
Inquiry into Equality, Capacity and Disability in Commonwealth Laws

Australian Law Reform Commission

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Introduction

1. The Law Council of Australia welcomes the opportunity to contribute to the Australian Law Reform Commission's (ALRC's) Inquiry into Equality, Capacity and Disability in Commonwealth Laws. This submission responds to Issues Paper No. 44, released by the ALRC on 15 November 2013.
2. As outlined in **Attachment A**, the Law Council is the peak body for the Australian legal profession. Through the law societies and bar associations of the Australian States and Territories, plus the Large Law Firm Group Ltd (the "constituent bodies" of the Law Council), the Law Council effectively speaks on behalf of around 60,000 Australian lawyers.
3. This submission will focus on the following matters raised in the Issues Paper:
 - access to justice and legal assistance programs;
 - the United Nations Convention on the Rights of Persons with Disabilities;
 - the National Disability Strategy 2010-2020;
 - a uniform approach to legal capacity;
 - general protections provisions;
 - anti-discrimination law;
 - the National Disability Insurance Scheme;
 - employment;
 - access to justice, evidence and federal offences;
 - social security, financial services and superannuation; and
 - particular disability communities.
4. This inquiry follows a number of current and past inquiries and reviews which have considered issues relevant to access to justice and equality before the law for people with disabilities, several of which are footnoted below.¹

¹ These include: the Productivity Commission's Inquiry into *Access to Justice Arrangements*; the Australian Human Rights Commission Review into *Access to Justice in the Criminal Justice System for People with Disability*; Review of the *National Partnership Agreement on Legal Assistance Services: Draft Evaluation Framework*; the Productivity Commission Inquiry Report on the *Review of the Disability Discrimination Act 1992*; the Productivity Commission's Report on *Disability Care and Support*, July 2011; Victorian Law Reform Commission Review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*; Victorian Parliament Law Reform Committee Inquiry into *Access to and Interaction with the Criminal Justice System by People with an Intellectual Disability and their Families and Carers*; New Zealand Parliamentary Inquiry into *Accessibility of Services to Parliament*; the Victorian Law Reform Commission's Inquiry into *Guardianship Laws*; and House Standing Committee on Health and Aging Inquiry into *Dementia – Early Diagnosis and Intervention*.

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5. The Law Council also refers the ALRC to the Law Society of South Australia's submission in response to the South Australian Attorney-General's Department's discussion paper on Improving the Criminal Justice System for People with Disability.²
 6. The Law Council is aware that there are a number of disability peak groups and disability advocacy organisations with a long history of engagement with governments and law reform commissions in various jurisdictions. The Law Council acknowledges that collectively these organisations represent a significant repository of information and expertise on various issues affecting people with disabilities.
 7. This submission has been prepared with the assistance of several legal practitioners, who are experts in the fields of criminal law, human rights, and civil justice.
 8. The Law Council wishes to thank the Commission for engaging in preliminary consultations with the Working Group on 4 December 2013 and looks forward to continued consultation with the Commission throughout the Inquiry.
 9. The Law Council is grateful to the Law Institute of Victoria (the LIV), the Law Society of New South Wales (the LSNSW), the Victorian Bar, the Law Society of South Australia (the LSSA) and the Superannuation Law Committee of the Law Council's Legal Practice Section contributions to this submission.

General Comments

10. The Law Council commends the Commission on its comprehensive Issues Paper, which covers a wide range of important issues relating to Commonwealth laws and legal frameworks that affect the equal recognition of people with disability before the law and their ability to exercise legal capacity.
11. As an overarching comment, the Law Council considers that the failure by successive governments to provide appropriate funding to legal assistance services has severely undermined the capacity of legal assistance providers to meet the legal needs of specific and vulnerable target groups. People with disability are identified by the Legal Australia-Wide (LAW) Survey report³ as being among those with the most significant unmet legal need in the Australian community. The LAW survey found that people with a disability had significantly higher prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems across a broad range of legal areas.⁴
12. In light of these findings the Law Council strongly recommends that the ALRC consider the impact of insufficient and steadily contracting funding for legal assistance services (in real terms) on the capacity of people with disability to access legal

² The Law Society of South Australia's submission to the South Australian Attorney-General's Department's discussion paper on Improving the Criminal Justice System for People with Disability provides information on a wide range of issues facing people with disabilities and their interaction with the South Australian justice system, including the notable problems that have arisen from the lack of free legal representation for people with disability at the South Australian Guardianship Board. The Law Society of South Australia's submission is available [here](#).

³ (2012), *Report of the Legal-Australia-Wide Survey*, NSW Law and Justice Foundation. See <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

⁴ 2012 Legal Australia-Wide (LAW) Survey categorised 'legal problems' into 12 groups as follows: accidents, consumer, credit/debt, crime, employment, family, government, health, housing, money, personal injury and rights.

assistance and their corresponding capacity to access justice, secure equal recognition before the law and exercise legal capacity.

United Nations Convention on the Rights of Persons with Disabilities

Question 1. Australia has an Interpretative Declaration in relation to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. What impact does this have in Australia 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?

13. The Law Council supports the promotion of supported decision-making which may improve autonomy for people with impaired decision-making ability.
14. The Victorian Law Reform Commission's (VLRC) consultation paper on Guardianship, notes that support relationships currently operate informally.
15. The VLRC identified some potential benefits and possible disadvantages in reforming the law to formalise supported decision-making arrangements,⁵ but adopted the view that formalisation of supported decision making arrangements would be desirable, as an effective way of recognising that people have different decision-making abilities and of providing more options for people whose capacity is impaired in some way⁶.
16. The VLRC outlined several proposals for the formalisation and/or the legal recognition⁷ of supported decision-making arrangements, including through:
 - Victorian Civil and Administrative Tribunal (VCAT) appointments, whereby VCAT would be able to make an order appointing one or more supporters to assist a person with impaired capacity; and
 - personally appointed supporters, whereby a person requiring decision-making supports appoints one or more supporters to assist them and this appointment is legally recognised.
17. The VLRC also outlined proposals for the appointments of co-decision makers along similar lines.
18. The Law Council is advised by the LIV that it does not support formalisation of supported decision making arrangements. The LIV points to the disadvantages outlined in the VLRC's consultation paper and has suggested that formalising supported decision-making may introduce practical problems without improving support for people with impaired decision-making ability.

⁵ See VLRC's Consultation Paper on Guardianship, paras 7.73 to 7.82.

⁶ Ibid, para 7.85.

⁷ The terms 'formalisation' and 'legal recognition' are used interchangeably in this submission.

19. However, the Law Council considers that formalised supported decision-making through the mechanisms proposed by the VLRC provide a reasonable balance between the benefits and disadvantages of regulating supported decision-making (which are articulated in the consultation paper⁸) and which provide for:

- Supported decision-making agreements;
- Co-decision-making agreements;
- Supported decision-making orders; and
- Co-decision-making orders.

National Disability Strategy 2010-2020

Question 2. What changes, if any, should be made to the *National Disability Strategy 2010-2020* to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?

20. The Law Council notes the general concerns about the National Disability Strategy (NDS) expressed by stakeholders as outlined in the Issues Paper and considers it appropriate for the ALRC to address those concerns, including:

- the lack of implementation of the NDS;
- absence of monitoring and reporting requirements; and
- the limited recognition of the rights of people with disability to marry, form intimate partner relationships, have a family and be parents.

