 In addition to amending the threshold or standard under s 93(8) of the *Commonwealth Electoral Act,* the ALRC also considers it is necessary to amend the Act to introduce a statutory test for the purposes of determining whether a person has reached the relevant threshold, but that the focus of any assessment must be on the decision-making supports available, rather than capability. In addition to the statutory test, the ALRC proposes that the AEC develop guidance to assist medical practitioners and others in determining whether a person has or does not have decision-making ability with respect to enrolment and voting at the relevant election.

### *Test*

9.27 Currently, there is no statutory test for determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election. In the ALRC's view, there should be a statutory test and that test should be based on a person's decision-making ability in the context of the relevant election and the available decision-making assistance and support.

9.28 The proposal would introduce a new test into the *Commonwealth Electoral Act*, the key elements of which reflect the National Decision-Making Principles.

### *Assistance and support*

9.29 The existing test of whether a person is of 'unsound mind' and 'is incapable of understanding the nature and significance of enrolment and voting' does not consider the possible role of assistance and support for electors.

9.30 The ALRC proposes that in addition to a new threshold and test, the available decision-making assistance and supports must be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.[27]

9.31 Decision-making support and assistance and supported decision-making are discussed further in the next part of this chapter.

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27 This proposal reflects a key element of the National Decision-Making Principles: Ch 3.

### *Guide to assessment*

9.32 Under the current law, an objection must be supported by a certificate from a medical practitioner stating that, in the opinion of the medical practitioner, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting.[28]

9.33 The ALRC asks a question about the categories of professionals who should be entitled to provide such evidence later in this chapter. Regardless of which professionals undertake this assessment, the ALRC proposes that the AEC, in consultation with its Disability Advisory Committee and others, develop a guide to assessing ability for the purpose of determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election. The guide should be aimed at medical practitioners and AEC employees. The guide or guidance material should incorporate and have regard to the National Decision-Making Principles and associated principles for determining decision-making ability. The NSW Capacity Toolkit also provides a useful model.[29]

## Evidence

**Question 9–1** Section 118(4) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person's name cannot be removed from the electoral roll unless an objection is accompanied by a certificate of a medical practitioner. Should this be amended to provide that an objection may also be accompanied by a statement from a range of qualified persons, including a psychologist or social worker, concerning an elector's decision-making ability with respect to enrolment and voting?

9.34 Section 118(4) of the *Commonwealth Electoral Act* provides that a person's name cannot be removed from the electoral roll unless an objection is accompanied by a certificate of a medical practitioner stating that, in the opinion of the medical practitioner, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting.

9.35 It has been suggested that this provision should be broadened to provide that other professionals who may be associated with the care or support of a person with impaired decision-making ability may provide a certificate in support of an objection.

9.36 In 2012, the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) contained an expanded list of qualified persons similar to the one outlined in Question 9–1 above. The AEC explained the reasoning behind the amendment was to remove the 'impost on individuals or their families by requiring them to go to a medical practitioner, particularly if they already had a relationship with

28 *Commonwealth Electoral Act 1918* (Cth) s 118(4).

29 New South Wales, Attorney General's Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

a psychologist, a psychiatrist or a social worker ... We wanted a process that was going to be relatively inexpensive, that was still going to have some security about it'.[30]

9.37 However, the Joint Standing on Electoral Matters that inquired into the Bill said that it was 'not satisfied that there is any pressing need ... that professions other than medical practitioners should be able to make determinations about a person's capacity to understand the nature and significance of enrolment and voting'.[31]

9.38 On the one hand, in light of moves away from the medical model of disability, and given the relationship people with disability may have with a range of medical and other professionals who are in a strong position to assess the true decision-making ability of the person, it may be beneficial to expand the category of professionals entitled to provide evidence in support of an objection. On the other hand, the evidence required for removing a person from the electoral roll should be of a high standard given the significance of removal,[32] and the regulation and registration of medical practitioners adds an additional safeguard with respect to the assessment process that should be mirrored with respect to any additional categories of professionals. As a result, the ALRC is interested in stakeholder feedback on the appropriate categories of professionals who should be entitled to provide evidence in support of an objection.

## Research and data collection

**Proposal 9–5** The Australian Electoral Commission should collect, and make publicly available, information about the operation of s 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth), including the number of people removed from the electoral roll, the reason, and whether they responded to the objection.

9.39 In 2008–09, 5735 electors were removed from the electoral roll under s 93(8)(a) of the Act. This number peaked in 2010–11 at 13,082 (an election year), and in 2011–12 it was 5445.[33] However, information about removals from the electoral roll is limited and not readily publicly available. For example, there is no publicly available information about the number or nature of objections, or responses to objections, or the reasons for people being removed from the roll.[34]

9.40 As a result, there is stakeholder concern about the lack of data available in relation to s 93(8)(a) of the Act. For example, the Human Rights Law Centre

30 Evidence to *Joint Standing Committee on Electoral Matters*, House of Representatives, 16 July 2012, 18 (Paul Pirani); Joint Standing Committee on Electoral Matters, above n 16, [2.86]; Evidence to *Joint Standing Committee on Electoral Matters*, House of Representatives, 16 July 2012, 18 (Paul Pirani).

31 Joint Standing Committee on Electoral Matters, above n 16.

32 Evidence to *Joint Standing Committee on Electoral Matters*, House of Representatives, 16 July 2012, 16 (Ngila Bevan, People with Disability Australia).

33 Australian Electoral Commission, Submission 2.1 to Joint Standing Committee on Electoral Matters, *Advisory Report on the Electoral and Referendum (Improving Electoral Procedure) Bill 2012* (Cth), (2012) 5.

34 See, eg, The Human Rights Law Centre, *Submission 54*.

recommended that research be commissioned to 'better understand who is disenfranchised by the provision and the circumstances in which their names are removed from the electoral roll'.[35]

9.41 The ALRC considers that this type of data would assist in informing policy development in this area and so proposes that the AEC collect and publicise information about the operation of s 93(8)(a) of the Act.

## Supported decision-making and voting

**Proposal 9–6** Section 234(1) of the *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that 'if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter's ballot paper'.

**Question 9–2** What further changes, if any, are required to the *Commonwealth Electoral Act 1918* (Cth) or relevant legal frameworks to facilitate the provision of assistance and support to people who require decision-making support to vote, including by secret ballot?

9.42 Australia's obligations under the CRPD include ensuring the accessibility of voting procedures, facilities and materials; protecting the right to vote by secret ballot; and where necessary, and at their request, allowing people with disability assistance in voting by a person of their choice.[36]

9.43 In light of these obligations, and the proposal above requiring decision-making assistance and support to be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election, there is a need to ensure the Act contains provision for appropriate decision-making assistance and support.

9.44 Section 234(1) of the *Commonwealth Electoral Act* currently provides that 'if any voter satisfies the presiding officer that his or her sight is so impaired or that the voter is so physically incapacitated or illiterate that he or she is unable to vote without assistance', the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter's ballot paper'.

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35 Ibid.

36 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 29, 4, 12. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 25, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Universal Declaration of Human Rights 1948* art 21.

9.45 This provision already provides for a form of supported decision-making. However, in order to ensure consistency with the ALRC's approach and the use of appropriate language, and to expand the category of people who may rely on the provision, the ALRC proposes that the provision be amended. It may be possible to include a more appropriately worded example in the Act. Specifically, the ALRC proposes the section be amended to provide that 'if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter's ballot paper'.

9.46 In addition to assistance in marking and depositing the ballot paper, people may require additional assistance in relation to enrolment and voting. For example, a person may require support to complete enrolment forms, update their address, or to obtain and understand information about candidates or voting procedures.

9.47 While the AEC and relevant state and territory electoral commissions have introduced a range of measures to increase electoral accessibility,[37] there remains a need for Australia to 'adopt concrete measures to support people with disabilities to exercise their right to vote on an equal basis with others'.[38]

9.48 In addition, the difficulty with any support related to the voting procedure is respecting the right to a secret ballot. PIAC submitted that 'ensuring a secret ballot is an essential element of Australia's democracy, yet this is not readily available to people with disability'.[39]

9.49 A number of stakeholders suggested support mechanisms that would allow people with disability to vote independently and in secret, including the use of logos or symbols; templates; assisted voting; electronically assisted voting; and outreach models.[40]

9.50 The ALRC is interested in what further changes, if any, are required to the *Commonwealth Electoral Act 1918* (Cth) or relevant legal frameworks to facilitate the provision of such decision-making assistance and support to people, including by secret ballot.

## Fines for failure to vote

**Proposal 9–7** The Australian Electoral Commission should develop or amend guidance for Divisional Returning Officers to assist them to determine if a valid or sufficient reason for failing to vote exists in circumstances where an elector is a person with disability.

37 See, eg Australian Electoral Commission, *Submission 10*.
38 The Human Rights Law Centre, *Submission 54*.
39 Public Interest Advocacy Centre, *Submission 41*.
40 Ibid.

9.51 There is a concern that people with disability who are on the electoral roll may be fined for failing to vote because they did not understand when or where booths were open, could not get to a polling station, or for some other reason associated with their disability.[41]

9.52 Section 245 of the *Commonwealth Electoral Act* relates to compulsory voting. Section 245(4) provides that a Divisional Returning Officer (DRO) is not required to send or deliver a penalty notice if he or she is satisfied that the elector: is dead, was overseas, was ineligible to vote or 'had a valid and sufficient reason for failing to vote'.

9.53 Some stakeholders have advocated for inclusion of disability as a specific criterion excusing failure to vote. In particular, PIAC and People with Disability Australia and the Disability Discrimination Legal Centre have argued that s 245(4) should be amended to 'include people with an intellectual or psychiatric disability who are unwell at election time' as a valid and sufficient reason for failing to vote.[42]

9.54 The ALRC's view is that status-based approaches to disability—even where they operate in favour of the person with disability, for example to waive a fine—should be avoided. Accordingly, the ALRC does not consider it appropriate to amend the section to specifically include disability as a separate criterion, or a statutorily defined valid and sufficient reason for failing to vote.

9.55 However, determining what constitutes a valid and sufficient reason for not voting is at the discretion of the DRO for each electorate to determine. The AEC states that

> the original decision of the DRO as to whether a reason for not voting is valid and sufficient is based on the merits of each individual case, in accordance with the law as previously interpreted by the courts, and within the boundaries of administrative guidelines developed by the AEC to assist DROs.[43]

9.56 Administrative guidelines developed by the AEC, in consultation with the AEC Disability Advisory Committee,[44] may provide a useful document in which to provide additional guidance to DROs in relation to the potential impact of disability on an electors' ability to vote. As a result, the ALRC proposes that the AEC amend existing administrative guidelines, or develop new guidance for DROs in determining what constitutes a valid and sufficient reason for failure to vote, including examples relating to disability.

## Other issues

9.57 The Issues Paper highlighted a number of broad issues affecting people with disability in relation to voting, including the lack of easily understood information

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41 See, eg, Ibid; People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

42 People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009. See also The Human Rights Law Centre, *Submission 54*.

43 Australian Electoral Commission, *Electoral Backgrounder: Compulsory Voting* (April 2010) [30].

44 Australian Electoral Commission, *Submission 10*.

about candidates, voting and preferences; difficulties enrolling; and access to voting (though noting this has improved somewhat with wheelchair accessible polling stations, telephone voting and postal voting).[45]

9.58 In submissions to the Issues Paper, stakeholders raised a range of systemic issues concerning enrolment and voting: for example, the need to ensure the AEC provides accessible information in a variety of formats and does so in a timely way prior to an election.[46] The AEC's National Disability Strategy includes actions and target outcomes relevant to improving the accessibility of websites and publications, which may go some way to addressing these concerns.[47]

9.59 Stakeholders also suggested that in addition to imposing obligations on the AEC in relation to provision of information, obligations should also be imposed on political parties and that receipt of electoral funding should be conditional upon the provision of accessible information.[48]

9.60 To an extent these issues are broadly relevant to the issue of decision-making assistance and support. While these are important issues in the lives of people with disability, they do not relate directly to individual decision-making, and the ALRC does not intend to make proposals in these areas.

9.61 Finally, there is some inconsistency between jurisdictions with respect to the matters discussed in this chapter. Given this, the ALRC suggests it may be useful for the AEC, and state and territory governments and electoral commissions, to consider ways to increase uniformity and introduce best practice approaches to electoral matters across jurisdictions consistent with ALRC proposals.

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45 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) [166].

46 See, eg, Public Interest Advocacy Centre, *Submission 41*; People with Disability Australia and Australian Centre for Disability Law, Submission 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

47 Australian Electoral Commission, *National Disability Inclusion Strategy 2012–2020*, (February 2013).

48 See, eg, Public Interest Advocacy Centre, *Submission 41*. A candidate or Senate group is eligible for election funding if they obtain at least 4% of the first preference vote in the division or the state or territory they contested. *Commonwealth Electoral Act 1918* (Cth) ss 294, 297.

# 10. Review of State and Territory Legislation

## Contents



## Summary

10.1 This chapter discusses the implications of the ALRC's proposals for state and territory laws that have an impact on the exercise of legal capacity. The Terms of Reference for the Inquiry focus on Commonwealth laws and legal frameworks, but also ask the Inquiry to consider how maximising individual autonomy and independence could be 'modelled'.

10.2 Modelling a new approach to individual decision-making at the Commonwealth level provides an opportunity to guide law reform at the state and territory level. Reform at the state and territory level is critical to the implementation of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) because many important areas of decision-making are governed by state and territory law—including in relation to guardianship, administration, financial management, powers of attorney and consent to medical treatment.

10.3 The key elements of the ALRC's approach include the proposed National Decision-Making Principles and the Commonwealth supporter and representative scheme ('Commonwealth decision-making model'), which reflects them.

10.4 The ALRC proposes that state and territory governments should facilitate review of legislation that deals with decision-making by people who need decision-making support to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. This chapter explains some of the implications of this proposal and how the ALRC's proposals might be applied in specific areas of state and territory law.

## Review of state and territory legislation

**Proposal 10–1** State and territory governments should review laws that deal with decision-making by people who need decision-making support 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; informed consent to medical treatment; mental health; and disability services.

10.5 The practical outcomes of the ALRC's Inquiry will depend, in significant part, on whether it serves as a catalyst for review of state and territory laws. This is mainly because guardianship and administration laws are state and territory based, and remain the primary mechanism in which others are vested with power to make decisions on behalf of people who need decision-making support.[1]

10.6 Further, many Commonwealth agencies and Commonwealth funded services, such as aged care service providers, rely on state and territory appointed substitute decision-makers in managing their relationships with individuals. In some areas—such as disability services under the National Disability Insurance Scheme (NDIS)—while states and territories will continue to play the major role in providing or overseeing the provision of services, 'federal authorities … will likely exercise more direct federal regulation of, and prescription of, the way states and territories administer disability funding'.[2] Such federal regulation might include encouraging supported decision-making.

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1 In 2007, there were over 4,000 people under public guardianship in Australia: NSW Office of the Public Guardian, Submission No 7 to the NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, 2010. At the end of August 2009, the NSW Trustee and Guardian was directly managing the affairs of 9,182 individuals and overseeing the work of a further 2,795 Private Managers: NSW Trustee and Guardian, Submission No 13 to the NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, 2010. The Victorian body, State Trustees protects the legal and financial interests of over 9,500 people: State Trustees, *Did You Know?* <https://www.statetrustees.com.au/our-story/did-you-know>.

2 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26, 33.

10.7 As discussed in Chapter 3, the proposed National Decision-Making Principles and associated Guidelines are intended to be consistent with the terms of art 12 of the CRPD. By reviewing guardianship and other laws in the light of the proposal, states and territories will advance fuller implementation of the CRPD in Australia.

10.8 This is important as, under international law, parties to treaties undertake to ensure that the terms of the treaty are applied in all parts of federal states. This is a requirement of the *Vienna Convention on the Law of Treaties*, to which Australia is a party,[3] and is an obligation required expressly by art 4(5) of the CRPD.[4]

10.9 In the Australian context, although it is the Australian Government that entered into the CRPD, the provisions of the Convention are binding not only upon the Australian Government, but also upon each state and territory government.[5]

10.10 The proposal indicates to states and territories that, in light of the ALRC's approach and its application in areas of Commonwealth law, similar state and territory laws also should be reviewed.

10.11 The intention is that states and territories would examine relevant legislation to see how the approaches represented by the National Decision-Making Principles and associated guidelines might be incorporated—most fundamentally by facilitating a shift from substitute to supported decision-making.

10.12 This would involve review of legislation that deals with decision-making by people who require decision-making support to ensure, among other things, that:

- legislative tests of decision-making capacity do not provide that people are assumed to lack capability on the basis of having a disability, and that ability is assessed by reference to the decision to be made and the available supports;
- supported decision-making is facilitated by appropriate legislative recognition of supporters;
- laws providing for the appointment of representative decision-makers do so only as a last resort and not as a substitute for appropriate support;
- laws providing for the appointment of representative decision-makers provide for appointments that are limited in scope, proportionate, and apply for the minimum time; and
- laws providing for supported and representative decision-making ensure that a person's 'will, preferences and rights' are respected—including by imposing appropriate duties on supporters and representative decision-makers.

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3 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) art 27.

4 'The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions': *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 4(5).

5 See Philip French, Julie Dardel and Sonya Price-Kelly, 'Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment' (People with Disability Australia, 2010) 14–15.

10.13 To some extent, states and territories have already commenced this process—at least with regard to guardianship, the legislative area of most obvious relevance. For example:

- the Victorian Law Reform Commission (VLRC), in its review of the *Guardianship and Administration Act 1986* (Vic), was asked to have regard to 'the principle of respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, and the other General Principles and provisions' of the CRPD;[6] and
- the Queensland Law Reform Commission has recommended that the General Principles in the *Guardianship and Administration Act 2000* (Qld) be amended to 'reflect more closely the relevant articles' of the CRPD.[7]

10.14 The Law Council of Australia suggested that

> a co-operative approach with States and Territories, in the form of mirror legislation or for the State and Territories to adopt model Commonwealth legislation, is the most practical way to achieve consistency across jurisdictions.[8]

10.15 The NSW Public Guardian submitted that '[a] uniform approach should fit with the Nation Disability Insurance Scheme'.[9]

10.16 A more comprehensive national review process might be coordinated through the Council of Australian Governments (COAG) or its ministerial councils, such as the Disability Reform Council, Law Crime and Community Safety Council or Health Council, in consultation with peak bodies such as the Australian Guardianship and Administration Council. The ALRC would be interested in comment on the best way to ensure that the agenda suggested by its proposals is advanced nationally.

## Application of the National Decision-Making Principles

10.17 The following material discusses, in general terms, how the National Decision-Making Principles and associated Guidelines might be used to guide review and amendment of state and territory laws in the particular areas of:

- guardianship and administration;
- consent to medical treatment; and
- mental health.

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6 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) xi.
7 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) i, rec 4–1.
8 Law Council of Australia, *Submission 83*.
9 NSW Public Guardian, *Submission 50*.

## Guardianship and administration

10.18 As discussed in Chapter 2, one of the key debates of central importance to this Inquiry concerns the extent to which art 12 of the CRPD permits 'substitute' or 'fully supported' decision-making.

10.19 A major implication of this debate concerns the extent to which the CRPD permits decision-making in the form of guardianship and administration, as currently provided for under state and territory laws.

10.20 However, regardless of the lack of consensus with respect to the status of guardianship laws in relation to the CRPD, there is 'a general acknowledgement', underpinned by the paradigm shift heralded by the CRPD that 'the focus must move from what a person with disability cannot do to the supports that should be provided to enable them to make decisions and exercise their legal capacity'.[10]

10.21 There should remain some room for fully supported decision-making. This conclusion is, in part, dictated by the reality that some people will always need decisions made for them.

10.22 The AGAC submitted that there needs to be 'careful development of supported decision making practices', but supported decision-making cannot 'completely replace substitute decision making and there will be an ongoing need for substitute decision making in limited circumstances'.[11] The Caxton Legal Centre noted:

> given the projected exponential increase in the ageing population and the consequent increase in the incidence of terminal cognitive diseases such as dementia and Alzheimer's, coupled with the factor of social isolation and sparse or non-existent support networks for many older people, the retention of a process of formal substituted decision making may be essential.[12]

10.23 Guardianship and administration laws need to be reviewed to ensure, among other things, that guardianship and administration are:

- invoked only as a last resort and after considering the availability of support to assist people in decision-making;
- as confined in scope and duration as is reasonably possible;[13]

10 Office of the Public Advocate Systems Advocacy (Qld), 'Autonomy and Decision-Making Support in Australia: A Targeted Overview of Guardianship Legislation' (February 2014).

11 Australian Guardianship and Administration Council, *Submission 51*.

12 Caxton Legal Centre, *Submission 67*.

13 The Office of the Public Advocate (SA) highlighted that 'there are different rates of full (plenary) appointments as opposed to limited appointments (limited to one area of decision making) between jurisdictions, and different rates for the appointments of private guardians': Office of the Public Advocate (SA), *Submission 17*.

- subject to accessible mechanisms for review; and
- consistent with decision-making that respects the will, preferences and rights of the individual.