Framing Principles

Question 3 The ALRC has identified as framing principles: dignity; equality; autonomy; inclusion and participation; and accountability. Are there other key principles that should inform the ALRC's work in this area?

21. The Law Council considers the principles outlined by the ALRC are appropriate. Further, the Law Council notes that legal recognition of supported decision making is likely to necessitate an accompanying regime which is intended to promote autonomy and accountability.

A uniform approach to legal capacity?

Question 4. Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity? If so,

⁸ See para 7.73 to 7.82 of the VLRC's consultation paper on Guardianship.

what is the most appropriate mechanism and what are the key elements?

22. The Law Council supports an approach which delivers the highest level of consistency throughout the nation.
23. The Law Council considers 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.

The role of family, carers and supporters

Question 5. How should the role of family members, carers and others in supporting people with disability to exercise legal capacity be recognised by Commonwealth laws and legal frameworks?

24. The Law Council considers that there should be a formal process for registration and recognition of the full range of the roles of family members, carers and other supporters, as well as a mechanism to provide guidance about the responsibilities held by those performing supporting roles, including to adhere to the principle of preserving the highest level of autonomy possible for the person with a disability.

Anti-discrimination law

Question 6. What issues arise in relation to Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to the *Disability Discrimination Act 1992* (Cth) to address these issues?

25. The Law Council has supported promotion of equality and the need for adequate protection against discrimination in previous advocacy and submissions.⁹
26. Federal anti-discrimination legislation addresses discrimination by way of four different separate pieces of legislation, plus the *Human Rights and Equal Opportunity Act 1986* (Cth). As noted in the Issues Paper, the current anti-discrimination system may not adequately protect against intersectional discrimination.¹⁰
27. Key concerns outlined in the Law Council's submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, follow:

⁹ See Law Council's submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Disability Discrimination and other Human Rights Legislation Amendment Bill 2008, and a supplementary submission in 2009.

¹⁰ The Issues Paper defines intersectional discrimination as discrimination "on the basis of more than one (or a combination of) grounds/protected attributes. For example, a woman with disability may experience discrimination because of both her sex and disability" see footnote 122 of Issues Paper.

Comparator test in the DDA

The Law Institute of Victoria (LIV) has explained that requiring a person experiencing disability to compare her or his situation and treatment to the treatment of someone without a disability is confusing, inappropriate and almost impossible in many cases where people with disabilities often suffer multiple different types of disability, and often intersectional discrimination based on other attributes.¹¹

Reasonable adjustments

The Law Council strongly supported the retention of the ‘reasonable adjustments’ provision in the DDA, and generally supported extending the duty to make reasonable adjustments to other attributes protected under the consolidated Act.¹² It is noted that the Issues Paper states that there have been expressions of uncertainty and concerns about concepts such as ‘reasonable adjustments’ (DDA, ss5,6) and ‘unjustifiable hardship’ (DDA s11) and their operation in practice. This is not an uncommon problem when new terms are employed in legislation. It will not be immediately known what the full range of meanings and applications are of such terms. However, they are suitable and appropriate terms which allow for the application of objective standards to the balancing of competing interests. As in other areas of the law, a body of case law will gradually emerge which interprets the terms and applies them to particular fact situations; providing guidance to those who are called upon to understand the meaning of the terms and take them into account in their day to day activities.

28. The Law Council recommended, in the context of the previous Federal Government’s attempts to consolidate anti-discrimination legislation, that the proposed consolidated act should specifically provide protection against intersectional discrimination and that any combination of protected attributes be covered by such a provision.¹³ That protection is no less desirable in the context of disability discrimination than any other area of discrimination, and disability discrimination legislation should make specific provision for it.

General protections provisions

Question 7. In what ways, if any, should the general protections provisions under the *Fair Work Act 2009* (Cth) be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

29. The Law Council is advised that it is unnecessary to amend the general protection provisions under the *Fair Work Act 2009* (Cth) to enable people with a disability to bring claims that relate to discrimination in a work context.
30. The general protection provisions under the *Fair Work Act 2009* (Cth) are afforded to employees and prospective employees at work. Section 351 of the *Fair Work Act 2009* expressly proscribes discrimination because of a person’s “physical or mental disability”, among other things.

¹¹ See Law Council’s supplementary submission to the Attorney-General’s Department on the Consolidation of Commonwealth anti-discrimination Laws Discussion Paper, April 2012, at para 31, available [here](#)

¹² Ibid, at para 53.

¹³ Ibid, at para 67.

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31. “Discrimination” is included first in a number of “Other Protections” in Division 5 of Part 3-1 “General Protections”.

Question 8. There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, should this legislation be amended to improve or clarify their interaction in circumstances of disability discrimination?

32. As noted in the Issues Paper, while the general protections provisions of the *Fair Work Act 2009* only apply in the context of employment, there are substantial overlaps between these provisions and the Commonwealth anti-discrimination legislation.
33. There are legislative limitations restricting the initiation of multiple claims in various jurisdictions alleging discrimination in relation to employment, pre-employment and termination of employment. For example, the complainant is required to make a choice of jurisdiction.
34. The Law Council acknowledges that this is a significant question and one that people could legitimately have different views about. There is no doubt that a person has the capacity in respect of the same alleged conduct to elect to take proceedings under either s351 of the *Fair Work Act 2009* or under the DDA. There are pros and cons in respect of each. Under *Fair Work Act 2009*, for example, it is unlikely that costs will be awarded, while costs can be claimed in respect of a matter brought under the DDA. The *Fair Work Act* matter will get to conciliation and hearing much quicker. However, the defences are not identical, such that there may be advantages in proceeding under the DDA.
35. One view is that it is unnecessary to amend the *Fair Work Act 2009* or Commonwealth anti-discrimination legislation given the importance of specific protections against disability discrimination in the context of employment.
36. The Law Council is advised that there is no requirement to legislate merely because there is overlap (the two laws are not inconsistent in a manner that requires amendment).
37. As noted earlier in this submission, the Law Council has previously suggested improvements to the protections available under the DDA, in the context of the previous Federal Government’s attempts to consolidate anti-discrimination laws, which may also be of relevance here.

Administrative Law

Question 9. What issues arise in relation to review of government decisions that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws

and legal frameworks relating to administrative law to address these issues?

38. Other than issues related to funding for legal advice and representation for NDIS clients seeking administrative review of decisions relating to their eligibility, care and support, discussed below, the Law Council has not been advised of any specific concerns under administrative law affecting equal recognition before the law for people with disability.

Competition and Consumer Law

Question 10. What issues arise in relation to competition and consumer law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to competition and consumer law to address these issues?

39. The Law Council has not been specifically advised of any concerns related to competition and consumer law affecting equal recognition before the law for people with disability. However, the Law Council acknowledges, as noted in the Issues Paper, that there are a number of issues affecting the capacity of people with disability to enter into consumer contracts.

Privacy

Question 11. What issues arise in relation to privacy that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to privacy to address these issues?

40. The Law Council has not been advised of any specific concerns in relation to privacy affecting equal recognition before the law for people with disability.