10.24 For example, the provisions of state and territory guardianship legislation differ in the extent to which decision-making that respects the will, preferences and rights of the individual is expressly promoted. In New South Wales, Western Australia and the Northern Territory, there is an overriding duty of guardians and administrators to act in the 'best interest' of the person.[14] In Victoria and Tasmania, the 'best interest' of the person is an equal consideration along with the wishes of the person and the least restrictive alternative.[15] In the ACT and Queensland, guardians are obliged to act in a way that least interferes with a person's right to make a decision, [16] or to give effect to a person's wishes, so far as they can be determined.[17] South Australia provides for substitute judgment, where the paramount consideration is the guardian's opinion of what the wishes of the person would have been if they were not mentally incapacitated.[18]

10.25 Recent reviews give important leads on how guardianship and administration laws may change. For example, the VLRC review recommended the development of a supported decision-making and a co-decision-making structure.[19]

10.26 Briefly, this would provide recognition to supporters—trusted persons providing support and assistance to an adult who needs help in making a decision—and external oversight by the Victorian Civil and Administrative Tribunal (VCAT). The co-decision maker would act jointly with the adult, and decisions would have to be with the consent and authority of the represented person, and would be treated as if they were the acts of the represented person with capacity.

10.27 Appointments would be made by the VCAT and the range of decisions specified for which the person needs support, which, in principle, could range across the areas previously covered by guardians and administrators. Safeguards against exploitation are detailed and include registration of co-decision-making orders, regular review on a range of grounds and the options to renew, amend or revoke the order.

10.28 Stakeholders in this Inquiry expressed support for continuing review of Australian guardianship laws,[20] and this has also been called for by the UNCRPD.[21]

10.29 In addition to highlighting the desirability of reviewing state and territory laws to ensure consistency with the National Decision-Making Principles and the

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14 *Guardianship Act 1987* (NSW) s 4; *NSW Trustee and Guardian Act 2009* (NSW) s 39; *Guardianship and Administration Act 1990* (WA) s 4; *Adult Guardianship Act 1988* (NT) s 4.
15 *Guardianship and Administration Act 1986* (Vic) s 4, (WA) s 6.
16 *Guardianship and Administration Act 2000* (Qld) ss 5–7, sch 1.
17 *Guardianship and Management of Property Act 1991* (ACT) ss 4, 5A.
18 *Guardianship and Administration Act 1993* (SA) s 5.
19 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) chs 8–9.
20 See, eg, National Seniors Australia, *Submission 57*.
21 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law*.

Commonwealth decision-making model, the ALRC's proposal also highlights a number of particular considerations that should inform such review. These are briefly discussed below, with particular reference to guardianship laws.

## Interaction with Commonwealth supporter and representative schemes

10.30 As discussed in Chapter 4, the ALRC proposes that a Commonwealth decision-making model, including 'supporters' and 'representatives' should be introduced into relevant Commonwealth legislation, including that relating to the NDIS, social security, aged care, eHealth and privacy.[22]

10.31 If implemented, the interaction of these Commonwealth schemes with state and territory guardianship and administration laws may need to be taken into account in review of the latter.

10.32 Chapter 4 highlights some of the issues involved. The nature of these issues will vary depending on what approach is taken in Commonwealth laws. For example, if it is possible to have both a Commonwealth supporter or representative and a state or territory appointed decision-maker with power to make decisions in the same area, there may need to be a mechanism to resolve any conflict between the two.

10.33 If Commonwealth schemes provide for separate assessment of a person's decision-making capabilities and support needs for Commonwealth purposes, even where a guardian or administrator has already been appointed, other interaction issues will arise.

## Consistency

10.34 It is clearly desirable for there to be consistency between Commonwealth, state and territory legislation dealing with individual decision-making, including in relation to terminology. At present, no such consistency exists:

> Terminology varies considerably between state/territory jurisdictions, including terms such as guardian, manager, administrator, which are inconsistently defined. Powers held under these appointments may also vary—noting that they are often specified by orders of a tribunal, within the scope of powers outlined in legislation; and cross-recognition is, at best, arbitrary.[23]

10.35 Such inconsistency causes problems, in particular because the criteria and scope of state and territory appointments vary; and appointments may not be recognised in other jurisdictions.

10.36 Stakeholders supported a nationally consistent approach. National Disability Services, for example, said that unless there are 'nationally consistent definitions, processes and safeguards around legal capacity assessment and decision support',

> people with disability and their families can experience inconsistent and additional administrative hurdles across different jurisdictions or areas of their lives. These hurdles can be more than just a logistical burden. The lack of recognition of a

22 See Chs 5 and 6.
23 B Arnold and Dr W Bonython, *Submission 38*.

> supported decision-making arrangement across a jurisdictional boundary has the potential to undermine key relationships, support networks and the autonomy of people with disability.[24]

10.37 The problem of inconsistency and its consequences was also noted by the Office of the Public Advocate (SA):

> Because these appointments are made under different laws, with different definitions of incapacity, the rights of people to make decisions, or to be supported to make their own decisions, will depend on which state they live. For example, there are significant differences in the population rate of guardianship appointments between jurisdictions, reflecting different laws, and also different interpretation of laws by tribunals at different times depending on the prevailing rights-based or welfare-based view at the time. There can be considerable 'bandwidth' in how laws are read, and whether or not an appointment is necessary in the circumstances contributing to variation.[25]

10.38 It suggested that a nationally consistent approach to mental incapacity would be helpful as

> it would be an effective way to ensure that rights are upheld according to the UNCRPD across all jurisdictions. The law could not only define mental incapacity, but also define a range of measures for supporting a person's incapacity that are recognised nationally.[26]

10.39 National Seniors Australia said that a nationally consistent approach to capacity would 'inform the initiation of further decision making supports', but cautioned that:

> A national approach to capacity should only take place following a review of Guardianship and Administration Acts and precedent in each state and territory. This will ensure that an appropriate mechanism for measuring decision making capacity will be evidence-based, supportive of individual circumstances and secure against forms of elder abuse or exploitation of power of attorney status.[27]

10.40 The Queenslanders with Disability Network (QDN) highlighted the opportunity the NDIS may provide to promote a more consistent approach to the appointment and powers of decision-makers, in order to prevent 'confusion in the appointment of nominees with regard to disability supports for the NDIS'. That is, where the appointment of NDIS nominees may not correlate with existing guardianship arrangements at a state level, the 'NDIS should be used as a catalyst for systemic change in this area'.[28]

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24 National Disability Services, *Submission 49*. With respect to the impact on movement interstate, see also: AFDS, *Submission 47*; Office of the Public Advocate (SA), *Submission 17*.

25 Office of the Public Advocate (SA), *Submission 17*. The submission includes a state-by-state comparison of the rate of public guardianship as at 30 June 2013, for states in which data could be obtained from online annual reports.

26 Ibid. The OPA (SA) also noted that it would aid monitoring and data collection in implementing the National Disability Strategy's area of policy action in rights protection and that there 'could be meaningful comparisons across jurisdictions'.

27 National Seniors Australia, *Submission 57*.

28 QDN, *Submission 59*.

## Cross-jurisdictional recognition

10.41 A related issue is the need to maximise cross-jurisdictional recognition of appointments and other decision-making arrangements.

10.42 A number of stakeholders emphasised the need for cross-jurisdictional recognition of appointments—especially as people commonly travel between jurisdictions or live in towns which straddle jurisdictional boundaries.[29] The QDN, for example, stated that:

> One of the great advantages of the NDIS will be that it will allow people with disability more freedom to move interstate, without having to be concerned with different support systems across jurisdictions. It would be a terrible shame for such significant reforms to be undermined by other inter-jurisdictional hurdles such as legal capacity definitions.[30]

10.43 Academics Bruce Arnold and Dr Wendy Bonython submitted that the 'rise of yet another class of substitute decision-makers or power-holders' appointed under Commonwealth legislation may lead to problems if it

> creates uncertainty about the validity of pre-emptive appointments made by people in anticipation of future loss of capacity, particularly if they lose capacity outside the jurisdiction the appointment was made in, or if they hold assets in multiple jurisdictions.
>
> In the event that this occurs, and an instrument is not recognised, the default is appointment of a guardian by the tribunal under the relevant jurisdictions' guardianship frameworks—a process which contributes a significant burden to all involved, including family members, healthcare and social workers, and the tribunal itself.[31]

10.44 There are some provisions permitting cross-jurisdictional recognition. However, these arrangements are not comprehensive and should be improved. For example, while the Victorian legislation makes provision for the recognition of interstate guardianship and administration orders,[32] Queensland has no corresponding law.

## Data collection

10.45 Stakeholders raised concerns about difficulties associated with obtaining consistent data in relation to the appointment of substitute decision-makers. A range of stakeholders emphasised the need for improved data collection to facilitate comparisons across jurisdictions and inform policy development.[33] Arnold and Bonython observed that

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29 See, eg, Office of the Public Advocate (SA), *Submission 17*.
30 QDN, *Submission 59*.
31 B Arnold and Dr W Bonython, *Submission 38*.
32 *Guardianship and Administration Act 1986* (Vic) pt 6A.
33 See, eg, B Arnold and Dr W Bonython, *Submission 38*; Office of the Public Advocate (SA), *Submission 17*.

> although data is often collected by service providers, regulatory bodies and third parties that data is often held within institutional silos and is not readily accessible. That inaccessibility militates against informed policy-making.[34]

10.46 State and territory review of guardianship and administration legislation may provide an opportunity to promote mechanisms for consistent and national data collection about supported and fully supported decision-making.

## Informed consent to medical treatment

10.47 At common law, all competent adults can consent to and refuse medical treatment. If consent is not established, there may be legal consequences for health professionals. Under the law of trespass, patients have a right not be subjected to an invasive procedure without consent or other lawful justification, such as an emergency or necessity. At the international level, the CRPD expresses this in terms of a 'right to respect for his or her physical and mental integrity on an equal basis with others'.[35]

10.48 'Informed consent' refers to consent to medical treatment and the requirement to warn of material risk prior to treatment. As part of their duty of care, health professionals must provide such information as is necessary for the patient to give consent to treatment, including information on all material risks of the proposed treatment. Failure to do so may lead to civil liability for an adverse outcome, even if the treatment itself was not negligent.[36]

10.49 The common law recognises that there are circumstances where an individual may not be capable of giving informed consent (for example, due to impaired decision-making ability) or where consent to treatment may not be required, as in the case of emergency. However, except in the case of children—where the High Court has recognised the courts' *parens patriae* jurisdiction in authorising treatment[37]—it does not provide significant guidance on supported decision-making in health care settings.

10.50 State and territory guardianship and mental health legislation (discussed below) does provide detailed rules for substitute decision-making concerning the medical treatment of adults who are deemed incapable of giving consent.[38]

10.51 Guardianship legislation outlines criteria for appointing substitute decision-makers, the hierarchy of possible decision-makers and the scope of their powers, which depend on the age of the patient and the type of treatment proposed.

10.52 In all jurisdictions, except the Northern Territory, guardianship legislation provides for a decision-maker who is chosen (for example, an enduring guardian), assigned by the legislation (for example, a spouse, close friend or relative) or appointed

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34 B Arnold and Dr W Bonython, *Submission 38*.