The National Disability Insurance Scheme

Question 12. What changes, if any, should be made to the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

41. The Law Council considers that the NDIS is likely to be one of the most significant administrative schemes to be established by the Commonwealth since Medicare. Under the scheme originally proposed by the Productivity Commission and adopted by the previous Federal Government, the NDIS is expected to create new rights to

individualised care and support packages for around 411,250 Australians, when fully operational.¹⁴

42. The Law Council has previously raised concerns about the failure to allocate funding for legal representation to those applying for review of decisions made by DisabilityCare Australia.
43. Prior to the 2013 Federal election, the Law Council was advised that very modest additional funding may be offered to legal aid commissions in order to run 'test cases'. On the basis of information received, the Law Council considers that funding, which was to be allocated by the previous government, is vastly insufficient to support even a limited number of test cases. The Law Council is not yet aware if the current Government has made any decisions with respect to funding for legal advice and assistance to scheme participants.
44. The Law Council submits that the failure to account for the additional legal need that will be created by the NDIS will have the following effect:
- a) Legal Aid Commissions and other legal service providers, including disability advocacy bodies, will be subject to even higher demand, which they will not have the capacity to meet;
 - b) NDIS clients will still apply to the Administrative Appeals Tribunal (AAT), unrepresented, placing significant additional strain on the resources of the AAT as it attempts to deal with much less efficient proceedings (problems created by unrepresented litigants are widely acknowledged); and
 - c) additional demand for justice services is likely to flow on to the Federal Court, again with the additional problem of managing unrepresented parties.
45. Furthermore, many vulnerable NDIS clients and their carers are likely to be disenfranchised by NDIS decision-making processes and administrative review arrangements, which they will face significant challenges navigating without legal assistance. This directly impacts on their capacity for equal recognition and protection before the law.

Question 13. What changes, if any, should be made to the nominee or child's representative provisions under the *National Disability Insurance Scheme Act 2013* (Cth) or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

46. The Law Council is advised that the nominee provisions under the NDIS Rules are appropriate, subject to a review of the experience of the provisions during the trial phase of the NDIS.

¹⁴ Productivity Commission, *Disability Care and Support*, July 2011, Commonwealth of Australia, page 754-5.

Question 14. What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

- (a) the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules;
- (b) social security legislation; and
- (c) state and territory systems for guardians and administrators?

47. The Law Council considers it would be desirable for there be some consistency brought to Commonwealth, State and Territory legislation dealing with nomination and appointment processes for children and people with disability.

Employment

Question 15. In what ways, if any, do Commonwealth laws or legal frameworks relating to employment diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

Disability Discrimination in the Workplace

48. The Law Council is advised that discrimination in the workplace against those with disability continues to be prevalent. The LIV has argued that the legislative model of a complaints-based system relies upon the victim of discrimination to take action against the perpetrator of the offending behaviour,¹⁵ which may present a reasonable barrier to that individual exercising those rights.
49. The Law Council considers that legislation which aims to address disability discrimination in the workforce can be strengthened by promoting education programs in the workplace and by providing access to information to employers and employees. Workplaces should be encouraged to ensure their workplaces are accessible to those with disabilities.

Intersectional discrimination

50. The Law Council has previously expressed support for the consolidation of Commonwealth anti-discrimination legislation into a single Act as a key initiative within Australia's human rights framework.¹⁶
51. In a previous submission to the AHRC on age barriers to work, the Law Council stated that the consolidation process offers the benefit of improving protections against

¹⁵ See Law Institute of Victoria's submission to the then Human Rights and Equal Opportunity Commission Inquiry into Equal Employment Opportunity and Participation for People with Disability, 20 April 2005, available [here](#).

¹⁶ See Law Council of Australia submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion paper – Supplementary Submission*, 26 April 2012. Available [here](#); Law Council of Australia submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012. Available [here](#).

intersectional discrimination in employment, for example, where a person might be discriminated against on the basis of age and disability.¹⁷

Flexible work arrangements

52. The Law Council notes that s 65 of the *Fair Work Act 2009* affords the right to request flexible work arrangements on the basis that an employee, amongst other factors, has a disability. Section 65(5) sets out a non-exhaustive list of what reasonable business grounds may amount to.
53. The prerequisites required to make a flexible work arrangement is that the employee must have completed at least 12 months of continuous service with the employer or be a long term casual employee, with a reasonable expectation of continuing employment.
54. An employer can only refuse a request for flexible work on 'reasonable business grounds'.¹⁸
55. Employers must provide written reasons for the refusal of a flexible work arrangement, which the Law Council considers is a sufficient requirement.

Wage inequality

56. The Law Council considers it appropriate for the ALRC inquire into wage inequality faced by people with disabilities. In this regard, the recent Full Federal Court decision in *Nojin v Commonwealth of Australia* [2012] FCAFC may be of assistance.
57. In that case the Full Federal Court declared that Coffs Harbour Challenge Inc unlawfully discriminated against two intellectually disabled men in contravention of s15 of the *Disability Discrimination Act 1992* (Cth) by imposing on them a requirement or condition that in order to secure a higher wage the Applicant undergo a wage assessment by the Business Services Wage Assessment Tool.
58. Justice Buchanan described the Business Services Wage Assessment Tool as follows:

The present case concerns the use of the Business Services Wage Assessment Tool ("BSWAT") to determine the wage rates of both Mr Nojin and Mr Prior. BSWAT examined both a disabled worker's "productivity" (by reference to work actually performed) and also the extent to which a disabled worker possessed identified "competencies". An assessment of competencies (as the term is here used) does not relate necessarily, and often will not relate, to work actually carried out, or the way it is performed. Rather, an assessment of competencies tests more general knowledge, and perhaps aptitude.¹⁹

59. The Law Council suggests that the ALRC inquire into whether the use of similar assessment tools to determine the wages of people with disabilities are appropriate and whether they are in breach of the legislative framework on disability discrimination.

¹⁷ See para 64 of the Law Council of Australia submission to the Australian Human Rights Commission Inquiry into *Grey Areas – Age Barriers to Work in Commonwealth Laws*, June 2012, available [here](#).

¹⁸ Fair Work Act 2009 (Cth), s 65(5). A recent case that dealt with this issue is *AMWU v Mildura Rural City Council* [2012] FWA 4308.

¹⁹ *Nojin v Commonwealth of Australia* [2012] FCAFC, at para 11 (per Buchanan J).

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60. The Law Council is also aware of a related proceeding currently being heard at the Federal Court (Tyson Duval-Comrie (by his Litigation Representative Claudine Duval) v Commonwealth of Australia) to block the Government's one-off payments to underpaid workers with disabilities following the Full Federal Court Decision in 2012 that found workers at sheltered workshops had been underpaid for several years, in breach of the *Disability Discrimination Act 1992* (Cth). It is understood that the Government's one-off payments to underpaid workers' with disabilities would be made upon the underpaid workers waiving their legal right to sue the government for back pay.²⁰

Citizenship rights, public service and board participation

Question 16. What changes, if any, should be made to the *Commonwealth Electoral Act 1918* (Cth) or the *Referendum (Machinery Provision) Act 1984* (Cth) to enable people with disability to be placed or retained on the Roll of Electors or to vote?

61. The Law Council supports measures directed at improving the capacity of disabled people to participate in the electoral process and to exercise fundamental democratic rights.

Question 17. What issues arise in relation to electoral matters that may affect the equal recognition before the law of people with disability or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

62. The Law Council notes that the 'unsound mind' provisions of the *Commonwealth Electoral Act 1918* may breach, or inhibit Australia's fulfilment of, obligations under the Convention on the Rights of People with Disability.
63. The right to vote is fundamental, and its exercise is compulsory for Australian citizens, subject to certain exceptions. Under s.93 of the *Commonwealth Electoral Act*, voting is restricted only to those under the age of 18, those who are serving a term of more than 3 years imprisonment following conviction of an offence, those who have been convicted of treachery or treason, who have not been pardoned, and those who by reason of being of unsound mind, are incapable of understanding the nature and significance of enrolment and voting.
64. The requirement for any objection under the 'unsound mind' provisions to be accompanied by medical evidence provides a reasonable safeguard against arbitrary removal from the electoral roll. However, the Act does not specify that notice in writing be given to the guardian or nominee of the challenged elector, where there is an objection lodged under s93(8)(a), which may place the person with disability at a disadvantage, in terms of determining how to respond to the notice (for example, by way of obtaining contradictory medical evidence supporting their right to remain on the Roll). It may be appropriate that the Act specify that notice be given to the appointed guardian or nominee of the person with disability, in such circumstances.

²⁰ See <http://www.smh.com.au/federal-politics/political-news/disabled-workers-go-to-federal-court-over-back-pay-20140119-312rx.html>.

Question 18. How does the language used in Commonwealth laws and legal frameworks affect the equal recognition of people with disability before the law or their ability to exercise legal capacity?

65. The Law Council suggests consideration be given to the employment of clear, plain-English terminology in legislation which purports to limit or alter the rights and entitlements of disabled people.

Question 19. In what ways do Commonwealth laws and legal frameworks relating to holding public office diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

66. The Law Council is not aware of any inappropriate restrictions on the right of disabled people to hold public office. However, it is noted that there may be a range of factors affecting the capacity of people with disability to hold public office, which may also apply to other disadvantaged groups. Those same factors may affect capacity to engage in other professions, vocations or activities. Ultimately, it is likely to depend on the nature of the disability and the level of support made available to the person over the course of their life.

67. In 2012, the Law Council supported legislation introduced into Federal Parliament enabling the establishment of a judicial commission and a framework for managing complaints against judicial officers, as an independent and arms-length process, which would enhance the public perception of the integrity of the federal judiciary.

Question 20. What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure that people with disability are not automatically or inappropriately excluded from serving on a jury or being eligible for jury service?

68. The Law Council notes that jury service is a solemn responsibility and legislative provisions which provide for the exclusion or ineligibility of certain people from serving on a jury are generally reasonable. It is noted there is likely to be some difficulty establishing a more specific objective standard by which those with certain disabilities will be excluded, or whether they are able to 'discharge the duties of a juror'.

69. Where a person is deemed ineligible by reason of their disability, it appears reasonable that the person should be given reasons for their exclusion by the Sheriff or the Court and informed of the process by which they can challenge that determination, should they so wish.

Question 21. In what ways do 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?

70. The Law Council has not been advised of any particular concerns relating to the operation of legislation governing the appointment of directors or their removal by reason of mental incapacity.

Question 22. What issues arise in relation to identity documents for people with disability? In what ways, if any, should Commonwealth laws and legal frameworks relating to identity documents be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

71. The Law Council is not aware of specific issues inhibiting the ability of people with disability to obtain primary identification documents.

Access to justice, evidence and federal offences

Question 23. What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?

72. Access to legal assistance services is essential to ensure that people with disability are afforded equal recognition before the law. For example, the OECD has noted that the effect of Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) is that :

Access has to be guaranteed on a non-discriminatory basis that, inter alia, implies the existence of a **legal aid scheme ensuring real access for all** [emphasis added].²¹

73. As noted in the Issues Paper while the International Covenant on Civil and Political Rights (ICCPR) makes no specific reference to people with disability, it enshrines the right to self-determination of all people as well as rights to physical integrity, liberty and security of the person and equality before the law.²²

74. The Law Council considers there is considerable evidence that people with disabilities do not enjoy equality before the law by reason of their disability. For example, in 2004, the Productivity Commission found that people with disabilities, particularly people with cognitive disabilities, are overrepresented in the criminal justice system, and are likely to face particular difficulties in the civil justice system as witnesses, plaintiffs (applicants) and respondents (defendants).²³

75. Further, in July 2011 a report into an investigation into hearing impairment among Indigenous prisoners within the Northern Territory Correctional Services found that:

“...more than 90% of Indigenous inmates had a significant hearing loss. Comments by inmates indicate that hearing impairment is often a significant disability in a custodial environment that contributes to the breakdown in communication with prison officers.”²⁴

²¹ See Issues Brief on Equal Access to Justice and the Rule of Law, Mainstreaming Conflict Prevention, Development Assistance Committee, OECD p 3. Available [here](#).

²² See para 27 of the Issues Paper.

²³ Productivity Commission Inquiry Report, *Review of the Disability Discrimination Act 1992*, 3 April 2004, p 251-2.

²⁴ Troy Vanderpole, Dr Damian Howard, *Investigation into hearing impairment among indigenous prisoners in the Northern Territory*, July 2011, page 3.

76. This followed a finding by a Senate Inquiry in 2010 into hearing loss in Australia²⁵ that hearing loss affects the vast majority of Indigenous prison inmates in all jurisdictions. The Senate Inquiry reported that approximately 98 per cent of Aboriginal people imprisoned suffered from cognitive disability (particularly deafness) which was not detected at the time of arrest, interview or trial, which may have affected their capacity to engage with the justice process and would have been a relevant factor to consider in determining whether they understood the charges or evidence presented against them. Evidence presented to the Inquiry led the Committee to conclude that:

“The case has been made to the Committee's satisfaction that there is likely to be a link between hearing impairment and higher levels of engagement with the criminal justice system...

“Poor communication at a person's first point of contact with the criminal justice system can have enormous implications for that person, and indeed for the integrity of the system as a whole. As has been noted above, the High Court has set a precedent that a conviction where the accused was not able to hear or understand the proceedings is not safe”²⁶

77. The Law Council also refers the ALRC to the Disability Council of NSW's *A Question of Justice Report*, which looked into the experiences of people with disability who came into contact with the NSW justice system.²⁷ The Disability Council found that:

- The inherently adversarial nature of the justice system disadvantages people with disabilities. People's disabilities are used to undermine their credibility and participation in formal proceedings. Even the less-formal alternative dispute resolution processes are implicitly adversarial and fail to adequately address underlying power imbalances.
- The justice system fails to understand the role of disability advocates, who are often wrongly perceived as a hindrance or interference to 'normal' processes.
- People with disabilities face considerable barriers trying to access information, advice or support. These barriers include inaccessible information formats, inappropriate consultation, negative staff attitudes and lack of service continuity.
- People with disabilities experience inconsistent, interrupted and uncoordinated service provision when attempting to access the justice system. Their experience includes difficulties in accessing the designated representative, little communication, and inconsistent practice.
- The ability of people with disabilities to participate is severely limited by communication barriers. The justice system is unable to communicate effectively with people with disabilities, relying on complex language and verbal forms of communication.
- Procedures in the justice system are applied narrowly and inflexibly, to the disadvantage of people with disabilities. Flexibility is interpreted by the system

²⁵ Senate Legal and Constitutional Affairs References Committee, May 2010, *Hear us: Inquiry into hearing health in Australia*, Australian Parliament.

²⁶ Ibid. paragraph 8.103-8.104.

²⁷ Disability Council of NSW (Disability Council), *A Question of Justice: Access to Participation for People with Disabilities in Contact with the Justice System*, Disability Council, Sydney, 2003.

as procedural unfairness – anything outside the ‘norm’ is considered to be ‘special’ or ‘extra’.