35 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) ART 17.

36 *Rogers v Whitaker* (1992) 175 CLR 479.

37 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

38 Eg, *Guardianship and Management of Property Act 1991* (ACT) ss 32B, 32D; *Mental Health Act 2009* (SA) ss 56, 57.

(for example, by a court) to make health decisions for an adult who is not capable of giving consent.[39]

10.53 In exercising their powers, substitute decision-makers are required to adopt one of two tests (or a combination of both in some jurisdictions) in reaching their decision for the person with impaired decision-making capacity. One is the best interests test, which requires a balancing of the benefit to the patient against the risks of the proposed treatment, and the other is the substituted judgment test, which involves making a decision which is consistent with what the person would have decided if they had the capacity to do so. Evidence of such wishes may be provided by advance care directives, religious beliefs and previous history of treatment.[40]

### *Supported decision-making in health care*

10.54 Stakeholders expressed opposition to existing substitute decision-making mechanisms in health care.[41] The NCOSS argued for supported decision-making and stated that 'quality of life decisions should be made by the affected person';[42] and the Illawarra Forum, stated that 'every effort should be made to support people to make informed decisions and choices'.[43]

10.55 Stakeholders suggested that a supported decision-making framework would be more likely to result in health care decisions that accord with an individual's personal beliefs and values.[44] The Carers Alliance asserted the primacy of the family in supporting people with disability to exercise capacity.[45] Family Planning NSW considered that encouraging supported decision-making may help overcome a lack of understanding about what constitutes informed consent in reproductive and sexual health.

> A supported decision making framework needs to encompass the requirement for clinicians, other health and support workers to take on the role of assisting a person to make decisions. This means that they need to develop the skills necessary to talk about reproductive and sexual health in ways that encourage the person to make their own decisions.[46]

10.56 A number of stakeholders expressed concerns about informed consent in the specific context of sterilisation procedures. Women with Disabilities Australia

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39 In the NT, there is no provision for consent to medical treatment without an appointment being made. SA has legislation specific to informed consent, which provides for medical powers of attorney: *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

40 See, eg, *Hunter and New England Area Health Service v A* [2009] NSWSC 761. The Supreme Court of NSW confirmed a person's advance care directive to refuse medical treatment is valid if it is made by a capable adult, is clear and unambiguous and applies to the situation at hand.

41 See, eg, NCOSS, *Submission 26*; The Illawarra Forum, *Submission 19*; Office of the Public Advocate (SA), *Submission 17*.

42 NCOSS, *Submission 26*.

43 The Illawarra Forum, *Submission 19*.

44 Office of the Public Advocate (Qld), *Submission 05*.

45 Carers Alliance, *Submission 84*. It was suggested that there is currently insufficient recognition of the role and contribution of carers and family members who possess 'intimate knowledge and understanding of the cognitively impaired person': N Widdowson, *Submission 31*.

46 Family Planning NSW, *Submission 04*.

submitted the 'best interest' approach to the sterilisation of women and girls has been used in a discriminatory way and the lack of education and accessible services can prevent women from making choices regarding their fertility and conception.[47]

10.57 Children with Disability Australia submitted that the criminalisation of forced sterilisation may be justified, as existing requirements for court authorisation have failed to protect the rights of people with disability, under the CRPD, to be free from violence and to retain their physical integrity.[48] Several other stakeholders supported legislative prohibition of sterilisation without informed consent.[49]

### *Review of the law*

10.58 The law on decision-making in health care is complex. Inconsistency in language, and different tests of decision-making capacity and processes across the jurisdictions may cause difficulties for health service providers and consumers.

10.59 A number of recent reports have suggested reforms. The VLRC's guardianship report recommended consolidating existing laws into new legislation distinguishing 'health decision makers' from 'guardians', and 'significant' from 'routine' medical procedures.[50] In the context of developing a national code of conduct for unregistered health care workers, the Australian Health Ministers' Advisory Council (AHMAC) has queried whether a national 'minimum enforceable standard' for informed consent should be introduced.[51]

10.60 In 2011, AHMAC developed a national policy framework for advance care directives to address challenges posed by divergent laws affecting consent to medical treatment,[52] and the ALRC received submissions noting the desirability of nationally consistent and enforceable laws on advance care directives.[53]

10.61 The Mental Health Council of Australia and the National Mental Health Consumer and Carer Forum expressed support for a legal framework for assessing health care decision-making ability in line with developments in the United Kingdom under the *Mental Capacity Act 2005* (UK).[54] This would place a focus on the ability of people to understand information relevant to a health care decision; retain that

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47 WWDA, *Submission 58*.
48 Children with Disability Australia, *Submission 68*.
49 Law Council of Australia, *Submission 83*; Women's Legal Services NSW, *Submission 76*; ADACAS, *Submission 29*.
50 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 12, 199–219, ch 13.
51 'Consultation Paper: A National Code of Conduct for Health Care Workers' (Australian Health Ministers' Advisory Council, March 2014) 16. Most state and territory health departments issue guidelines on consent to health care.
52 Australian Health Ministers' Advisory Council, *National Framework for Advance Health Care Directives*, September 2011.
53 Mental Health Coordinating Council, *Submission 07*; ADACAS, *Submission 29*; Law Council of Australia, *Submission 83*.
54 NMHCCF and MHCA, *Submission 81*.

information; use or weigh that information as part of a decision-making process; and communicate the decision.[55]

10.62 The ALRC proposes that state and territory governments review legislation relating to informed consent to medical treatment, including in relation to advanced care directives, with a view to reform that is consistent with the National Decision-Making Principles and the Commonwealth decision-making model.

10.63 For example, reform encouraging a supported decision-making model might involve recognition that a person may be able to give informed consent to medical treatment with the assistance of a supporter. The implications of such a change, including in relation to the legal liability of health practitioners, would need to be carefully assessed.

10.64 Any new approach to informed consent would need to be reflected in guidance such as the Australian Charter of Rights in Healthcare, the National Safety and Quality Health Service Standards, the National Framework on Advance Care Directives, publications on communication with patients[56] and the national codes of conduct of health practitioners.[57]

## Mental health

10.65 All states and territories have mental health laws that regulate consent to medical treatment, including the involuntary detention and treatment of people with severe mental illness. Generally, mental health laws have provided for treatment based on a person's need for treatment and the risk of harm posed to themselves and others.[58]

10.66 New mental health legislation in Tasmania and Victoria has changed the focus of criteria for the involuntary detention and treatment from the risk of harm to a person's capacity to consent to treatment;[59] and there are active mental health reviews and legislative initiatives in other jurisdictions.[60]

10.67 The Mental Health Coordinating Council (MHCC) submitted that the *Mental Health Act 2007* (NSW) is 'problematic' because there is little detail about the basis of decisions made by doctors on the treatment of detained psychiatric patients, particularly those who retain decision-making capacity in relation to certain treatment

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55 See *Mental Capacity Act 2005* (UK) s 3. This approach is reflected in the ALRC's proposed Representative Decision-Making Guidelines: see Ch 3.

56 'General Guidelines for Medical Practitioners on Providing Information to Patients' (National Health and Medical Research Council, 2004); 'Communicating with Patients: Advice for Medical Practitioners' (National Health and Medical Research Council, 2004).

57 The codes of conduct for the 14 national boards of health practitioners are available at Australian Health Practitioner Regulation Agency, *National Boards* <http://www.ahpra.gov.au/National-Boards.aspx>.

58 See, eg, *Mental Health and Related Services Act* (NT) s 14; *Mental Health Act 2007* (NSW) s 14.

59 The *Mental Health Act 2013* (Tas) factors in a person's decision-making capacity, and not just the mental illness or a risk of harm in the assessment criteria: s 8; the *Mental Health Act 2014* (Vic) defines 'capacity to give informed consent' and provides a statutory presumption of capacity: (Vic) ss 68, 70.

60 See, eg, ACT second exposure draft bill to amend the *Mental Health (Treatment and Care) Act 1994*; Mental Health Bill 2013 (WA); SA Department of Health review of the *Mental Health Act 2009* (SA); Queensland review of the *Mental Health Act 2000* (Qld); NSW review of the *Mental Health Act 2007* (NSW).

decisions and who have a view about the preferred treatment or wish to forgo certain treatments.[61]

10.68 The MHCC stated that the law should outline the rights of patients to refuse and receive treatment and deal with how patients' preferences can be taken into account in medical decisions—including by way of advance care directives—to ensure that doctors override patients' preferences only in limited circumstances, where a patient lacks capacity to make that decision, and the proposed treatment is 'manifestly in the person's best interests'.[62]

10.69 New legislation in Tasmania and Victoria protects the rights of mental health patients through statements of rights. In Tasmania, the rights of involuntary patients are outlined in statute and whenever a person is admitted to, or discharged from, an approved facility, its controlling authority must give the person a statement of their rights.[63] In Victoria, a statement of rights must be explained to people being assessed or receiving treatment in relation to their mental illness.[64]

10.70 A person's rights under the *Mental Health Act 2014* (Vic) include the right to communicate, make advance statements and have a nominated person to support them and help represent their interests.[65] The role of a nominated person is to receive information about the patient; be one of the persons who must be consulted in accordance with the Act about the patient's treatment; and assist the patient to exercise any right under the Act.[66] A person can only nominate another person in writing and the nomination must be witnessed.[67] A nomination can be revoked in the same manner by the person who made the nomination or if a nominated person declines to act in the role.[68]

10.71 A similar model for supported decision-making in mental health services is contained in the Mental Health Bill 2013 (WA) (the WA Bill).[69] Under the proposed legislation, mental health services are obliged to comply with a charter of mental health care principles. The charter recognises the involvement of other people such as family members and carers.[70] In addition, the WA Bill would give effect to a carers' charter provided for in the *Carers Recognition Act 2004* (WA).[71]

10.72 The WA Bill provides for a 'nominated person', someone chosen by the person with mental illness to assist them in ensuring their rights under the Act are observed and their interests and wishes are taken into account by medical practitioners and

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61 Mental Health Coordinating Council, *Submission 07*.
62 Ibid.
63 *Mental Health Act 2013* (Tas) ss 62, 129, sch 1.
64 From 1 July 2014: *Mental Health Act 2014* (Vic) ss 12, 13.
65 Ibid pt 3.
66 Ibid s 23.
67 Ibid s 24.
68 Ibid ss 25–27.
69 The Mental Health Bill 2013 (WA) was adopted by the WA Legislative Assembly in April 2014 and is expected to progress to the Legislative Council for review. If enacted, it will replace the *Mental Health Act 1996* (WA).
70 Mental Health Bill 2013 (WA) sch 1.
71 Ibid cl 319(2)(g), 332(3)(e).

mental health workers.[72] A nominated person is entitled to 'uncensored' communication with the person with mental illness, and to receive information related to the person's treatment and care.[73]

10.73 Under the WA Bill, a nominated person may exercise the rights of the person with mental illness under the legislation, but is not authorised to apply for the admission to or discharge by a mental health service.[74] Unless the provision of information is not in the best interests of the patient, a nominated person has a right to be involved in matters relating to the treatment and care of the patient, including the consideration of the options that are reasonably available for the patient and the provision of support to the patient.[75]

10.74 The ALRC proposes that state and territory governments review mental health legislation, with a view to reform that is consistent with the National Decision-Making Principles and the Commonwealth decision-making model. This might involve, for example, moving towards supported decision-making models similar to those contained in the Victorian legislation and in the WA Bill.