- The financial, physical and emotional costs of legal action are major barriers. People with disabilities are less likely to be in a position to afford private legal advice and more likely to rely on the diminishing resources of community legal services, pro bono schemes, and legal aid.

Funding restrictions to legal assistance providers

78. As noted earlier in this submission, funding restrictions on legal assistance service providers directly impact on access to justice in both criminal and civil law matters for people with disability.
79. The Law Council refers the Commission to the Law Council’s submission to the Productivity Commission Inquiry into Access to Justice Arrangements²⁸ for background on the roles, functions, and utility of legal assistance service providers in ensuring access to justice.
80. The Law Council notes that, according to Australian census data, people with ill-health are more likely to be victims of crime, be unemployed, have low incomes and have low levels of educational attainment.²⁹ The Law Council refers the ALRC to the NSW legal needs survey conducted in 2006, which found that *people with chronic illness or disability constitute a vulnerable group who have increased likelihood of having multiple, complex and interconnected legal and non-legal needs*.³⁰

Identification

81. The identification of people with disability early in their interaction with the criminal justice system is essential to ensure disabled people enjoy equal access to, and treatment under, the justice system.
82. Access to justice generally for people with all types of cognitive disability is a critical issue that requires further examination.
83. People with an intellectual disability need to be identified early in their interaction with the criminal justice system, so that appropriate adjustments can be made and offenders are able to access appropriate diversion programs and other supports. The Law Council is advised that police and indeed legal practitioners and judicial officers, may not be properly identifying individuals with an intellectual disability when they are dealing with suspects, the accused, victims or other witnesses. The Law Council is further advised that there is little publicly available information on how such assessments are made.
84. The Law Council suggests that the ALRC inquire into this issue further in order to ascertain what can be done to improve the identification of people with disability early in the criminal justice system.

²⁸ See paras 27-53 Law Council’s submission to the Productivity Commission Inquiry into Access to Justice Arrangements, 13 November 2013, available [here](#).

²⁹ See Christine Coumarelos and Zhigang Wei, ‘The legal needs of people with different types of chronic illness or disability’, Law and Justice Foundation of New South Wales, May 2009, Paper 11. Available at: [http://www.lawfoundation.net.au/ljf/site/articleIDs/8F7E30A44DA0D60ECA2575BB00083A10/\\$file/JL11_Chronic_illness_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/8F7E30A44DA0D60ECA2575BB00083A10/$file/JL11_Chronic_illness_web.pdf).

³⁰ See Coumarelos et al., ‘Justice made to measure: NSW Legal Needs Survey in disadvantaged areas’, Law and Justice Foundation of New South Wales (2006) at p 15.

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85. In addition, to the police, legal practitioners, judicial officers and court staff play an important role in identifying clients who might have an intellectual or cognitive disability. For example, in Victoria, under the *Professional Conduct and Practice Rules 2005*, lawyers are required to seek to assist their clients to understand the issues of their case to enable them to provide proper instructions.³¹
86. However, whilst lawyers are required to assess their client's capacity to give instructions on any particular legal matter or transaction the Law Council is advised that lawyers in some circumstances are unlikely to be able to identify intellectual disability without expert assistance.
87. These issues also arise when a matter proceeds to trial. The Law Council is advised that the Victorian Bar is developing a vulnerable witness accreditation program designed to enhance the ability of barristers to deal with vulnerable witnesses, addressing various issues relating to access to justice and the provision of evidence.
88. The Accreditation will draw on best practice in Australia and the United Kingdom, including judicial bench books and *The Advocate's Gateway* materials (www.theadvocatesgateway.org). The aims and objectives of the Accreditation include:
- improving the outcomes for witnesses and defendants;
 - improving practice and enabling advocates to elicit evidence effectively and ethically;
 - imparting knowledge of relevant aspects of child development, especially cognitive, language and communication, emotional and moral development;
 - identifying harmful practices that should be avoided;
 - assisting with preparation for the examination of young or vulnerable witnesses;
 - special communication skills;
 - enhancing the knowledge, skills and expertise of advocates and decrease performance anxiety; and
 - embracing the tension between demands for victim's welfare and the pursuit for justice.
89. The Law Council is advised that the Victorian Bar is still exploring funding arrangements.

Accessing Legal Services

90. The Law Council has been advised that many elderly people have physical disabilities, which prevent them from telephoning or travelling to a lawyer or community legal centre. Some have reduced cognitive abilities due to dementia or other causes.
91. Many older people are also often dependent on legal and other services coming to them, particularly when their ability to initiate access to those services is severely limited or non-existent.

³¹ Available at: <http://www.lsb.vic.gov.au/documents/LSBLIVRules2005.pdf>.

Question 24. What issues arise in relation to evidence law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?

92. The Law Council considers that the rules of evidence in ordinary circumstances strike a reasonable balance. However, the Law Council is advised that the law of evidence may need to be revised to accommodate people with disabilities. For example people with 'locked in' syndrome might not be able to communicate in the same way as persons without disabilities.
93. The Law Council also acknowledges concerns that the introductions of too many exemptions to the Commonwealth Evidence legislation may run the risk undermining the operation of the rule.
94. Ultimately, determining the admissibility or probative value of the evidence provided by a disabled witness will be a matter for the Court. The Court has sufficient powers to make appropriate orders in matters involving evidence adduced from a disabled party or witness, including to ensure the person is protected from harassment or unduly aggressive questioning. In this regard, the Law Council considers that Part IAD of the *Crimes Act 1914* (Cth) is operating effectively.
95. The Law Council is unable to suggest any specific changes to Commonwealth laws and legal frameworks at this time, but may comment on any proposals put forward by the ALRC in due course.

Question 25. What issues arise in relation to the law on federal offences that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to federal offences to address these issues?

96. The Law Council is not advised of any specific concerns about the operation of the criminal law in respect of disabled defendants, or the impact of prosecutorial discretion on equal recognition or access to justice for people with disability.

Social security, financial services and superannuation

Question 26. In what ways do Commonwealth laws and legal frameworks relating to social security diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

Question 27. What changes, if any, should be made to the nominee provisions under the *Social Security (Administration) Act 1999* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

97. The Law Council has not received any advice in relation to specific issues affecting disabled people in respect of equal recognition or access in social security, banking or insurance.

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98. In relation to social security, it is noted that the Federal Government has recently announced an inquiry into the welfare system, which will have a specific focus on limiting the availability of certain social security payments, including the disability support pension.³²
99. As noted earlier in this submission, the Law Council considers it would be desirable for there to be some consistency in relation to the nominee provisions in under the *Social Security (Administration) Act 1999* (Cth) (the SSAA), the NDIS and various State and Territory legislation dealing with guardianship and power of attorney.
100. The Law Council also considers it reasonable that the SSAA should incorporate a specific power to enable a principal to request cancellation of a nominee arrangement.

Question 28. What issues arise in relation to banking for people with disability? What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure people with disability control their own financial affairs and have equal access to bank loans, mortgages and other forms of financial credit?

101. The Law Council does not have any specific comments on issues arising in relation to banking and equal recognition and capacity for people with disability.
102. The Law Council notes, as identified by the Australian Banking Association, the paramount consideration must be the protection of disabled people and other vulnerable people from financial exploitation.

Question 29. In what ways, if any, do Commonwealth laws or legal frameworks relating to insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity?

Question 30. What changes, if any, should be made to the insurance exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Question 31. What additional guidance or supporting material relating to the application and operation of the insurance exemption under the *Disability Discrimination Act 1992* (Cth) would assist people with disability?

103. The Law Council notes that the exemption under the DDA (allowing insurers to discriminate against disabled people by refusing cover or charging a higher premium than for those without disability) exists as acknowledgement that insurers need to price insurance products according to risk.
104. Article 5 of the Convention on the Rights of Persons With Disabilities requires that “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”
105. The only exception to this is set out in Article 5(4), which states: “Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of

³² See <http://kevinandrews.dss.gov.au/transcripts/41>

the present Convention.” It is unclear whether the ‘insurance exemption’ is a measure which might accelerate or foster de facto equality of persons with disability.

106. The ALRC has previously considered the ‘insurance exemption’ in its inquiry into older workers and Commonwealth laws (ALRC Report 120), which may be instructive in this inquiry.
107. The Law Council recommends that the ALRC have specific regard to the provisions of the Convention, balanced against the imperative that insurance products must be available to disabled persons, to the greatest extent possible and at minimal disadvantage in terms of cost.

Question 32. What changes, if any, should be made to the superannuation exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Summary

108. The Issues Paper refers to access to superannuation money on the basis of severe financial hardship or compassionate grounds, and seeks comments on these early release provisions and their relevance and operation in practice for people with disability. The Law Council notes that the more usual grounds for early release of superannuation, for members who become unable to work because of disability, are ‘permanent incapacity’ and ‘temporary incapacity’ (pursuant to the Superannuation Industry (Supervision) Regulations 1994 Schedule 1 items 103 and 109 respectively).
109. The Law Council broadly supports the current restrictions on access to superannuation where a member is not suffering a disability that prevents them from working (‘conditions of release’ set out in the *Superannuation Industry (Supervision) Regulations 1994* Schedule 1).
110. However the Law Council suggests that the ALRC might inquire into the following issues:
 - whether the current definitions of ‘permanent incapacity’ and ‘temporary incapacity’, and the interaction between them, are the most appropriate to ensure people who are no longer able to work because they have suffered a disability have access to superannuation in appropriate circumstances; and
 - whether the provision of long term salary continuance benefits through superannuation funds, in substitution for lump sum permanent incapacity benefits, should be encouraged (including by modification to the prescribed insurance benefit features for ‘MySuper’ products).
111. The Law Council does not support any substantial relaxation of the requirements for early access on severe financial hardship or compassionate grounds given that the policy objective of superannuation is provide income for retirement. However, the Law Council does not oppose some relaxation of the requirements for early access to superannuation for medical treatment.

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112. The Law Council considers that if changes are made to the insurance exemption in the DDA corresponding changes should also be made to the superannuation exemption, for consistency and clarity.
113. The Law Council broadly supports applying a consistent approach to supported and substituted decision-making for persons with a disability, in relation to decisions about their superannuation. In particular, the Law Council submits that clarification of mechanisms for supported and substituted decision-making in relation to binding death benefit nominations (Regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994*) would be beneficial for members, their carers and superannuation funds.

Superannuation exemption

114. The Issues Paper notes that the “key areas of potential difficulty for people with disability with respect to superannuation, aside from adequacy of superannuation balances, relate to early access to superannuation and the superannuation exemption under the DDA.”³³
115. The Issues Paper refers to access to superannuation money on the basis of severe financial hardship or compassionate grounds, and seeks comments on these early release provisions and their relevance and operation in practice for people with disability.³⁴ However these grounds for early release are not directed at disability. The more usual grounds for early release, for superannuation fund members who become unable to work because of disability, are *permanent incapacity* and *temporary incapacity* which are specifically directed at disability.
116. This submission comments on the availability of the severe financial hardship and compassionate grounds for access members who suffer a disability, but focuses more on the *permanent incapacity* and *temporary incapacity* grounds as these are more relevant.
117. The relevant legislation for most superannuation fund members is the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and the regulations to the SIS Act (*Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations)). The SIS Act applies to all private sector funds and to public sector funds that have elected to be regulated under the SIS Act.³⁵
118. Given the complexity of the legislative framework on superannuation, this submission summarises or reproduces the relevant definitions of severe financial hardship, compassionate grounds, permanent incapacity and temporary incapacity for ease of reference.

³³ Issues Paper, para 227.

³⁴ Issues Paper paragraphs 228 and 230. The *Superannuation Act 1976* (Cth)), referred to in paragraph 228 of the Issues Paper, only applies to Commonwealth Government public sector funds and is not relevant to any other fund members.

³⁵ Some Commonwealth and State public sector funds are not regulated under the SIS Act, and the comments in this submission do not apply specifically to these funds. However these funds would normally have similar provisions for payment of benefits on permanent or temporary incapacity, so the comments would be broadly applicable to them.

Access on severe financial hardship or compassionate grounds

119. A member is in *severe financial hardship* if the trustee of their superannuation fund is reasonably satisfied that:
- (a) They have written evidence from a Commonwealth department or agency that they have received Commonwealth income support payments for a continuous period of 39 weeks, and they are unable to meet reasonable and immediate family living expenses; or
 - (b) Where they have reached preservation age plus 39 weeks, they have written evidence from a Commonwealth department or agency that they have received Commonwealth income support payments for a cumulative period of 39 weeks after they reached preservation age.³⁶
120. The amount that can be accessed under paragraph (a) is a single lump sum of not more than \$10,000 in a 12 month period. If paragraph (b) applies, the member can access their entire benefit.³⁷
121. A member can apply to the Department of Human Services (**DHS**) for release of benefits on a compassionate ground if they can demonstrate an amount is required:
- (a) to pay for medical treatment or medical transport for the person or a dependant – 2 medical practitioners (at least one of whom must be a specialist) must certify that the treatment is necessary to treat a life threatening illness or injury, or to alleviate acute or chronic pain or an acute or chronic mental disturbance, and is not readily available through the public health system;
 - (b) to enable the person to make a payment on a loan, to prevent foreclosure of a mortgage or the mortgagee exercising power of sale, in relation to the person's principal place of residence;
 - (c) to modify the person's principal place of residence or vehicle to accommodate the special needs of the person or a dependant arising from severe disability;
 - (d) to pay for expenses associated with a person's palliative care in the case of impending death;
 - (e) to pay for expenses associated with a dependant's palliative care in the case of impending death, death, funeral or burial; or
 - (f) to meet expenses in other cases where the release is consistent with a ground mentioned in paragraphs (a) to (e), as DHS determines.³⁸
122. The amount that can be accessed under sub-paragraph (b) is, in each 12 month period, not more than 3 months repayments due under the mortgage and 12 months interest on the outstanding loan balance. The amount that can be

³⁶ SIS Reg 6.01(5)

³⁷ SIS Regs Schedule 1 item 105

³⁸ SIS Reg 6.19A

accessed in other circumstances is determined by DHS as the amount reasonably required taking account of the ground and the person's financial capacity.³⁹

Law Council's Comments

123. The severe financial hardship ground of early release is aimed at people who have been out of work for an extended period of time for whatever reason, and is not specifically aimed at people with disability although people who are receiving Commonwealth disability support payments can qualify under this ground.
124. The compassionate ground of release is aimed at accessing superannuation money for specific expenses, most (but not all) of which are related to disability. The significant feature of this ground is that a member can access their superannuation for an expense related to the disability of a dependant – all other grounds for access relate to the member's own circumstances. However the grounds on which benefits can be accessed are very limited.
125. As the policy objective of superannuation is to provide income for retirement, the Law Council broadly supports the current restrictions on access to superannuation where a member is not suffering a disability that prevents them from working (conditions of release are set out in the Schedule 1 of the *Superannuation Industry (Supervision) Regulations 1994*). The Law Council therefore does not support any substantial relaxation of the requirements for early access on severe financial hardship or compassionate grounds. The Law Council would not however oppose some relaxation of the requirements for access to superannuation for medical treatment.