10.75 COAG's Standing Council on Health has long overseen developments in mental health laws, and may be able to advance such an initiative. The AHMAC, a component committee of the Standing Council, commissioned a national project on model mental health legislation, which was completed in 1994.[76] This project propelled review of mental health laws in every state and territory in Australia in the late 1990s.[77]

## Disability services

10.76 State and territory disability services legislation provides the statutory basis for the provision of supports and services to people with disability.[78]

10.77 The role of disability services legislation in regulating restrictive practices is a major focus of Chapter 8, where the ALRC proposes the development of a national or nationally consistent approach that considers, among other things, the need for regulation of restrictive practices in disability services.

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72 Ibid cl 263.

73 Ibid cl 264(2). This includes information about the grounds on which an involuntary treatment order was made, the treatment provided to the patient and the patient's response to that treatment, and the seclusion of, or use of bodily restraint on, the patient: Ibid cl 266(1)(a).

74 Mental Health Bill 2013 (WA) cl 264(5)–(6).

75 Ibid cl 266(1)(b).

76 The University of Newcastle, 'Model Mental Health Legislation' (Australian Health Ministers' Advisory Council, 1994).

77 Chris Sidoti, 'Mental Health for All: What's the Vision?' (Speech delivered at the National Conference on Mental Health Services, Policy and Law Reform in the Twenty First Century, Newcastle, 13–14 February 1997).

78 *Disability Act 2006* (Vic); *Disability Services Act 2006* (NSW); *Disability Services Act 2006* (Qld); *Disability Services Act 1993* (SA); *Disability Services Act 1993* (WA); *Disability Services Act 1993* (NT); *Disability Services Act 1991* (ACT). NSW concluded public consultation on the Disability Inclusion Bill 2014 (NSW) to replace the *Disability Services Act 1993* (NSW).

10.78 More generally, disability services legislation is another area where state and territory governments should facilitate review to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model.

# 11. Other Issues

## Contents



## Summary

11.1 This chapter discusses a number of other issues that are relevant to the focus of the Inquiry on Commonwealth laws and legal frameworks that have an impact on the exercise of legal capacity. These involve:

- the common law relating to incapacity to contract;
- consumer protection laws;
- consent to marriage;
- the nomination of superannuation beneficiaries; and
- acting as a member of a board and in other corporate roles.

11.2 In addition, the ALRC received submissions on a number of areas which are not the focus of the Inquiry. While the ALRC does not intend to make recommendations in these areas, some of the key concerns are outlined.

## Incapacity and contract law

11.3 The assumption underlying any contract is that each party has freely entered into a binding agreement, having assessed whether or not the terms are in their best

interests. Some categories of person—including minors and people with impaired mental capacity—have traditionally been regarded by the law as being incapable of looking after their own interests, and through various rules, a 'legal disability' has been imposed on them.[1]

11.4 Generally, if people under a legal disability attempt to make a contract, that contract can be declared ineffective.[2] Contract law does not, however, require a person's ability to understand the implications of a contract to be assessed. Instead, the common law developed a complex set of rules categorising transactions, especially by minors, in terms of whether there is a legal disability.

11.5 In practice, the existing law of contract may work for the benefit of persons with impaired decision-making ability. A contract may be avoided on the ground that a person lacked the capacity to understand the consequences of entering into it. It has been said that:

> This rule (probably by accident), reflects the modern realisation that mental incapacity has a wide variety of forms with very different degrees of impairment. The idea that people should be presumed to be capable unless shown to be otherwise enhances their dignity and capacity to manage their affairs. The treatment of contracts as binding unless avoided complements this approach.[3]

11.6 In order to avoid the contract on the ground of incapacity, the onus is on the party seeking to have the contract avoided to first establish that: (a) the contracting party was unable, due to mental impairment, to understand the contract at the time of formation; and (b) that the other party either knew or ought to have known of the impairment. This is said to be very similar to the law relating to unconscionable conduct[4]—which is given statutory recognition in the Australian Consumer Law (ACL).[5]

11.7 Effectively, the common law recognises a presumption of capacity and treats contracts as binding unless avoided. Arguably, any reform that required more scrutiny of capacity may work against the interests of persons with impaired decision-making ability to enter into contracts.

11.8 For example, introducing any new test of decision-making ability (as proposed in other areas of law) into contract law may be counterproductive—it would not necessarily assist people, and may deprive them of the ability to contract, or make contracting so risky for the other party that they will refuse to enter into contractual relations.

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1 See Thomson Reuters, *The Laws of Australia* [7.3.160]. Much of the background discussion of contractual incapacity below is taken from the 'Contract Law' title of *The Laws of Australia*, edited by Dr Nicholas C Seddon (1994–2003) and Emeritus Professor JLR Davis (1994–). See also Ch 2.

2 There are exceptions to the general rule, under which persons who lack legal capacity to contract may contract for the necessities of life, such as food, clothing, shelter and education or training for work: see Ibid [7.3.230]–[7.3.260].

3 Ibid [7.3.580].

4 Ibid [7.3.590]–[7.3.600].

5 *Australian Consumer Law* (Cth) s 20 (Unconscionable conduct within the meaning of the unwritten law).

11.9 There are arguments for abolishing the common law relating to contractual incapacity in its entirety. Arguably, this would have no adverse consequences, as questions about the validity of a contract could be dealt with satisfactorily by the laws relating to unfair and unconscionable contracts, undue influence and misrepresentation.[6]

11.10 However, in practice, such a reform may have limited benefit as the likely outcomes of legal disputes about the validity of contracts would be the same. Any reform would be constitutionally problematic as there is no head of Commonwealth legislative power dealing specifically with contract law. Reform covering all contracts would likely require the cooperation of states and territories either under a referral of power to the Commonwealth Parliament (s 51(xxxvii)) or through the enactment of model laws in all jurisdictions.[7]

## Consumer protection laws

**Question 11–1** Should provisions similar to the responsible lending provisions of the *National Consumer Credit Protection Act 2009* (Cth) apply to other consumer contracts? That is, should businesses have obligations to ensure that a consumer contract is suitable for the consumer, including making all reasonable inquiries and ensuring that the consumer fully understands the contract terms?

11.11 There are a range of consumer protection laws that allow contracts to be challenged, including under the ACL and the *National Consumer Credit Protection Act 2009* (Cth).

11.12 The ACL contains provisions under which contracts or contractual terms may be avoided. These include provisions in relation to misleading or deceptive conduct, unconscionable conduct, unfair contract terms and unsolicited consumer agreements.[8]

11.13 Legal Aid Queensland submitted that the existing consumer law framework 'effectively encourages people with a disability to participate in society to the fullest extent possible without being denied goods or services because it might be more difficult to ensure they are aware of their legal obligations' and reflects the CRPD approach to capacity. That is, applying this to consumer law specifically, 'a person may have the ability and understanding to engage with simple consumer products or transactions but may not have the capacity to understand or engage with more complex consumer products'.[9]

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6 Thomson Reuters, *The Laws of Australia* [7.3.180].

7 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Australian Government Attorney-General's Department, 2012).

8 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 20, 22–24; pt 3–2, div 2.

9 Legal Aid Qld, *Submission 64*.

11.14 The *National Consumer Credit Protection Act 2009* (Cth) contains provisions on responsible lending conduct.[10] These essentially require credit providers to assess the capability of all consumers—not only consumers with disabilities—and assist them to understand consumer credit and financial products being offered.

11.15 Legal Aid Queensland submitted that the consumer credit provisions offer 'adequate protections for people with disabilities without the need to adopt an overarching definition of capacity or disability in the legislation'—an approach, it said, that may serve as a useful model for other legislation in the Commonwealth jurisdiction.[11]

11.16 For example, the National Association of Community Legal Centres submitted that, to improve protection for people with disability entering into contracts, companies and retailers should be subject to regulations requiring them to 'ensure that consumers have the capacity to understand and fulfil the terms of contracts'—for example, through asking a 'mandatory list of questions to ensure that a consumer has understood the contract'.[12]

11.17 Similarly, the Public Interest Advocacy Centre suggested that there is a need for 'greater protection of people with disabilities in signing up for consumer contracts, particularly when this is done over the phone and through door-to-door sales'.[13]

11.18 On the other hand, reforms that place undue focus on assessment of a person's abilities, including by imposing positive obligations to make inquiries about the understanding consumers have of particular transactions, may end up disadvantaging some people because goods and services may not be made available to them.

11.19 However, the ALRC is interested in further comment on possible reform. For example, should provisions similar to those requiring responsible lending conduct apply to other consumer contracts, such as telephone or door-to-door sales? That is, should businesses have obligations to ensure that a consumer contract is suitable for the consumer, including making all reasonable inquiries and ensuring that the consumer fully understands the contract terms?

## Marriage

11.20 Article 23 of the CRPD recognises the right of people with disability to marry and found a family.[14] Persons with disability face a range of difficulties in exercising the right to marry and form intimate relationships. However, the focus of this section is on the *Marriage Act 1961* (Cth) and the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* (the Guidelines).

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10 *National Consumer Credit Protection Act 2009* (Cth) ch 3.
11 Legal Aid Qld, *Submission 64*.
12 National Association of Community Legal Centres and Others, *Submission 78*.
13 Public Interest Advocacy Centre, *Submission 41*.
14 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 23.

11.21 The ALRC asks whether amendment is required to the threshold under the *Marriage Act* for 'real consent' to marriage,[15] to provide that the consent of either of the parties may not be real consent where that party did not have decision-making ability with respect to the marriage.

11.22 In addition, the ALRC proposes that existing guidelines for marriage celebrants be amended to ensure they are consistent with the National Decision-Making Principles so that people who may have impaired decision-making ability are not unnecessarily prevented from entering a marriage.

## Real consent to marriage

**Question 11–2** Should s 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth) be amended to provide that, instead of a test of mental incapacity, a party who did not have the decision-making ability with respect to the marriage, does not give 'real consent'?

11.23 The *Marriage Act 1961* (Cth) provides that a marriage will be void in a number of circumstances. Specifically, s 23B(1)(d)(iii) of the *Marriage Act* provides that a marriage is void where 'the consent of either of the parties was not a real consent because ... that party was mentally incapable of understanding the nature and effect of the marriage ceremony'.[16]

11.24 As a result, before a marriage is entered into, the person solemnising the marriage must determine that the parties to the marriage are mentally capable of understanding the nature and effect of the marriage ceremony.[17] It is an offence for a celebrant to solemnise a marriage where he or she has reason to believe that one of the parties does not meet this standard.[18]

11.25 Disability Rights Now has expressed the view that these provisions effectively exclude 'some people with disability, particularly those with cognitive impairments from entering into marriage'.[19] Similarly, the Illawarra Foundation submitted that 'terminology must be reviewed to reflect a clear distinction between intellectual disability and mental capacity ... people with disability should be assessed on their mental capacity as opposed to their disability '.[20]

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15 *Marriage Act 1961* (Cth) s 23B(1)(d)(iii).

16 Ibid.

17 A number of categories of people are authorised celebrants for the purpose of solemnising marriages under the *Marriage Act.* Ministers of Religion are registered with states and territories to solemnise marriages for a recognised denomination. Certain state and territory officers are also entitled to solemnise marriages; for example, officers of the relevant registry of births, deaths and marriages. There are also Commonwealth registered marriage celebrants, who are registered under the Commonwealth Marriage Celebrants program: Ibid pt IV div 1.

18 Ibid s 100.

19 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012).

20 The Illawarra Forum, *Submission 19*.

11.26 However, academics Bruce Arnold and Dr Wendy Bonython submitted that,

> as a binding legal agreement, inherent with responsibilities as well as rights, it is of fundamental importance that parties entering a marriage understand what it is they are binding themselves to. For people who lack the capacity to understand this, marriage should not be available.[21]

11.27 Section 23B(1)(d)(iii) reveals a tension between the need to protect people with disability from exploitation or forced marriage, while ensuring that any person with disability who is able to understand and consent should be entitled to marry freely.

11.28 This formulation of the test was first introduced in the *Matrimonial Causes Act 1959* (Cth).[22] There have only been three reported decisions with respect to this test.[23] Most recently in *Oliver and Oliver*, Forster J concluded that the test

> not only required a capacity to understand 'the effect' but also refers to 'the marriage' rather than 'a marriage' ... taken together the matters require more than a general understanding of what marriage involves.[24]

11.29 Foster J also expressed the view that 'the relevant point of time proving mental incapacity is the time of the marriage ceremony'.[25]

11.30 This interpretation of the provision reflects the ALRC's approach to capacity being context and time specific, and relevant to the particular decision to be made. However, in order to ensure clarity, and consistency with the ALRC's approach to language in this Inquiry and the one taken in relation to a similar provision under the *Commonwealth Electoral Act 1918* (Cth),[26] it may be necessary to amend 23B(1)(d)(iii).

11.31 Therefore, the ALRC seeks stakeholder comment on possible amendments including, for example, whether the provision should provide that 'the consent of either of the parties was not a real consent because ... that party did not have decision-making ability with respect to the marriage'.

11.32 The ALRC does not intend, however, to make proposals to include a statutory test of decision-making ability in the *Marriage Act*, or to require consideration of the available decision-making supports. This is largely because of concerns that such inclusions may have the unintended consequence of making the test under the

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21 B Arnold and Dr W Bonython, *Submission 38*.

22 The *Matrimonial Causes Act 1959* (Cth) was then repealed by the *Family Law Act 1975 (*Cth), and the test was later incorporated into the *Marriage Act 1961* (Cth). See, eg, *Oliver and Oliver* [2014] FamCA 57, [241]–[243].

23 *Brown and Brown* (1982) 92 FLC 232; *AK and NC* (2003) 93 FamCA 178; *Oliver and Oliver* [2014] FamCA 57.

24 *Oliver and Oliver* [2014] FamCA 57, [255].

25 Ibid [201].

26 Section 23B(1)(d)(iii) is similarly worded to the second part of s 93(8) of the *Commonwealth Electoral Act 1918* (Cth) which provides that people are not entitled to have their name placed or retained on the Electoral Roll, or to vote, where they are a person 'who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'.

*Marriage Act*, which currently only requires 'a very simple or general understanding ... of the marriage ceremony and what it involves',[27] more difficult to satisfy.

### *Guardians and consent*

11.33 In some jurisdictions, under guardianship legislation, a guardian of a person with disability cannot consent or refuse to consent to a marriage, but may give an opinion as to whether the guardian thinks the marriage should proceed.[28]

11.34 Disability Rights Now has suggested this may give guardians 'undue influence over the extent to which a person with disability can realise their right to freely marry'.[29] Similarly, Family Planning NSW expressed the view that 'the opinion of a person with disability's guardian should not be taken into account when determining a person's capacity to consent to marriage'.[30] This may be an issue that could be considered in the course of review of state and territory guardianship legislation.

## Guidelines on the Marriage Act

**Proposal 11–1** The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* should be amended to ensure they are consistent with the National Decision-Making Principles.

11.35 Commonwealth registered marriage celebrants may solemnise marriages under the *Marriage Act* and *Marriage Regulations 1963* (Cth) and must comply with the Code of Practice for Marriage Celebrants and ongoing professional development obligations.[31] There are a number of guidelines for celebrants;[32] and celebrants must undergo performance reviews by the Registrar of Marriage Celebrants.[33]

11.36 As outlined above, it is an offence for a celebrant to solemnise a marriage where he or she has reason to believe that one of the parties does not meet the standard contained in s 23B(1)(d)(iii).[34] The Guidelines state that if a celebrant believes the

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27 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 [8.6].

28 See, eg, The Illawarra Forum, *Submission 19*; Family Planning NSW, *Submission 04*.

29 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 152.

30 Family Planning NSW, *Submission 04*. See, also, The Illawarra Forum, *Submission 19*.

31 *Marriage Act 1961* (Cth) s 39G.

32 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012; Australian Government Registrar of Marriage Celebrants, *Guidelines on Advertising for Commonwealth-Registered Marriage Celebrants*, (2012); Australian Government Registrar of Marriage Celebrants, *Guidelines on Conflict of Interest and Benefit to Business for Commonwealth-Registered Marriage Celebrants*, (2012). Note, at the time of writing the *Guidelines on the Marriage Act 1961* were under review.

33 *Marriage Act 1961* (Cth) s 39(H).

34 Ibid s 100.

consent of one or both parties is not a real consent, they 'should refuse to marry the couple, even if the marriage ceremony has commenced'.[35]

11.37 The Guidelines suggest that to determine whether a party's consent is real, a celebrant should speak to the party in the absence of the other party, speak to third parties and keep relevant records.[36] The Guidelines state:

> in cases of mental capacity to understand the nature and effect of the marriage ceremony, a very simple or general understanding will be sufficient. A high level of understanding is not required. The authorised celebrant should ask questions of the person about whom they have concerns in order to gauge the level of their understanding of the marriage ceremony and what it involves.[37]

11.38 The Guidelines also provide a list of questions to assist celebrants to identify situations where consent issues may arise.[38]

11.39 Stakeholders expressed a number of concerns about the Guidelines. The Physical Disability Council of NSW, for example, submitted that it did not consider

> that a celebrant who may not have any knowledge of disability should be authorised to base this judgement. Issues could potentially arise where for example, a person with physical disability who has issues with their speech be incorrectly classed as 'incapable'.[39]

11.40 Similarly, The Illawarra Forum submitted that the Act needs to be amended so that the marriage celebrant does not have the right or responsibility to ascertain 'mental capacity'.[40]

11.41 The Physical Disability Council of NSW highlighted that the Guidelines do not 'consider communication needs and augmented communication used by people with disability'.[41] The Council recommended amendment to clauses of the Guidelines which relate to obtaining a translator or interpreter[42] in order to ensure compliance with art 21 of the CRPD, which requires acceptance and facilitation of the use of 'sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions'.[43]

11.42 The ALRC recognises stakeholder concerns about the expertise of a marriage celebrant in determining whether a person has decision-making ability with respect to the marriage and the need for consideration of the communication needs of people with

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35 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 79.
36 Ibid [8.6].
37 Ibid.
38 Ibid.
39 Physical Disability Council of NSW, *Submission 32*.
40 The Illawarra Forum, *Submission 19*.
41 Physical Disability Council of NSW, *Submission 32*.
42 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 [4.1.2], [5.9].
43 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 21(b).

disability. It may be necessary to amend the Guidelines to provide additional guidance for marriage celebrants in relation to potential issues relating to decision-making ability and communication needs and requirements. The ALRC proposes amendment to the Guidelines to incorporate and have regard to the National Decision-Making Principles and guidelines. The NSW Capacity Toolkit also provides a useful model.[44]

## Other concerns

11.43 In Australia, many persons with disability experience discrimination or difficulties in exercising their rights to marry, form intimate relationships, and sexual expression. In particular, persons with disability

> experience paternalistic and moralistic attitudes from support staff and service providers and their needs for assistance in developing and maintaining relationships and friendships and their decisions to enter into marriage or partnerships receive little or no support at a policy or service delivery level.[45]

11.44 The 'subject of sexuality and intimate relationships are generally silent, ignored and invisible aspect of the lives of people with disability'.[46] Some stakeholders emphasised that many people with disability may be denied the right to engage in intimate relationships. Stakeholders emphasised a range of difficulties including: legislative barriers under state and territory law;[47] attitudes of family, carers and service providers;[48] risk management processes and policies;[49] limited access to information;[50] difficulty accessing sex workers;[51] and the need for education and awareness raising in relation to people with disability and sexual and reproductive health.[52]

11.45 While important, some of these issues arise at a state or territory level and the key to addressing many of the others extends beyond the limits of law or legal

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44 New South Wales, Attorney General's Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

45 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 15–16. See also: Family Planning NSW, *Submission 04*.

46 Family Planning NSW, *Submission 04*. See also, Family Planning NSW, 'Love & Kisses: Taking Action on the Reproductive and Sexual Health and Rights of People with Disability 2014-2018' (December 2013) <http://www.fpnsw.org.au/disability_advocacy.pdf>.

47 For example, provisions that make it an offence to have sexual intercourse with a person who, for example, does not have the capacity to consent to sexual intercourse because of 'cognitive incapacity': *Crimes Act 1900* (NSW) s 61HA(4)(a) and the broad definition of cognitive impairment under s 61H(1A), *Crimes Act 1958* (Vic) ss 50–52. See, also, Touching Base, *Submission 40*.

48 See, eg, Queenslanders with Disability Network, *Submission 59*; B Arnold and Dr W Bonython, *Submission 38*; Family Planning NSW, *Submission 04*. See, also, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 158. Michael Kirby, 'Adult Guardianship: Law, Autonomy and Sexuality' (2013) 20 *Journal of Law and Medicine* 866, 873.

49 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 158.

50 Vicdeaf, *Submission 56*.

51 Queenslanders with Disability Network, *Submission 59*; Touching Base, *Submission 40*; Physical Disability Council of NSW, *Submission 32*.