Access on 'permanent incapacity' and 'temporary incapacity'

126. Members of superannuation funds can access superannuation before preservation age on the grounds of 'permanent incapacity' and 'temporary incapacity'.
127. Where a person suffers an illness or injury resulting in a disability that prevents them from working, they would normally access superannuation benefits on the ground of permanent incapacity. Some members have access to a temporary incapacity benefit (this is only available if the member has salary continuance or income protection insurance through their superannuation fund).
128. A member who has become disabled would normally apply for access to benefits on severe financial hardship or compassionate grounds only if the member did not qualify as permanently incapacitated and a temporary incapacity benefit is not available.
129. The definitions are:

... a member of a superannuation fund ... is taken to be suffering **permanent incapacity** if a trustee of the fund is reasonably satisfied that the member's ill-health (whether physical or mental) makes it unlikely that the member will engage in gainful employment for which the member is reasonably qualified by education, training or experience.⁴⁰

³⁹ SIS Regs Schedule 1 item 107

⁴⁰ SIS Reg 1.03C

temporary incapacity, in relation to a member who has ceased to be gainfully employed (including a member who has ceased temporarily to receive any gain or reward under a continuing arrangement for the member to be gainfully employed), means ill-health (whether physical or mental) that caused the member to cease to be gainfully employed but does not constitute permanent incapacity.⁴¹

130. Where permanent incapacity is established, the member must be paid a benefit in one or more lump sums.⁴² Where the member has 'total and permanent disablement insurance', the benefit includes the insurance benefit. Where the member does not have that insurance the benefit is their account balance.
131. Where temporary incapacity is established, the member must be paid a non-commutable income stream for a period not exceeding the period of incapacity from employment of the kind engaged in immediately before the temporary incapacity.⁴³ Because of the requirement for an income stream benefit, the member's account balance is not available to pay these benefits and temporary incapacity benefits are only paid if the member has 'salary continuance' (or 'income protection') insurance through the fund.
132. A member can also access the full amount of their superannuation benefit on the ground of a 'terminal medical condition'.⁴⁴
133. Under amendments to the SIS Act that came into effect on 1 January 2014 (referred to as 'Stronger Super' amendments), where a member of a superannuation fund has not given the trustee an election about their superannuation contributions, the trustee is required to pay the contributions to a 'MySuper product' which must have prescribed features.
134. All MySuper products must provide insurance on death or permanent incapacity on a default basis (i.e., the insurance applies unless the member elects to decline the insurance) or compulsory basis, with very limited exceptions. The fund may decide to provide insurance in the MySuper product for temporary incapacity on a default basis or on an optional basis (i.e., the insurance only applies if the member elects the insurance) or to not offer temporary incapacity benefits at all.

Law Council's comments

135. A consequence of the requirement for permanent incapacity insurance, as a feature of a MySuper product, is that superannuation funds are not able to provide default temporary incapacity insurance instead of permanent incapacity insurance.
136. 'Permanent incapacity' is an 'all or nothing' concept. To be eligible for a permanent incapacity benefit the member must demonstrate that they are suffering ill-health such that it is unlikely they will engage in gainful employment for which they are reasonably qualified by education, training or experience.
137. 'Temporary incapacity' only requires the member to demonstrate that they are currently unable to be gainfully employed because of ill-health, and the benefit continues to be paid as a salary continuance benefit while that ill-health continues.

⁴¹ SIS Reg 6.01

⁴² SIS Reg Schedule 1 item 103 and SIS Reg 6.18(3)(b)

⁴³ SIS Reg Schedule 1 item 109

⁴⁴ See definition in SIS Reg 6.01A

Salary continuance benefits available through superannuation are often subject to a maximum payment period (2 to 5 years are common periods) after which the benefit ceases even if the member is still unable to work due to the disability. However, salary continuance benefits are also available that are paid up to age 65 if the member remains unable to work due to disability for that period.

138. The requirement for default permanent incapacity insurance has reduced the scope for superannuation funds to assess whether a long term salary continuance benefit might be more suitable for their members than a lump sum permanent incapacity benefit. Superannuation funds can only provide a long term salary continuance benefit, in substitution for the lump sum permanent incapacity benefit, if the member elects that benefit.
139. Other forms of insurance, for example 'trauma insurance' (payable where a member suffers a specified condition), cannot be provided through a superannuation fund.
140. The Law Council suggests that the ALRC might inquire into the following issues:
 - whether the current definitions of 'permanent incapacity' and 'temporary incapacity', and the interaction between them, are the most appropriate to ensure people who are no longer able to work because they have suffered a disability have access to superannuation in appropriate circumstances; and
 - whether the provision of long term salary continuance benefits through superannuation funds, in substitution for lump sum permanent incapacity benefits, should be encouraged (including by modification to the prescribed insurance benefit features for 'MySuper' products).

DDA exemption

141. The exemption under the DDA applicable to superannuation is, in summary:

It is not unlawful for a superannuation trustee to discriminate against a person on the grounds of their disability:

- by refusing to offer the person membership of a superannuation fund or scheme; or
- in respect of the terms and conditions on which membership of a superannuation fund or scheme is offered to or may be obtained by them, if:
 - the discrimination is based on actuarial or statistical data on which it is reasonable for the superannuation trustee to rely, and is reasonable having regard to the matter of the data and other relevant factors;
 - in a case where no such actuarial or statistical data is available and cannot reasonably be obtained – the discrimination is reasonable having regard to any other relevant factors.

142. The exemption is in the same terms as the exemption for insurance benefits.

Law Council comments

143. A significant number of superannuation funds have negotiated arrangements with insurance companies that provide a level of permanent incapacity insurance coverage available to all members regardless of their health status at the time of joining. This is partly a consequence of the Stronger Super amendments, but the trend was noticeable prior to the introduction of Stronger Super.
144. The result is that, despite the availability of the DDA exemption, all people who are eligible to contribute to a superannuation fund can be eligible for some level of insurance benefits payable on their permanent incapacity even if they are suffering from a disability at the time of joining.
145. Where limitations on benefits or exclusions do apply under the fund's insurance policy, for pre-existing conditions or other risk factors, a superannuation trustee will rarely impose a similar limitation in relation to the member's uninsured benefit. That is, where a member satisfies the definition of permanent incapacity but an insured benefit is not payable or is reduced, because of a pre-existing condition or other risk factor under the policy, the superannuation trustee will still pay the member's account balance.
146. However some defined benefit funds 'self insure' permanent incapacity benefits (which means the benefits are funded by employer contributions rather than insurance). These funds are carrying risk in a similar way to an insurance company, and may impose similar conditions to an insurance company for pre-existing conditions or other risk factors.
147. For this reason, superannuation trustees may still need some flexibility to exclude people from some products or provide limited disability benefits, in the same types of circumstances as are considered appropriate for insurance companies.
148. The Law Council's view is that the exemption for superannuation should continue to be the same as the exemption for insurance. If changes are made to the insurance exemption, the Law Council would support an equivalent change to the superannuation exemption. The comments on review of the insurance exemption in paragraphs 103-107 of this submission are applicable in respect of the superannuation exemption.

<p>Question 33. What issues arise in relation to superannuation for people with disability that may affect their equal recognition before the law or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?</p>
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149. The provisions in the SIS Act and SIS Regulations that provide mechanisms for members to give directions to the trustee of their superannuation fund generally require 'writing' and the extent to which certain directions can be given under substituted decision making mechanisms such as enduring powers of attorney is unclear.
150. A particular area of uncertainty is binding death benefit nominations. The form requirement for a binding death benefit nomination is that the nomination:
- (a) must be in writing;

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- (b) must be signed and dated by the member in the presence of two witnesses, each of whom has turned 18 and neither of whom is mentioned in the nomination; and
 - (c) must contain a declaration signed and dated by the witnesses stating that the notice was signed by the member in their presence.⁴⁵
151. In the absence of a binding nomination, superannuation death benefits are generally paid to a dependant of the member determined by the trustee (usually their spouse or children) or in some cases to the member's estate.
152. Practices vary among superannuation funds as to whether binding nominations can be made where a member does not have physical capacity to sign the nomination or where there is doubt about the member's legal capacity to understand the nature of the document. Some funds accept a 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.
153. A consistent approach by superannuation funds would be beneficial for disabled persons and their carers. The Law Council's view is that superannuation funds would be more likely to adopt a consistent approach if there were greater clarity in the legislative provisions that govern superannuation death benefits.
154. Greater clarity as to the role and powers of persons holding an enduring power of attorney would also assist members and their carers in managing the member's superannuation benefits.
155. The Law Council notes the Commission's general commentary on supported and substituted decision-making. The Law Council supports including superannuation decisions in the scope of a consistent approach to supported and substituted decision-making.

Health and Aging

Question 34. What issues arise in relation to health care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to health care to address these issues?

Question 35 What issues arise in relation to aged care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to aged care to address these issues?

156. The Law Council refers the Commission to the Law Council's submission to House Standing Committee on Health and Aging Inquiry into Dementia: Early Diagnosis and Intervention. Dementia represents the leading cause of disability in Australia.⁴⁶

⁴⁵ SIS reg 6.17A(6)

157. The key points in that submission of relevance to this Inquiry are as follows:

- sustained efforts are needed to achieve greater consistency and harmonisation in relation to capacity, substitute decision makers and advance care directives, to promote greater clarity for dementia sufferers and their families; and facilitate a more accessible system through which individuals can give legal effect to their decisions.
- The Law Council supports the adoption and implementation of the guidelines and principles outlined in the National Framework for Advance Care Directives, as endorsed by the Australian Health Ministers' Advisory Council (**AHMAC**).
- Early diagnosis and intervention provides individuals with a greater opportunity to consider the implications of a loss of capacity, to seek information and to engage in discussions with their families, carers and friends regarding their wishes. It is important that dementia sufferers are encouraged to make decisions in relation to lifestyle, medical and financial matters and take the necessary steps to execute any necessary legal instruments, before a loss of capacity precludes them from being able to validly do so.
- Although previously viewed as a level of cognition that either exists or is absent, there is increasing acceptance that capacity may be fluid and vary from time to time. Dementia's effects on capacity will manifest differently in each individual circumstance. Some individuals may experience a gradual decline, whilst others may experience episodic incapacity.

158. In a previous submission to the Senate Community Affairs References Committee Inquiry into Planning Options and Services for People Aging with a Disability, the Law Institute of Victoria submitted that because some people with disability are in a more financially disadvantaged position than their peers without a disability, this leads to fewer options when they enter into the aged care system. For example, people with disability are often left with no choice but to rely on Government pensions at retirement as a result of less disposable income. This is often due to the difficulty in maintaining full time employment, which leads to inadequate superannuation, whilst having to meet the cost of their disability along with managing normal living expenses.

Restrictive Practices

Question 36. In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?

Question 37. What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?

⁴⁶ Law Council submission to the House Standing Committee on Health and Aging Inquiry into dementia: Early Diagnosis and Intervention, 2 May 2012, available [here](#).

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159. The Law Council has not been advised of any specific concerns in relation to the use of restrictive practices affecting equal recognition before the law for people with disability.

Marriage, intimate relationships, parenthood and family

Question 38. What issues arise in relation to marriage that may affect the equal recognition before the law of people with a disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to marriage or marriage celebrants to address these issues?

Question 39. What issues arise in relation to people with disability and intimate relationships that may affect their equal recognition before the law or ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to address these issues?

Question 40. What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?

160. The Law Council is not advised of any specific concerns in relation to people with disabilities' ability to get married, engage in intimate partner relationships, parent or raise a family.
161. However, the Law Council is advised that people with disabilities' are vulnerable to family violence.
162. The Law Council refers the Commission to the Women's Legal Service of Victoria's (WLSV) submission to the Productivity Commission's Inquiry into Access to Justice Arrangements. In that submission, the WLSV is concerned that women who experience family violence and relationship breakdown are generally disadvantaged in accessing the justice system, which is compounded by mental or physical disabilities.⁴⁷

Family Violence and Disability

163. The Law Council supports the WLSV's submission to the Productivity Commission's Inquiry into Access to Justice Arrangements, which highlights that the lack of expertise and training in the family law system to address the needs of people disability who experience family violence (reproduced below):

⁴⁷ See Women's Legal Service of Victoria's submission to the Productivity Commission Inquiry into Access to Justice Arrangements at p 6, available [here](#).

Lack of specialist training and expertise

- family report writers, independent children's lawyers, judicial officers, courts staff and legal advisors do not necessarily have the knowledge of the dynamic of family violence to deal with women who are victims of family violence.
- there is also a lack of training around working with individual parties in the family law system who experience disability – there is a very limited understanding of mental health issues and what is culturally and religiously appropriate in the family law system.⁴⁸

Particular disability communities

Question 41. How do Commonwealth laws and legal frameworks relating to equal recognition before the law and capacity affect people with disability who are:

- (a) children;
- (b) women;
- (c) Aboriginal and Torres Strait Islander;
- (d) from culturally and linguistically diverse backgrounds;
- (e) older;
- (f) lesbian, gay, bisexual, transgender or intersex; or
- (g) living in rural, remote and regional areas?

Involuntary or Coerced Sterilisation of People with Disabilities in Australia

164. The Law Council is advised by the Law Institute of Victoria that the sterilisation of girls and women in the absence of their free, prior and informed consent should be prohibited.
165. The Law Council acknowledges the complexity of this issue and refers the ALRC to the Senate Standing Committees on Community Affairs July 2013 Report into the involuntary or coerced sterilisation of people with disabilities in Australia.⁴⁹

Safety of Women in Psychiatric Inpatient Units

166. The Law Council is advised that women in psychiatric inpatient units are often at risk of sexual harassment and assault from other patients and staff.
167. The Law Council is advised that a key means of securing safety for women and girls is to give them a choice of receiving treatment in a female-only ward, with a full suite of facilities including a designated female-only corridor and bedrooms as well as a lounge and outdoor recreation area.

⁴⁸ Ibid, at p 9.

⁴⁹ Available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/First_Report.

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168. The Law Council considers it appropriate for the ALRC to inquire into the safety of women and girls in psychiatric inpatient units.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.