52 Family Planning NSW, *Submission 04*. See more generally: The Illawarra Forum, *Submission 19*; Senate Standing Committee on Community Affairs, 'The Involuntary or Coerced Sterilisation of People with Disabilities in Australia' (Commonwealth of Australia, 2013).

frameworks, the focus of the ALRC's work.[53] The ALRC does not intend to make proposals in relation to these issues.

## Superannuation

11.46 Many decision-making issues in relation to superannuation concern the operation and power of state and territory appointed decision-makers, including powers of attorney. As they arise under state and territory law, these issues go beyond the scope of this Inquiry. The focus of this chapter is confined to decision-making issues that may require amendment to Commonwealth legislation and legal frameworks.

11.47 The *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) govern the operation of superannuation funds in Australia.[54] The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Commissioner of Taxation supervise superannuation funds.[55] Individual superannuation funds are also governed by their trust deeds and governing rules.

11.48 This section discusses two specific questions with respect to superannuation and binding death benefit nominations. The first question is whether the SIS Act and SIS Regulations should be amended to provide for supported decision-making when a member of a superannuation fund nominates a beneficiary. The second question relates to whether, when a member of a superannuation fund has appointed a state or territory decision-maker, that decision-maker should be able to nominate a beneficiary on behalf of the member.

### Binding death benefit nominations

**Question 11–3** Should the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide:

(a) for supported decision-making regarding a binding death nomination of a beneficiary;

(b) that a state or territory decision-maker (such as under an enduring power of attorney) may nominate a beneficiary on behalf of the member?

53 See, eg, B Arnold and Dr W Bonython, *Submission 38*.

54 The SIS Act makes provision for the prudent management of certain superannuation funds and applies to all private sector funds and certain public sector funds that have elected to be regulated by the SIS Act: *Superannuation Industry (Supervision) Act 1993* (Cth) s 3(1).

55 Ibid.

**Question 11–4** If a person acting under an enduring power of attorney may make a binding death nomination on behalf of a person holding a superannuation interest under the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth), should they be required to have regard to the will, preferences and rights of the member in making the nomination? What safeguards need to be in place?

11.49 Superannuation is generally provided through a trust structure in which trustees hold the funds on behalf of members. The SIS Act and SIS Regulations provide mechanisms to allow superannuation fund rules to permit a member of the superannuation fund to complete a binding notice nominating a beneficiary.[56] A member can nominate a legal personal representative, or a dependant or dependants as their beneficiary.[57] Nominations are generally only binding for three years, but can be renewed.[58] On or after the member's death, the trustee of the fund must then provide the member's benefits to the person or people mentioned in the notice.[59]

11.50 'Legal personal representative' is defined under the SIS Act to mean 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person'.[60] The ALRC is interested in stakeholder feedback on whether amendment may be required to this definition.

11.51 The SIS Regulations require that the notice nominating a beneficiary must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18 and neither of whom is mentioned in the nomination; and

56 Ibid s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. There is also provision for a non-binding death benefit nomination which is not binding on the trustee of the superannuation fund, however the trustee will take the member's wishes into consideration when making a decision as to whom to pay the benefit: Ibid reg 6.22.

57 Superannuation law restricts who is an eligible dependant to receive a death benefit payment to a spouse (including same-sex and de facto), child, or person with whom the member has an interdependency relationship: *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10, 10A.

58 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(7). When a binding nomination lapses there is some confusion about whether the death benefit becomes part of the estate or the nomination just becomes non-binding. Although it is outside the terms of reference this has been raised as an issue of concern.

59 This is subject to a trustee of the entity complying with any conditions contained in the regulations, and the member's notice being given in accordance with the regulations. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 59; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. A dependant is defined to include the spouse, child or any person with whom the person has an interdependency relationship: ss 10, 10A.

60 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

- contain a declaration signed and dated by the witness stating that the notice was signed by the member.[61]

11.52 The Law Council of Australia submitted that

> some funds accept nomination by a person holding an enduring power of attorney granted by the member, generally without inquiring as to the wishes of the member. Some funds do not accept a nomination by a person holding an enduring power of attorney, with the result that binding nominations cannot be made by these members.[62]

11.53 Subject to the scope of the appointment of a state or territory decision-maker, such as a power of attorney, there does not appear to be any restriction in the SIS Act or SIS Regulations that would prevent a person acting under a power of attorney from completing and signing a binding death benefit nomination. The Superannuation Complaints Tribunal has held that an enduring power of attorney would have permitted such an action.[63]

11.54 The Law Council of Australia has suggested that superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.[64]

11.55 There appear to be key three issues. First, if persons with disability are being prevented from nominating a beneficiary because they require decision-making support, the SIS Act and SIS Regulations may need to be amended to remedy this situation. The ALRC is interested in stakeholder feedback in relation to this issue.

11.56 Secondly, should the SIS Act and SIS Regulations be amended to limit the provision of a binding death nomination to persons with disability who are able to make the decision, with support? For example, should a person acting for a person with disability, under an enduring power of attorney, be restricted from making a binding death nomination? While a nomination is a lifetime act, the effect is will-like in nature—as it affects property after the death of the person who holds the superannuation interest.[65]

11.57 Under strict conditions, wills can now be authorised by the court in some jurisdictions ('statutory wills'), where a person is regarded as having lost, or never having had, legal capacity.[66] In the succession context it is a relatively new jurisdiction and exercised cautiously, given the importance accorded to testamentary freedom as a valued property right. Generally speaking, the conditions for such statutory wills reflect the changes in emphasis in approaches to legal capacity and support for those who may

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61 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.
62 Law Council of Australia, *Submission 83*.
63 Superannuation Complaints Tribunal, Decision D07–08\030 (3 September, 2007) [34].
64 Law Council of Australia, *Submission 83*.
65 See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [3.10]–[3.12].
66 *Succession Act 2006* (NSW) ss 18–26; *Succession Act 1981* (Qld); ss 21–28; *Wills Act 1936* (SA) s 7; *Wills Act 2008* (Tas) ss 21–28; *Wills Act 1997* (Vic) ss 21–30; *Wills Act 1970* (WA) s 40; *Wills Act 1968* (ACT) ss 16A–16I; *Wills Act 2000* (NT) ss 19–26.

require decision-making assistance discussed in Chapter 2. The legislation also reflects the time of its introduction in the standard applied by the courts.[67] For example, the courts have to ask whether the proposed will would 'accurately reflect the testator's likely intentions'; is a will that is 'reasonably likely' to be one that the testator would have made; 'is or may be a will ... that the person would make'; or 'is one which could be made by the person'.[68]

11.58 For the purposes of this Inquiry, the key question is whether a similar approach should be taken in relation to binding death nominations. This would require strict provisions for testing whether the nomination is one that the person would really want: that is, does it express their will and preferences? If it is considered that binding death nominations should only be made by the person whose superannuation interest is affected, with appropriate support in making that decision, then the SIS Act and SIS Regulations should be clarified to this effect.

11.59 Thirdly, if a person acting under an enduring power of attorney is to be permitted to make a binding death nomination for the person, then the SIS Act and SIS Regulations need, similarly, to be clarified. The standard by which such nomination should be made and the scrutiny made of the nomination by way of safeguards should also be made clear.

11.60 Accordingly, the ALRC asks whether legislative change is required to clarify whether a binding death nomination may be made by a person acting on behalf of another (such as by an enduring power of attorney), and, if so, what standard should be used to guide such action and what safeguards are necessary in relation to it.

## Board membership and other corporate roles

11.61 Board participation is one of the areas listed in the Terms of Reference. In the Issues Paper, the ALRC asked in what ways the Commonwealth laws and legal frameworks relating to membership of, or participation on, boards diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity. Stakeholders expressed concern about under-representation of people with disability on corporate, government and non-government boards; and about the operation of legal provisions allowing the removal of directors or board members because of intellectual disability or mental illness.[69]

11.62 The Mental Health Coordinating Council submitted that the language of laws should change to 'eradicate any stigmatising and discriminating practice towards

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67 See the discussion in Croucher and Vines, above n 65, [6.11]–[6.20]; R Croucher, '"An Interventionist, Paternalistic Jurisdiction"? The Place of Statutory Wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674.

68 Croucher and Vines, above n 65, [6.11].

69 See eg, Hobsons Bay City Council, *Submission 44*; Mental Health Coordinating Council, *Submission 07*; The Illawarra Forum, *Submission 19*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; J Meagher *Submission 79*.

people with a mental health condition'—including in relation to some provisions concerning board membership.[70]

11.63 For example, the *Associations Incorporation Act 2009* (NSW) applies model rules to the constitutions of associations, if appropriate provision is not otherwise made.[71] These default rules provide that a casual vacancy in the office of a member of the committee occurs if the member 'becomes a mentally incapacitated person'.[72] In turn, the *Interpretation Act 1987* (NSW) defines the term 'mentally incapacitated person' to mean a person who is 'an involuntary patient or a forensic patient or a correctional patient within the meaning of the *Mental Health Act 2007*, or a protected person within the meaning of the *NSW Trustee and Guardian Act 2009*'.[73]

11.64 Such a broad provision seems inconsistent with the National Decision-Making Principles because it makes status-based assumptions about decision-making ability, and does not recognise that ability may fluctuate over time.[74] The fact that someone is briefly an involuntary patient, or is subject to some form of administration or guardianship order, should not automatically require them to vacate a position on an association's committee.[75] In this Inquiry the ALRC proposes to move away from a status-based approach.

11.65 At a Commonwealth level, a number of provisions in the *Corporations Act 2001* (Cth) apply tests of capacity in relation to acting in various corporate roles, including as a director, auditor, liquidator and financial services licence holder:

- ***Directors***. If a person who is the only director and the only shareholder of a proprietary company 'cannot manage the company because of the person's mental incapacity', the person's personal representative or trustee may appoint another person as director.[76]
- ***Auditors and liquidators***. The Companies Auditors and Liquidators Disciplinary Board must, on an application by ASIC or APRA, cancel the registration of an auditor or liquidator if the person 'is incapable, because of mental infirmity, of managing his or her affairs'.[77]
- ***Financial services licence holders***. ASIC may suspend or cancel an Australian financial services licence held by a person who 'becomes incapable of managing their affairs because of mental or physical incapacity'.[78]

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70 Mental Health Coordinating Council, *Submission 07*.
71 *Associations Incorporation Act 2009* (NSW) s 25.
72 *Associations Incorporation Regulation 2010* (NSW) sch 1, cl 18(2)(f).
73 *Interpretation Act 1987* (NSW) s 21.
74 See, eg, the Representative Decision-Making Guidelines.
75 The Mental Health Coordinating Council proposed that the wording should be changed to 'permanently incapacitated' rather than 'mentally incapacitated': Mental Health Coordinating Council, *Submission 07*.
76 *Corporations Act 2001* (Cth) s 201F(2).
77 Ibid s 1292(7)(b).
78 Ibid s 915B.

**Proposal 11–2** Sections 201F(2), 915B and 1292(7)(b) of the *Corporations Act 2001* (Cth) should be amended to provide that a person is incapable of acting in the particular role if they cannot:

(a) understand the information relevant to the decisions that they will have to make in performing the role;

(b) retain that information to the extent necessary to make those decisions;

(c) use or weigh that information as part of the process of making decisions; and

(d) communicate the decisions in some way.

11.66 The existing tests of a person's capacity to act in roles regulated by the *Corporations Act* are inconsistent with the principles of supported decision-making. In particular, they are status-based—referring to concepts such as 'mental infirmity' and 'mental incapacity'. Further, the functional aspect of some of the tests refers broadly to a person's ability to manage 'their affairs' rather than to make particular categories of decision or perform particular duties.

11.67 Such tests, to the extent they are necessary, should be based on a person's decision-making ability in the context of a particular role or duties. In the ALRC's view, the *Corporations Act* should be amended to introduce provisions based on the National Decision-Making Principles and Guidelines.

# Other issues

## Employment

11.68 There are many concerns about the employment of people with disability in Australia, including those arising from lower levels of labour force participation and higher unemployment as compared to others;[79] and the lowest employment participation rate for people with disability among OECD countries.[80]

11.69 In addition, in response to the Issues Paper, stakeholders raised concerns about:

- the relationship between employment and social security systems;
- the operation of the Job Services Australia and Disability Employment Services system, including the conduct of employment services assessments;
- the operation of Australian Disability Enterprises;

79 See, eg: Australian Bureau of Statistics, 'Australian Social Trends' (Cat No 4102.0).

80 Organisation for Economic Co-Operation and Development, Directorate for Employment, Labour and Social Affairs, *Sickness, Disability and Work*, Background Paper for High-Level Forum, Stockholm, 14–15 May 2009.

- the operation of the supported wage system and business service wage assessment tool (and proposed changes); and
- the declining rate of employment of people with disability in the Commonwealth public service.[81]

11.70 While these are important issues in the lives of persons with disability, the issues do not relate directly to concepts of legal capacity or decision-making ability, and the ALRC does not intend to make proposals in these areas.

## Anti-discrimination

11.71 The nature and operation of Commonwealth anti-discrimination legislation raises a range of significant issues for people with disability. These issues relate especially to factors which may limit the ability of people with disability to access the system, including:

- the individualised nature of the complaint system;
- issues of standing;
- failure to cover intersectional discrimination;
- costs associated with proceeding past conciliation;
- reliance on, and the operation of, exceptions;
- coverage;
- positive duties;
- remedies and enforcement; and
- the role, powers and resourcing of the Australian Human Rights Commission.[82]

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81 See, eg, Legal Aid Qld, *Submission 64*; Redfern Legal Centre, *Submission 46*; Deaf Australia, *Submission 37*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

82 See, eg, Law Council of Australia, *Submission 83*; National Association of Community Legal Centres and Others, *Submission 78*; Women's Legal Services NSW, *Submission 57*; Anti-Discrimination Commissioner (Tasmania), *Submission 71*; Children with Disability Australia, *Submission 68*; Coordinating Committee of Women's Legal Services Australia, *Submission 70*; Legal Aid Victoria, *Submission 65*; Legal Aid Qld, *Submission 64*; Spinal Cord Injuries Australia, *Submission 63*; Queenslanders with Disability Network, *Submission 59*; National Seniors Australia, *Submission 57*; Vicdeaf, *Submission 56*; Disability Discrimination Legal Service, *Submission 55*; Mental Health Council of Australia, *Submission 52*; National Disability Services, *Submission 49*; Central Australian Legal Aid Service, *Submission 48*; Redfern Legal Centre, *Submission 46*; MDAA, *Submission 43*; Public Interest Advocacy Centre, *Submission 41*; B Arnold and Dr W Bonython, *Submission 38*; Cairns Community Legal Centre, *Submission 30*; Equal Opportunity Commission of South Australia, *Submission 28*; Deaf Society of NSW, *Submission 24*; Carers NSW, *Submission 23*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Insurance Council of Australia, *Submission 08*; Mental Health Coordinating Council, *Submission 07*; Office of the Public Advocate (Qld), *Submission 05*; Family Planning NSW, *Submission 04*.

11.72 These are systemic concerns about anti-discrimination law and practice and, in the light of this, and the significant work that has been undertaken in this area in recent years,[83] the ALRC does not intend to make proposals in this area.

## Insurance

11.73 In the Issues Paper, the ALRC asked what changes, if any should be made to the insurance exemption under the *Disability Discrimination Act 1992* (Cth) (DDA), and for submissions on other issues relating to insurance. The key concerns expressed by stakeholders with respect to people with disability and insurance relate to:

- the availability of, information about, and the cost of insurance;
- the operation of policy exclusions, including for example in relation to pre-existing conditions and mental illness;
- the relevance, transparency and accessibility of the actuarial and statistical data on which disability-based insurance underwriting and pricing occurs; and
- reliance on the insurance exemption under the DDA.[84]

11.74 Conversely, some stakeholders submitted that 'laws and legal frameworks concerning insurance do not reduce the equal recognition of people with disability' and that the operation of the underwriting process or the operation of the exemption under the DDA are appropriate.[85]

11.75 Again, some of the issues highlighted by stakeholders do not relate directly to concepts of legal capacity or decision-making capability, and the ALRC does not intend to make proposals in these areas.

11.76 There have been a number of recent inquires which have dealt with these matters. For example, in many respects the concerns mirror those expressed in the ALRC's Age Barriers to Work Inquiry. The conclusions reached in the report *Access All Ages—Older Workers and Commonwealth Laws*[86] may also be applicable in the context of disability, including in relation to:

- the need for clear and simple information about available insurance products;
- the desirability of an agreement between the Australian Government and insurers requiring the publication of data upon which insurance offerings based on age rely;

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83 See, eg, Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth); Senate Legal and Constitutional Affairs Committee, *Review of Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Cth), February 2013 (and submissions to the Senate Committee); Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws,* Discussion Paper (2011) and submissions in response to the Discussion Paper.

84 See, eg, Anti-Discrimination Commissioner (Tasmania), *Submission 71*; Mental Health Council of Australia, *Submission 52*; Physical Disability Council of NSW, *Submission 32*.

85 Insurance Council of Australia, *Submission 08*. See, also, Financial Services Council, *Submission 35*.

86 Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013).

- review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age as well as the development of guidance material about the application of any insurance exception under Commonwealth anti-discrimination legislation; and
- amendment of the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct to include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.[87]

## Parenthood and family law

11.77 The Terms of Reference identify parenthood and family law as an area for consideration in this Inquiry. Some of the issues which arise are referred to in other parts of the Discussion Paper. For example, issues concerning the appointment of case and litigation representatives and protecting vulnerable witnesses often arise in family law proceedings and are discussed in Chapter 7. Similarly, issues relating to sterilisation are discussed in Chapter 10.

11.78 Another issue raised by stakeholders was concern about the removal of children from parents with disability, particularly through the operation of the child protection system in states and territories.[88] However, as outlined in Chapter 1, the focus of the ALRC's work is on Commonwealth laws and legal frameworks, and examination of the operation of state and territory child protection systems extends beyond the Terms of Reference for this Inquiry.

11.79 Some stakeholders also raised issues relating to the effect that a parent having disability may have on parenting proceedings in the Family Court.[89] However, the Hon Chief Justice Diana Bryant AO expressed the view that:

> insofar as it is being suggested that the Act discriminates against parents with an intellectual disability, or that the presence of an intellectual disability is of itself a disqualifying factor in an application in which a parent is seeking to spend substantial time with their child, I believe those views are misconceived.[90]

11.80 In any event, these concerns focus on the application by judges of the primary and secondary considerations in parenting matters under ss 60CC(2) and 60CC(3) of the *Family Law Act 1975* (Cth) and are outside the scope of this Inquiry.

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87 Ibid.

88 See, eg, G Llewellyn, *Submission 82*; Anti-Discrimination Commissioner (Tasmania), *Submission 71*; ADACAS, *Submission 29*; Office of the Public Advocate (Vic), *Submission 06*. See also Office of the Public Advocate (Vic), 'What Even Happened to the Village? The Removal of Children from Parents with a Disability' (Report 1: Family Law—Hidden Issues, December 2013).

89 See, eg, Office of the Public Advocate (Vic), above n 88. See also ADACAS, *Submission 29*; The Illawarra Forum, *Submission 19*.

90 D Bryant, *Submission 22*.

## Holding public office

11.81 People with disability are significantly under-represented in public office.[91] The main barrier to holding public office for persons with disability may be the negative assumptions about their ability to perform the functions in a role of trust. The Law Council of Australia acknowledged that this social disadvantage, rather than any legal restriction, affects the capacity of people to hold public office, as well as to engage in a profession, vocation or other activities.[92]

11.82 The qualifications of members of the House of Representatives and Senators are set out in the *Australian Constitution*.[93] They include eligibility as an elector under the *Commonwealth Electoral Act 1918* (Cth).[94] As discussed in Chapter 9, the ALRC proposes amendment of the 'unsound mind' provision contained in the *Commonwealth Electoral Act*.[95]

11.83 Under the *Australian Constitution*, a Commonwealth judicial officer may be removed on an address from both Houses of the Parliament on the ground of 'proved misbehaviour or incapacity'.[96] A statutory process for assisting the Parliament to consider removal has been established by the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth). Under this Act, the Parliament may establish a commission to investigate and report on an allegation of misbehaviour or incapacity, so that the Parliament is well-informed about the decision at hand.

11.84 The *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) modified various related laws such as the *Family Law Act 1975* (Cth) and the *Federal Court of Australia Act 1976* (Cth) to provide a statutory basis for the heads of jurisdiction[97] to deal with complaints about judicial officers, including establishing a conduct committee.

11.85 The ALRC does not propose any change to these laws because they appear to provide for an impartial and considered approach to the assessment of decision-making ability. These 2012 laws have also not yet been tested. In time, the ALRC's National Decision-Making Principles may inform the decisions of Parliament and the heads of jurisdictions of Commonwealth courts.

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91 In 2010, the Hon Kelly Vincent MLC, South Australia, from the 'Dignity for Disability' party was the first member of parliament in Australia to be elected on a disability platform.

92 Law Council of Australia, *Submission 83*.

93 *Australian Constitution* ss 16, 34.

94 Similar provisions exist at state level and, in Victoria, the constitution itself explicitly provides that a person who 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting is not entitled to be enrolled': *Constitution Act 1975* (Vic) s 48(2)(d).

95 *Commonwealth Electoral Act 1918* (Cth) s 93(8).

96 *Australian Constitution* s 72. Similar grounds apply for the removal of Commissioners of the ALRC: *Australian Law Reform Commission Act 1996* (Cth) ss 17, 17A.

97 The heads of jurisdiction are the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate.