Australian Government
Australian Law Reform Commission

Equality, Capacity and Disability in Commonwealth Laws

FINAL REPORT

ALRC Report 124

August 2014

This Report reflects the law as at 21 August 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).

The office of the ALRC is at Level 40, MLC Centre, 19 Martin Place, Sydney NSW 2000 Australia.

Postal Address:

GPO Box 3708
Sydney NSW 2001

Telephone: within Australia (02) 8238 6333

International: +61 2 8238 6333

Facsimile: within Australia (02) 8238 6363

International: +61 2 8238 6363

E-mail: info@alrc.gov.au

Website: www.alrc.gov.au

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Australian Government

Australian Law Reform Commission

Senator the Hon George Brandis QC

Attorney-General of Australia

Parliament House

Canberra ACT 2600

29 August 2014

Dear Attorney-General

Equal recognition before the law and legal capacity for people with disability

On 23 July 2013, the Australian Law Reform Commission received Terms of Reference to undertake a review of equal recognition before the law and legal capacity for people with disabilit**y**. On behalf of the Members of the Commission involved in this Inquiry—including Graeme Innes AM, former Disability Discrimination Commissioner, Australian Human Rights Commission, and in accordance with the *Australian Law Reform Commission Act 1996*—I am pleased to present you with the Final Report on this reference, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124, 2014).

Yours sincerely,

Professor Rosalind Croucher

President

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

Executive Director

Sabina Wynn

Principal Legal Officer

Bruce Alston

Acting Senior Legal Officer

Amanda Alford, until May 2014

Legal Officers

Khanh Hoang, from March 2014

Sonya Kim

Advisory Committee Members

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

The Hon Justice Berna Collier, Federal Court of Australia

Phillip French, Director, Australian Centre for Disability Law

Stephen Gianni, Acting CEO, The Australian Federation of Disability Organisations, until March 2014

David Fintan, Corporate Counsel, National Disability Insurance Agency

Damian Griffis, Executive Director, First People's Disability Network

Rosemary Kayess, Visiting Fellow, Australian Human Rights Centre, University of New South Wales

Emeritus Professor Ron McCallum AO, Sydney Law School, University of Sydney

Christina Ryan, General Manager, Advocacy for Inclusion

Therese Sands, Co-Chief Executive, People with Disability Australia

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

Legal Interns

Andrew Brooks

Oliver Doraisamy

Bronte Lambourne

Georgie Leahy

Penelope Marles

Jane Murray

Isabella Partridge

Hagen Sporleder

Recommendations

3. National Decision-Making Principles

Recommendation 3–1 Reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines (see Recommendations 3–2 to 3–4) to ensure that:

- supported decision-making is encouraged;
- representative decision-makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

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

Principle 3: Will, preferences and rights

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

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

Recommendation 3–2 ***Support Guidelines***

(1) *General*

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

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

(c) The role of persons who provide decision-making support should be acknowledged and respected—including family members, carers or other significant people chosen to provide support.

(d) Persons who require decision-making support may choose not to be supported.

(2) *Assessing support needs*

In assessing what support is required in decision-making, the following must be considered:

(a) All adults must be presumed to have ability to make decisions that affect their lives.

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

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

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

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

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

Recommendation 3–3 ***Will, Preferences and Rights Guidelines***

(1) *Supported decision-making*

(a) In assisting a person who requires decision-making support to make decisions, a person chosen by them as supporter must:

(i) support the person to express their will and preferences; and

(ii) assist the person to develop their own decision-making ability.

(b) In communicating will and preferences, a person is entitled to:

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

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

(2) *Representative decision-making*

Where a representative is appointed to make decisions for a person who requires decision-making support:

(a) The person's will and preferences must be given effect.

(b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.

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

(d) A representative may override the person's will and preferences only where necessary to prevent harm.

Recommendation 3–4 ***Safeguards Guidelines***

(1) *General*

Safeguards should ensure that interventions for persons who require decision-making support are:

(a) the least restrictive of the person's human rights;

(b) subject to appeal; and

(c) subject to regular, independent and impartial monitoring and review.

(2) *Support in decision-making*

(a) Support in decision-making must be free of conflict of interest and undue influence.

(b) Any appointment of a representative decision-maker should be:

(i) a last resort and not an alternative to appropriate support;

(ii) limited in scope, proportionate, and apply for the shortest time possible; and

(iii) subject to review.

4. Supported Decision-Making in Commonwealth Laws

Recommendation 4–1 A Commonwealth decision-making model that encourages supported decision-making should be introduced into relevant Commonwealth laws and legal frameworks in a form consistent with the National Decision-Making Principles and Recommendations 4–2 to 4–9.

Recommendation 4–2 The objects and principles provisions in Commonwealth legislation concerning decision-making by persons who require decision-making support should reflect the National Decision-Making Principles.

Recommendation 4–3 Relevant Commonwealth laws and legal frameworks should include the concept of a supporter and reflect the National Decision-Making Principles in providing that:

(a) a person who requires decision-making support should be able to choose to be assisted by a supporter, and to cease being supported at any time;

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

(c) supported decisions should be recognised as the decisions of the person who required decision-making support.

Recommendation 4–4 A supporter assists a person who requires support to make decisions and may:

(a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;

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

(c) assist the person to communicate the decisions; and

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

Recommendation 4–5 Relevant Commonwealth laws and legal frameworks should provide that supporters of persons who require decision-making support must:

(a) support the person to make decisions;

(b) support the person to express their will and preferences in making decisions;

(c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person;

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

(e) support the person to consult, as they wish, with existing appointees, family members, carers and other significant people in their life in making decisions; and

(f) assist the person 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 formally appointed to make decisions for the person.

Recommendation 4–6 Relevant Commonwealth legislation should include the concept of a representative and provide for representative arrangements to be established that reflect the National Decision-Making Principles.

Recommendation 4–7 A representative assists a person who requires support to make decisions or, where necessary, makes decisions on their behalf and may:

(a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;

(b) provide advice to the person about the decisions that might be made;

(c) communicate the decisions; and

(d) endeavour to ensure the decisions made are given effect.

Recommendation 4–8 Relevant Commonwealth laws and legal frameworks should provide that representatives of persons who require decision-making support must:

(a) support the person to make decisions or make decisions on their behalf reflecting their will and preferences;

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

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

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

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

(f) consult with existing appointees, family members, carers and other significant people in their life in making decisions; and

(g) assist the person to develop their own decision-making ability.

For the purposes of paragraph (f), '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 formally appointed to make decisions for the person.

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

Recommendation 4–10 The Australian and state and territory governments should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments and to facilitate review and monitoring.

Recommendation 4–11 The Australian Government should ensure that persons who require decision-making support, and their supporters and representatives are provided with information and guidance to enable them to understand their functions and duties.

Recommendation 4–12 The Australian Government should ensure that employees and contractors of Commonwealth agencies who engage with supporters and representatives are provided with information, guidance and training in relation to the roles of supporters and representatives.

5. The National Disability Insurance Scheme

Recommendation 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.

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

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

Recommendation 5–4 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to incorporate provisions dealing with the process and factors to be taken into account by the CEO of the National Disability Insurance Agency in appointing representatives. These provisions should make it clear that the CEO's powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed, and with particular regard to the participant's will, preferences and support networks.

Recommendation 5–5 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to provide that, before exercising the power to appoint a representative, the CEO of the National Disability Insurance Agency may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities. The CEO may then exercise the power to appoint that person as a representative under the NDIS Act.

6. Supporters and Representatives in Other Areas of Commonwealth Law

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

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

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

Recommendation 6–4 The Australian Information Commissioner should develop guidelines consistent with the Commonwealth decision-making model describing the role of supporters and explaining how 'APP entities' should recognise the role of supporters in assisting people to exercise their rights under the *Privacy Act 1988* (Cth).

Recommendation 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, consistent with other legal duties.

7. Access to Justice

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

(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; or

(d) communicate the decisions in some way.

Recommendation 7–2 State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for:

(a) limits on the period of detention that can be imposed; and

(b) regular periodic review of detention orders.

Recommendation 7–3 The *Federal Court of Australia Act 1976* (Cth), *Family Law Act 1975* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) should provide that a person needs a litigation representative if the person cannot be supported to:

(a) understand the information relevant to the decisions that they will have to make in conducting proceedings, including in giving instructions to their legal practitioner;

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

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

(d) communicate the decisions in some way.

Recommendation 7–4 The *Federal Court of Australia Act 1976* (Cth), *Family Law Act 1975* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) should provide that litigation representatives must:

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

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

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

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

Recommendation 7–5 Federal courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

Recommendation 7–6 The Law Council of Australia should consider whether the Australian Solicitors' Conduct Rules and Commentary should be amended to provide for 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.

Recommendation 7–7 The *Evidence Act 1995* (Cth) should be amended to provide that a person is not 'competent to give evidence about a fact' if the person cannot be supported to:

(a) understand a question about the fact; or

(b) give an answer that can be understood to a question about the fact.

Recommendation 7–8 The *Evidence Act 1995* (Cth) should be amended to provide that a person who is 'competent to give evidence about a fact' is not competent to give sworn evidence if the person cannot understand that he or she is under an obligation to give truthful evidence, and cannot be supported to understand.

Recommendation 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.

Recommendation 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.

Recommendation 7–11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may support persons with disability in giving evidence.

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

(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; or

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

Recommendation 7–13 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.

Recommendation 7–14 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that communication assistants, allowed by the trial judge to assist a juror, should:

(a) swear an oath or affirm to faithfully communicate the proceedings or jury deliberations; and

(b) be permitted in the jury room during deliberations without breaching jury secrecy principles, providing they are subject to and comply with requirements for the secrecy of jury deliberations.

Recommendation 7–15 The *Federal Court of Australia Act 1976* (Cth) should provide for offences, in similar terms to those 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

Recommendation 8–1 The Australian Government and the Council of Australian Governments should take the National Decision-Making Principles into account in developing the national quality and safeguards system, which will regulate restrictive practices in the context of the National Disability Insurance Scheme.

Recommendation 8–2 The Australian Government and the Council of Australian Governments should develop a national approach to the regulation of restrictive practices in sectors other than disability services, such as aged care and health care.

9. Electoral Matters

Recommendation 9–1 The *Commonwealth Electoral Act 1918* (Cth) should be amended to repeal:

(a) s 93(8)(a), which 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; and

(b) s 118(4), which relates to objections to enrolment on the basis that a person is of 'unsound mind'.

Recommendation 9–2 State and territory governments should repeal 'unsound mind' provisions in their electoral legislation and make other changes consistent with those recommended by the ALRC with respect to the *Commonwealth Electoral Act 1918* (Cth).

Recommendation 9–3 Section 245 of the *Commonwealth Electoral Act 1918* (Cth) on compulsory voting should be amended to provide that it is a 'valid and sufficient reason' for not voting if a person cannot:

(a) understand information relevant to voting at the particular election;

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

(c) use or weigh that information as part of the process of voting; or

(d) communicate their vote in some way.

Recommendation 9–4 The Australian Electoral Commission should provide Divisional Returning Officers with guidance and training, consistent with the National Decision-Making Principles, to help them determine if a person with disability has a valid and sufficient reason for failing to vote.

Recommendation 9–5 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 chosen by the voter to assist them with voting.

Recommendation 9–6 The Australian Electoral Commission should provide its officers with guidance and training, consistent with the National Decision-Making Principles, to improve support in enrolment and voting for persons who require support to vote.

Recommendation 9–7 The Australian Electoral Commission should investigate methods of maintaining the secrecy of votes of persons who require support to vote.

10. Review of State and Territory Legislation

Recommendation 10–1 State and territory governments should review laws and legal frameworks concerning individual decision-making 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; consent to medical treatment; mental health; and disability services.

11. Other Issues

Recommendation 11–1 Sections 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth) should be amended to remove the references to 'being mentally incapable' and instead provide that 'real consent' is not given if 'a party did not understand the nature and effect of the marriage ceremony'.

Recommendation 11–2 The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* should be amended to reflect the removal of the reference to 'mental incapacity' in the *Marriage Act 1961* (Cth) and to provide further guidance on determining whether or not a person can 'understand the nature and effect of the marriage ceremony'.

Recommendation 11–3 Sections 201F(2), 915B and 1292(7)(b) of the *Corporations Act 2001* (Cth) should be amended to remove references to 'mental incapacity', 'being incapable, because of mental infirmity' and 'mental or physical incapacity'. Instead, the provisions should state that a person is not eligible to act in the roles of director, auditor or liquidator, or a financial services licence holder, if they cannot be supported to:

(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; or

(d) communicate the decisions in some way.

Recommendation 11–4 The Australian Government should review and replace provisions in Commonwealth legislation that require the termination of statutory appointments by reason of a person's 'unsound mind' or 'mental incapacity'.

1. Executive Summary

Contents

Towards supported decision-making in Australia

1.1 This Inquiry is about ensuring people with disability have an equal right to make decisions for themselves. It is about respecting people's dignity, autonomy and independence, while supporting them to make their own decisions, where such support is needed. This reflects an important movement away 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 objective of the NDIS is to provide persons with disability with greater choice and control over the disability services and support they receive.

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1 United Nations Enable-Secretariat for the CRPD, *Convention on the Rights of Persons with Disabilities* <www.un.org/disabilities>.

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

1.3 The Terms of Reference required the Australian Law Reform Commission (ALRC) to consider 'how maximising individual autonomy and independence *could be modelled* in Commonwealth laws and legal frameworks'.[3] The ALRC considers this can best be achieved by setting out principles and guidelines that can be used as a template for specific reforms. These principles and guidelines can be applied to Commonwealth and state and territory laws—in particular, guardianship and administration laws.

National Decision-Making Principles

1.4 The ALRC recommends that the reform of relevant Commonwealth, state and territory laws should be consistent with the following National Decision-Making Principles:

> ***Principle 1: The equal right to make decisions***
>
> All adults have an equal right to make decisions that affect their lives and to have those decisions respected.
>
> ***Principle 2: Support***
>
> Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.
>
> ***Principle 3: Will, preferences and rights***
>
> The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.
>
> ***Principle 4: Safeguards***
>
> Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

1.5 These principles reflect the paradigm shift signalled in the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) to recognise people with disabilities as persons before the law and their right to make choices for themselves. The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive decisions that they make, and that others make on their behalf.

1.6 These four general principles reflect the key ideas and values upon which the ALRC's approach is based. 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.

1.7 The principles are supported by three sets of guidelines. The principles and guidelines are discussed in Chapter 3.

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3 Terms of Reference (emphasis added).

A Commonwealth decision-making model

1.8 To encourage supported decision-making at a Commonwealth level, the ALRC recommends a new model (the Commonwealth decision-making model) based on the positions of 'supporter' and 'representative'. These terms are also part of building a new lexicon for supported decision-making. The role of both supporters and representatives is to assist persons who need decision-making support to make decisions in relevant areas of Commonwealth law.

1.9 In Chapter 4, the ALRC makes recommendations about amending the objects or principles provisions in relevant Commonwealth legislation; the appointment, recognition, role and duties of supporters and representatives; and appropriate and effective safeguards.

The National Disability Insurance Scheme

1.10 The NDIS represents a significant new area of Commonwealth responsibility and expenditure with respect to persons with disability in Australia. In Chapter 5, the ALRC recommends that the Commonwealth decision-making model be applied to the NDIS, which already incorporates elements of supported decision-making. This will require some amendment of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) and Rules to provide for legal recognition of supporters and representatives, including provisions for their appointment, removal and associated safeguards.

1.11 The Chief Executive Officer of the National Disability Insurance Agency should retain the power to appoint a 'representative' for a participant as a measure of last resort. There are circumstances where the exercise of this power is necessary—in the absence of a Commonwealth guardianship tribunal or equivalent body—to ensure that persons with disability are properly supported in the relation to the NDIS.

1.12 There should be a presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative, and amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.

1.13 In the light of the shift towards a supported decision-making model, the ALRC also recommends that the Australian Government provide guidance and training in relation to decision-making and the NDIS.

Supporters and representatives in other areas of Commonwealth law

1.14 The Commonwealth decision-making model may also be applied to other existing legislative schemes in Commonwealth laws that already contain a decision-making mechanism or make some provision for supporters and representatives—however described.

1.15 As discussed in Chapter 6, these schemes concern individual decision-making in relation to social security, 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* (Cth).

1.16 The model might also be applied to individual decision-making in relation to personal information under the *Privacy Act 1988* (Cth) and the provision of banking services.

1.17 In some of these areas, legislation should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model. However, any reform needs to be proportionate to the situation, and to the role of the supporter or representative. In relation to privacy and banking, the ALRC recommends new guidelines to encourage supported decision-making, rather than legislation.

1.18 One overarching issue is the interaction between Commonwealth decision-making schemes and state and territory appointed decision-makers. In each area, the interaction of Commonwealth supporters and representatives with state and territory appointed decision-makers will have to be considered.

Access to justice

1.19 Chapter 7 deals with issues concerning decision-making and access to justice. There are a range of Commonwealth laws and legal frameworks affecting persons with disability involved in court proceedings, including as:

- defendants in criminal proceedings—the concept of unfitness to stand trial;
- parties to civil proceedings—the appointment and role of litigation representatives;
- witnesses in criminal or civil proceedings—giving evidence as a witness, and consenting to the taking of forensic samples; and
- potential jurors—qualification for jury service.

1.20 In each of these areas there are existing tests of a person's capacity to exercise legal rights or to participate in legal processes. The ALRC recommends that these tests be reformed consistently with the National Decision-Making Principles. By providing models in Commonwealth laws, the ALRC seeks to inform and provide a catalyst for reform of state and territory laws.

1.21 An important theme is the tension between laws that are intended to operate in a 'protective' manner—for example, in order to ensure a fair trial—and increasing demands for equal participation, in legal processes, of persons who require decision-making support.

Restrictive practices

1.22 The term 'restrictive practices' refers to the use of interventions that have the effect of restricting the rights or freedom of movement of a person in order to protect them. Serious concerns have been expressed about inappropriate and under-regulated use of restrictive practices in a range of settings in Australia.

1.23 Current regulation of restrictive practices occurs mainly at a state and territory level. However, the Commonwealth, state and territory disability ministers endorsed

the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (National Framework) in March 2014 to forge a consistent national approach.

1.24 As discussed in Chapter 8, the National Framework is intended to reduce the use of restrictive practices, including by informing the development of the NDIS quality assurance and safeguards system. The ALRC recommends that the Australian Government and the Council of Australian Governments (COAG) incorporate aspects of the National Decision-Making Principles in developing the NDIS system.

1.25 The ALRC also recommends that the Australian Government and COAG adopt a similar, national approach to the regulation of restrictive practices in other relevant sectors such as aged care and health care.

Electoral matters

1.26 Australia is obliged, under the CRPD, to guarantee that persons 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.[4]

1.27 In Chapter 9, the ALRC recommends that the 'unsound mind' provisions of the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act), which relate to disqualification for enrolment and voting, be repealed. A new exemption to compulsory voting based on a functional test consistent with the National Decision-Making Principles should be enacted, so that a person who lacks decision-making ability relating to voting is exempt from penalties arising from a failure to vote.

1.28 Where a person with disability requires assistance to vote, they should be supported by all available means. The ALRC recommends that current provisions of the Electoral Act concerning permissible support be broadened, and that the Australian Electoral Commission (AEC) provide its officers with guidance and training to improve support in enrolment and voting for persons with disability. As the right to a secret vote is fundamental to the right to vote, but may be compromised by some forms of support, the AEC should also investigate methods of maintaining the secrecy of voting.

Review of state and territory legislation

1.29 This new approach to individual decision-making at the Commonwealth level can also be used to guide law reform at the state and territory level. Reform at the state and territory level is critical to the implementation of the CRPD because many important areas of decision-making are governed by state and territory law—including in relation to guardianship and administration, consent to medical treatment, mental health and disability services.

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4 *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.

1.30 The ALRC recommends that state and territory governments review their legislation that deals with decision-making to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In Chapter 10, the ALRC discusses how, in conducting such a review, regard should be given to:

- interaction with any supporter and representative schemes under Commonwealth legislation;
- consistency between jurisdictions, including in terminology;
- maximising cross-jurisdictional recognition of arrangements; and
- mechanisms for consistent and national data collection.

Other issues

1.31 Chapter 11 deals with a number of other issues raised that are relevant to Commonwealth laws and legal frameworks that concern the exercise of legal capacity, including in relation to:

- the common law relating to incapacity to contract;
- consumer protection laws;
- consent to marriage;
- the nomination of superannuation beneficiaries;
- acting in the role of a board member and in other corporate roles; and
- holding public office.

1.32 The ALRC recommends amendments to the *Marriage Act 1961* (Cth) and associated guidelines for marriage celebrants, and some provisions of the *Corporations Act 2001* (Cth) to better reflect the National Decision-Making Principles. It also recommends that the Australian Government should review and replace provisions in Commonwealth legislation that require the termination of statutory appointments by reason of a person's 'unsound mind' or 'mental incapacity'.

The law reform process

1.33 Law reform recommendations cannot be based upon assertion or assumption and need to be built on an appropriate conceptual framework and evidence base.

Framing principles

1.34 The ALRC identified five framing 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 decision-making model that is developed in the Report.

1.35 **Dignity** is one of the guiding principles of the CRPD[5] and is recognised in a number of other international human rights instruments.[6] In Australia, the National Disability Strategy (NDS) prioritised the concept of dignity in its principles.[7] 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.[8]

1.36 **Equality** is at the heart of the CRPD. The United Nations Committee on the Rights of Persons with Disabilities stated that: 'Equality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights'.[9] Similarly, art 5 prohibits all discrimination on the basis of disability and requires States to promote equality, and arts 6 and 7 emphasise equality for women and children. The NDS principles emphasise equality of opportunity,[10] and 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).

1.37 **Autonomy** is a significant principle underlying the ability of persons with disability to exercise legal capacity. It is enshrined in the general principles of the CRPD and is a key principle of the NDS.[11] The objects and principles of the NDIS also reflect the notion of autonomy.[12] This Inquiry has been informed by autonomy in the sense of 'empowerment', not just 'non-interference'.[13] This involves seeing an individual in relation to others, in a 'relational' or 'social' sense,[14] and understanding that connects with respect for the family as the 'natural and fundamental group unit of society' that is entitled to protection by States Parties.[15] Such a view sits comfortably with a shift in emphasis towards supported decision-making, which 'acknowledges that

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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 3(a).

6 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).

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

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

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

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

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

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

13 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'.

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

15 *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) r 9.

individuals rely to a greater or lesser extent on others to help them make and give effect to decisions'.[16]

1.38 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. The social model emphasises that, while 'a person might have an impairment, their disability comes from the way society treats them, or fails to support them'.[17] Inclusion and participation are active values, consistent with an approach to autonomy as empowerment. 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'.[18] Further, one of the objects of the NDIS Act is to facilitate greater community inclusion of people with a disability.[19] The focus on supported decision-making developed throughout the Report reflects the principle of inclusion and participation.

1.39 The principle of **accountability** has a number of key components. The first is the need for systemic and specific accountability mechanisms and safeguards. 'Supporters' who fulfil a supportive role in decision-making must be properly accountable, as well as those who are appointed to make decisions on a person's behalf. Another important component is the accountability and responsibility of persons with disability for their decisions, recognising that active participation involves both responsibilities and risks.[20]

Building an evidence base

1.40 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[21] Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[22]

1.41 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference and the timeframe in which the inquiry must be

16 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.
17 Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 1, 98.
18 Australian Government, *National Disability Strategy 2010–2020*, 16.
19 *National Disability Insurance Scheme Act 2013* (Cth) s 3.
20 Children with Disability Australia, *Submission 68*.
21 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.
22 *Australian Law Reform Commission Act 1996* (Cth) s 38.

completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC's website.[23]

Community consultation

1.42 A multi-pronged strategy of seeking community comments was used. Two consultation documents were released to facilitate focused consultations in stages through the Inquiry. An Issues Paper was released on 15 November 2013 and a Discussion paper on 22 May 2014.[24]

1.43 The Discussion Paper put forward 56 proposals and 16 questions to assist the ALRC to develop its recommendations for reform. Both consultation papers and this final Report were also released in an Easy English format.[25]

1.44 Two national rounds of stakeholder consultation teleconferences, meetings, forums and roundtables were also conducted following the release of each of the consultation documents.

1.45 The Terms of Reference for this Inquiry directed the ALRC to consult with relevant stakeholders, particularly persons with disability and their representative, advocacy and legal organisations, but also families and carers of people with disability, relevant Commonwealth, states and territory departments and agencies, the Australian Human Rights Commission, and other key non-government stakeholders. The many individuals, departments, agencies and organisations consulted in the Inquiry are listed at the end of the Report.

1.46 The ALRC received 156 submissions, a full list of which appears at the end of the Report. Submissions were received from a wide range of people and agencies, including: bodies representing persons with disability; courts; public guardians and advocates; individuals; academics; lawyers; community legal centres; law societies and representative groups; and Commonwealth and state government agencies.

1.47 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. This can have a significant impact in organisations with limited resources. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

Appointed experts

1.48 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of Advisory Committees, panels, roundtables and the appointment by the

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23 <www.alrc.gov.au/law-reform-process>.

24 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) 41; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014).

25 Easy English is an accessible format that uses simple, everyday language and illustrations for people with low English literacy.

Attorney-General of part-time Commissioners. The Advisory Committee for this Inquiry had 11 members, listed at the beginning of the Report. Two meetings were held in Sydney on 3 October 2013 and 8 April 2014.

1.49 In this Inquiry the ALRC was able to call upon the expertise and experience of Graeme Innes AM, Disability Discrimination Commissioner, who was appointed as a part-time Commissioner specifically to assist the ALRC in this Inquiry. The Hon Justice Berna Collier of the Federal Court of Australia contributed her experience as a part-time Commissioner until October 2013 and thereafter on the Advisory Committee for the Inquiry.

1.50 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a group of experts as an Advisory Committee, panel or roundtable and the enlisting of expert readers are invaluable aspects of ALRC inquiries. These experts assist in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the significant contribution made by the Advisory Committee in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

Implementation

1.51 Once tabled in the Australian Parliament, the Report becomes a public document.[26] ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2012–2013 records that 61% of ALRC reports are substantially implemented and 28% are partially implemented, representing an overall implementation rate of 89%.[27]

1.52 Quite apart from such statistics, an assessment of the contribution that law reform work makes must have a long view. Law reform inquiries have a far bigger impact than just the implementation of recommendations, some of which may occur shortly after a report is released, some many years later. But whether or not recommendations are implemented, ALRC reports provide enormous value. Each ALRC report provides not only a mapping of law as at a particular moment in time, but in reviewing the submissions and consultations the reports also provide a snapshot of opinion on the issues being considered—providing a considerable contribution to legal history, and increasingly locating that within its particular social context at a given time In making a submission to the Senate Standing Committee on Legal and Constitutional Affairs, when the Committee conducted an inquiry into the ALRC over

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26 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

27 Australian Law Reform Commission, *Annual Report 2011–2012* (ALRC Report 121), 24 and see Appendix F.

the summer of 2010–2011,[28] the Federal Court of Australia said that the Court benefits greatly from ALRC reports:

> More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented.[29]

Outcomes

1.53 Australia was an active participant and leader in the development of the CRPD, contributing greatly to the negotiations of the text of the Convention. Australia was also one of the original signatories when it opened for signature on 30 March 2007.

1.54 The adoption by the Australian Government of the National Decision-Making Principles and the Commonwealth decision-making model set out in the Report will provide the impetus for further reform of laws nationally to promote better compliance with the CRPD.

1.55 The most difficult policy challenges in this area concern those who require the most support. Where a person's will and preferences are difficult, or impossible to determine, they may need someone else to make decisions on their behalf. These hard cases should not, however, be treated as a barrier to building law and legal frameworks that move towards supported decision-making in practice, as well as in form.

1.56 Recent reviews and amendment of state and territory guardianship and administration laws provide important directions for reform. In the Report, the ALRC puts forward a model to encourage supported decision-making under Commonwealth laws and to provide the catalyst towards further initiatives at the state and territory level.

1.57 In adopting the model and leading its implementation federally, the Australian Government can maintain its leadership in championing and implementing reforms for persons with disability, ensuring their equal recognition before the law in accordance with art 12 of the CRPD.

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28 See the inquiry report: Australian Parliament, Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission* (8 April 2011), <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%inquiries/2010-13/lawreformcommission>.

29 Ibid, Submission 22.

2. Conceptual Landscape—the Context for Reform

Contents

Summary

2.1 This chapter discusses the principles, language and theory behind debates about decision-making processes that concern persons with disability. The ALRC considers international human rights law and key concepts in the literature concerning disability and issues of 'capacity'. This provides the conceptual background to the ALRC's recommendations in this Report.

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' 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 people who may require decision-making support. The ALRC identifies significant conceptual confusion that is affecting the development of a focus on support and the

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).

acknowledgement of the need, at times, for a person to act on behalf of another—particularly in relation to what is called 'substitute' decision-making. In this context, Australia's Interpretative Declaration in relation to art 12 is considered.

2.3 The chapter concludes by summarising the implications for 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 The CRPD was the first binding international human rights instrument to explicitly address disability. Australia was an active participant and leader in its development, contributing greatly to the negotiations of the text of the Convention.[2] Australia was also one of the original signatories when it opened for signature on 30 March 2007.[3] Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. The CRPD entered into force for Australia on 16 August 2008,[4] and the Optional Protocol in 2009.[5] The CRPD consolidates existing international human rights obligations and clarifies their application to persons with disabilities.[6] It does not create new rights.

2.5 In addition to the general principles and obligations contained in the CRPD,[7] it is art 12, 'Equal recognition before the law', that is of central importance in this Inquiry. It underpins the ability of persons with disability to achieve many of the other rights in 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' and contains five paragraphs:

> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

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2 Evidence to the Joint Standing Committee on Treaties, *Hansard*, Parliament of Australia, 16 June 2008, 3 (Peter Arnaudo).

3 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).

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

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

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 *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.

> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity 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 and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
>
> 5. Subject to the provisions of this article, States Parties shall 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.[8]

2.6 By ratifying the CRPD, Australia accepted the obligations 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.

2.7 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.[9] However, 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 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.[10]

2.8 Even when an international convention has been incorporated into domestic law, 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.[11]

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8 Ibid art 12.

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

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

11 A Johnston, *Submission 12*.

2.9 An added complexity with respect to the implementation of the CRPD in Australia is that guardianship and administration issues rest in state and territory law. As the ACT Disability, Aged and Carer Advocacy Service (ADACAS) observed:

> The realities of the Australian federal system are going to create significant challenges for reform, particularly in the nexus between Commonwealth and state law.[12]

2.10 While implementation is clearly a multifaceted challenge, a document like the CRPD can both reflect and propel shifts in thinking. 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';[13] and ADACAS said that the CRPD 'represents a cultural, identity and legal shift'.[14]

2.11 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. 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.[15]

2.12 Such an approach is in contrast to a 'medical' approach, in which a diagnosis or categorisation of condition leads to particular consequences for individuals—for example, the imposition of guardianship.[16]

2.13 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.[17]

2.14 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*'.[18]

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12 ADACAS, *Submission 108*.
13 Family Planning NSW, *Submission 04*.
14 ADACAS, *Submission 29*.
15 *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.
16 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; 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.
17 Office of the Public Advocate (Qld), *Submission 05*.
18 G Llewellyn, *Submission 82*.

2.15 In addition to the general principles and obligations contained in the CRPD,[19] 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'.[20] Article 12 was of central importance to this Inquiry.

2.16 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. The CRPD also requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse.[21]

Other international instruments

2.17 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.[22] While the *International Covenant on Civil and Political Rights* (ICCPR) makes no specific reference to persons with disability, it enshrines rights to life, physical integrity, liberty and security of the person, equality before the law and non-discrimination.[23] In addition, 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;[24] and the *Convention on the Rights of the Child* refers specifically to disability.[25]

2.18 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (CAT)[26] 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.[27]

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19 *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.

20 Ibid art 12.

21 Ibid art 12(4).

22 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948). As a non-binding declaration it does not have the same force as a Convention, but forms part of the broader international human rights backdrop to this Inquiry.

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

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

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

26 *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).

27 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.

2.19 There are also a number of international instruments that specifically protect the rights of women[28] and Indigenous peoples,[29] which are of relevance in considering intersectional discrimination. All of these instruments are reflected in the articles of the CRPD.

Key concepts

The challenge of language

2.20 This Inquiry tackled issues of great significance which contribute to the framing of legal policy responses for persons with disability. The ALRC recognises the importance of carefully defining terms and clarifying how certain concepts are being described. The language concerning disability has shifted significantly over time, for example:

- the distinction between 'lunatics' and 'idiots' in William Blackstone's day in the mid-18th century—'[a]n idiot, or natural fool, is one that hath had no understanding from his nativity' and '[a] lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reasons';[30]
- the language of 'unsound mind' of the early 20th century, as evident for example in the *Commonwealth Electoral Act 1918* (Cth);[31]
- the use of the terms 'mentally retarded persons' and 'disabled persons' in United Nations Declarations of 1971 and 1975;[32] and
- 'persons with disabilities' in the CRPD in 2007.

2.21 The legal historian Dr John Bennett remarked that '[f]or many centuries ... the law of lunacy was regulated by principles and nomenclature of the Middle Ages'.[33] As words have become associated with negative connotations, or used pejoratively, a new

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28 *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).

29 *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).

30 William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, 292, 294. 'Lunatic' was derived from the Latin 'luna' or moon. As Louise Harmon explains, it embodied the idea that 'like the moon, the insanity of the lunatic waxed and waned. Even a lunatic who appeared permanently insane was presumed potentially curable. He had once lived his life on equal mental footing with others, and there was always that glimmer of hope that he would do so again': Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' [1990] *Yale Law Journal* 1, 16.

31 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.

32 *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).

33 John Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, 1974) 125.

lexicon has been developed.[34] In its 1989 report, *Guardianship and Management of Property*, the ALRC commented that

> 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.[35]

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'.[36]

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,[37] the ALRC considers that the development of a new lexicon serves to signal the paradigm shift reflected in the CRPD—the purpose of which 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'.[38] This Inquiry provided an opportunity to contribute to that process.[39] In particular, the ALRC seeks to place the emphasis in law, and in language, on support.

2.24 The ALRC acknowledges, however, that changes in language, as in law, of themselves, do not effect change:

> Changing laws and implementing new policies regarding legal capacity is only the first step in realising the right to equal recognition before the law for people with disability.[40]

2.25 What is needed is a shift in understanding and commitment—or as some express it, a change in 'culture'. Such a view is summed up in the comments by ADACAS, which said:

> ADACAS fully supports the belief that effective change management requires the development of a new lexicon, and the use of terminology such as fully supported decision making contributes to that goal. Of course, there is a risk associated with a sudden departure from traditional terminology. It may cause confusion at a time when more onerous demands are possibly going to be imposed on supporters. We recognize

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

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

36 Ibid.

37 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.

38 *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.

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

40 PWDA, ACDL and AHR Centre, *Submission 136*.

> that there are implementation issues, but it lays within the power of legislative drafters to mitigate these impacts, possibly through the staged introduction of new requirements. More importantly, a change of culture will not happen simply because legislation is enacted. Intentional community development activities will need to be undertaken to support the broad community to make the change to viewing people with cognitive impairments as having capacity and being valid decision makers.[41]

Definitions of disability

2.26 'Disability' may be defined in different ways and for different purposes. Approaches to defining disability have also shifted over time—particularly from the medical to a social approach. 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.

2.27 For the purposes of this Inquiry, the ALRC is taking a broad encompassing approach to definitions of disability, as reflected in the CRPD.[42] This definition includes: sensory, neurological, physical, intellectual, cognitive and psychosocial disability.

2.28 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 recommendations in this Report.

Recognition as 'persons'

2.29 The Terms of Reference require a consideration of the recognition of people with disability 'as persons before the law'.[43] 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'.

2.30 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,

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41 ADACAS, *Submission 108*. See also PWDA, ACDL and AHR Centre, *Submission 136*.

42 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).

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

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'.

> 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]

2.31 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.

2.32 In its General Comment on art 12 the United Nations Committee on the Rights of Persons with Disabilities (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 Report, the ALRC recommends a model that emphasises ability and support to exercise legal agency, consistent with a full recognition of personhood.

'Equal recognition'

2.33 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 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.

2.34 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]

2.35 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]

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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 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [5].

47 Terry Carney, above n 16, 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 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [1].

49 Ibid.

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 some submissions. For example, Hobsons Bay City Council 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 Article 12(2) of the CRPD provides that 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

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 individuals to take 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:

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50 Hobsons Bay City Council, *Submission 44*.

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 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [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.

> 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 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] They are not a general starting point for action, but a retrospective focusing 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. 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 the trigger for formal arrangements for decision-making support through, for example the appointment of guardians and administrators, or the commencement of enduring powers of attorney. They are also made in a range of health care decisions.

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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.

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, Gino Dal Pont and Ken 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, Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 14.

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

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, the Australian Centre for Disability Law and the Australian Human Rights Centre 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 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

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61 See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Guardianship and Administration Act 1990* (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 16.

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

65 PWDA, ACDL and AHR Centre, *Submission 66*.

> 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 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 direct reform towards supported decision-making, the ALRC uses the word 'ability'[68]—and emphasises that the focus should be on assessing how the individual can be supported to exercise their ability.

Supported and substitute decision-making

2.51 In this Report, the ALRC recommends shifting away from 'substitute decision-making' to 'supported decision-making'. There is an important distinction between them and it is the key issue in the discussion surrounding the meaning and effect of art 12 of the CRPD. It is also the point at which most confusion has arisen.

2.52 Decision-making 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]

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

67 National Disability Services, *Submission 49*. See also PWDA, ACDL and AHR Centre, *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.

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.

2.53 Formal arrangements may also include recognition of support by family, friends or others—for example, where provision is made for the designation of a 'nominee' for particular purposes.[71] Banks may provide facilities for co-signing, allowing designated others to conduct banking along with the account holder.

2.54 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.

2.55 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 'substitute decision-making' are used. The discourse around art 12, and particularly the General Comment on art 12 when published as a draft in 2013,[72] has exacerbated this tension.

2.56 General Comments are provided by way of guidance and are different from legally binding obligations as reflected in the CRPD itself. The Rules of Procedure of the UNCRPD provide that it may prepare General Comments 'with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations'.[73] Some of the tension arising from the discussion about models of decision-making is evident in the submissions made in response to the UNCRPD's General Comment on art 12.

2.57 Australia has set out its understanding about art 12 in one of three Interpretative Declarations.[74] In relation to art 12, Australia declared its understanding:

> 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.[75]

2.58 This Declaration was made in the light of the contentiousness of guardianship in the discussions surrounding the development of the text of the CRPD and the criticism of what was described as 'substituted' decision-making. A number of other countries

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71 Eg, Centrelink 'correspondence nominees'. See 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*, 2013. The final General Comments No 1 and No 2 were adopted by the UNCRPD on 11 April 2014.

73 UNCRPD, *Rules of Procedure* (5 June 2014) r 47.

74 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, outlining the State's understanding of obligations under the CRPD, without purporting to exclude or modify its legal effects: International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [1.1]–[1.3].

75 *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). There were also Interpretative Declarations in relation to arts 17 and 18.

made similar declarations that the CRPD permits substitute decision-making in certain limited circumstances and subject to appropriate safeguards.[76]

2.59 There are differing views about the effect of Australia's Interpretative Declaration, particularly in relation to the role of substitute decision-making. The ALRC considers that this is driven by conceptual confusion that is impeding reform. To appreciate the significance of this tension, and to provide the context for the formulation of legal policy responses in this Inquiry, the following section explores some key concepts and the emergence of the concepts of 'supported' and 'substitute' decision making.

The emergence of 'substitute' decision-making

2.60 Any discussion of substitute decision-making needs to distinguish two separate issues: the first is the *appointment* of a person to act on behalf of another and the scope of the person's powers; the second is the *standard* by which that appointee is to act. They are entirely separate points, but often confused. The appointee may be chosen by the person themselves, or by a court or tribunal. The standard is the test by which any decision-making by the appointee is to occur. To explain the distinction, it is constructive to set out a little of the history.

2.61 Traditional guardianship laws have been described as exceedingly paternalistic,[77] 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.[78]

> 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.[79]

2.62 Such efforts sought to limit the scope of appointment of substitute decision-makers, such as guardians, to achieve the 'least restrictive option'. But they also focused on the standard by which the appointee was to act: 'best interests' standards, as suggested in this quote, were ones that preceded, and were to be contrasted with, a 'substituted judgment' 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

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76 Eg, Norway, Estonia and Canada: see Australian Government Attorney-General's Department, *Submission 113*.

77 Eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [6.95]–[6.96].

78 Ibid [2.8].

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

protection of life'.[80] A 'best interests' standard 'requires a determination to be made by applying an objective test as to what would be in the person's best interests'. A 'substituted judgment' standard is 'what the person would have wanted',[81] based for example on past preferences. Substitute decision-making can therefore apply in two broadly different ways—one involves an objective 'best interests' standard, the other involves a focus on what the person wants or would have wanted ('substituted judgment').

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] So when a 'substitute' was appointed to act on behalf of another, their powers were to be restricted and the standard by which they were to act was increasingly one of 'substituted judgment', based on what the person would have wanted.

2.65 Even in a reformed context of being committed to advancing individuals' rights, however, 'best interests' standards were still retained, in language and in form. The Australian Guardianship and Administration Council 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—a combination of subjective and objective. Some 'best interests' standards have also been expressed in terms of prioritising the wishes and preferences of the person. For example, the *Mental*

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80 Donnelly, above n 51, 11. Donnelly refers to the Hippocratic Oath.
81 Explanatory Notes, *Mental Capacity Act 2005* (UK) [28].
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.
84 AGAC, *Submission 51*.

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, Dr Mary Donnelly writes that it 'attempts to mitigate the consequences of a loss of capacity while staying within a best interests framework'.[86] The overall question is an objective one, but it is informed by past and present wishes and the opinion of others as to what would be in the person's best interests.

Shift towards supported decision-making

2.69 By the second decade of the 21st century, the approach advocated is described as 'supported decision-making', which 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]

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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.

87 Carney, above n 47, 60.

2.70 Supported decision-making emphasises the ability of a person to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. It focuses on what the person *wants*.

2.71 In the context of developing—and championing—'supported decision-making', however, '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. The fact that someone is appointed as a substitute becomes problematic of itself, rather than focusing upon *how* the substitute is to act.

2.72 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 'substitute' decision-making—and the blurring between 'substituted judgment' and 'substitute decision-making'—the ALRC considers that it might be preferable to move away from this language altogether. The terms the ALRC recommends are 'supporter' and 'representative' contained in the Commonwealth decision-making model set out in this Report.

Substitute decision-making and the CRPD

2.73 An important issue to clarify is whether the CRPD permits substitute decision-making at all, or in what form. This also raises the questions of what is meant by substitute decision-making in the CRPD context, how is it different from supported decision-making and what are the implications of this analysis in informing reform recommendations.

2.74 The ALRC considers that the issue of the appointment of a person to act needs to be clearly differentiated from the standard by which the appointee—or substitute—is to act. The danger in analytical terms is to condemn the appointment of a person to act on behalf of another simply by virtue of the appointment, presupposing that the appointee will not act in a way that places the individual at the centre of the decision-making process. The ALRC considers that much of the conceptual confusion lies in a failure properly to distinguish these two things. As noted above, substitute decision-making can apply an objective 'best interests' standard or can use a 'substituted judgment' standard of what the person wants or would have wanted.

2.75 In its General Comment on art 12, finalised in April 2014,[88] the UNCRPD said that 'support' is a broad term—'that encompasses both informal and formal support

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

arrangements, of varying types and intensity'.[89] It then spelled out its understanding of the difference between a 'support' model and a 'substitute' one.

2.76 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'.[90] 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).[91]

2.77 A *substitute* 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.[92]

2.78 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'.[93] 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 substitute decision-making regimes *is not sufficient to comply with Article 12*'.[94] What is required is '*both* the abolition of substitute decision-making regimes and the development of supported decision-making alternatives'.[95]

2.79 The UNCRPD commented on 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'.[96]

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89 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law*, 2013 [15].

90 Ibid [25].

91 Bernadette McSherry, above n 52, 26.

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

93 Ibid [3].

94 Ibid [24]. Emphasis added.

95 Ibid. Emphasis added.

96 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].

2.80 The ALRC acknowledges that there is considerable tension about what is described as 'substitute decision-making'. As noted above, the so-called 'substitute judgment' approach was anchored in the will and preferences of the person—the significant conceptual shift related to how the appointed substitute was to act, namely *away* from an objective 'best interests' standard.

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"'.[97] 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 should be put in place only when they are necessary in order to enable the exercise of legal capacity and only where there are sufficient safeguards in place.[98]

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'.[99] 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?

2.83 Australia welcomed the initiative to clarify the scope of States Parties' obligations under art 12 and noted 'the Committee's perception of a general failure of States Parties to recognise that the human-rights based model of disability implies a shift from the substitute decision making paradigm to one that is based on supported decision-making':

> Australia acknowledges the importance of supporting decision-making where this is possible, but considers that a human rights-based model of disability does not preclude all substituted decision-making. Such decisions should only be made on behalf of others where this is necessary, as a last resort, and subject to safeguards.[100]

2.84 Australia considered the discussion of art 12(1) and (4) 'particularly helpful',[101] but was critical of the characterisation of art 12(3) 'as never permitting substituted decision-making',[102] and that the General Comment did not acknowledge

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97 Office of the Public Advocate (SA), *Submission 17*. See, also, Caxton Legal Centre, *Submission 67*.

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

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

100 Australian Government, Submission to the UN Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention–Equal Recognition before the Law*, 2014 [5].

101 Ibid [8].

102 Ibid [5].

> Situations where no amount of support will assist, such as where a person may have a severe cognitive or psychiatric impairment and is unable to understand, make or communicate a decision. It is unfortunate that the complexities of this issue are not acknowledged and discussed in the current draft.[103]

2.85 Australia reiterated the position under art 6 of the ICCPR, in cases of medical emergency where a person is not able to consent to treatment, it is permissible to provide such treatment where this is necessary for life-saving purposes.[104]

> Australia considers the same principle to be relevant to persons with disabilities, and that the exclusion of any form of substituted decision making in relation to persons with disabilities would be incompatible with these other international human rights obligations.[105]

2.86 Australia expressed concern that the draft General Comment was characterising the entirety of art 12 'in absolute terms',[106] although art 12 itself is not expressed in this fashion:

> Australia considers that while it is important that the legal capacity of persons with disabilities is respected to the fullest extent possible, there are circumstances in which substituted decision-making may be the only available option. Australia considers that guidance from the Committee on the most human rights compatible approach in situations where a person does not have, either temporarily or permanently, the capacity to make or communicate a decision, would be useful to States Parties.[107]

2.87 Australia argued that, in a number of respects, the draft General Comment sought to extend the scope of art 12 beyond that of existing expressions of both equality before the law and 'legal capacity' in international human rights law. It stated that the most significant example of this is 'the characterisation of art 12 as requiring supported decision-making and not permitting substituted decision-making in any circumstances':

> The statement that there are no circumstances permissible in which a person may be deprived of the right to recognition as a person before the law, or to have this right limited, relates to article 16 of the ICCPR, rather than article 12 of the Convention. The ICCPR provides for this in article 4(2), which states that no derogation from that right is permissible even in times of public emergency. The Convention does not contain a similar provision. However, Australia accepts that this is applicable in relation to article 12(1).[108]

2.88 Australia reiterated that it did not consider art 12 required the abolition of all substitute decision-making regimes and mechanisms.[109] Other States Parties expressed similar concerns with the language of the draft General Comment.[110]

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103 Ibid [9].
104 Ibid [11].
105 Ibid.
106 Ibid [13].
107 Ibid [16].
108 Ibid [21].
109 Ibid [24].
110 See submissions to the UNCRPD on the draft General Comment from, eg, Denmark, New Zealand and Norway: Australian Government Attorney-General's Department, *Submission 113*.

2.89 There are distinct threads in these responses. First, that an approach of supporting decision-making is paramount; secondly, that any appointment of a person to act on behalf of another should be limited, a last resort and subject to safeguards compatible with human rights; and thirdly, that the CRPD does not prohibit the appointment of a person to act on behalf of another. What is *not* clearly disentangled, however, is separating the fact of an appointment in certain circumstances and how the person is to act. Both are subsumed in the argument that, in some limited circumstances, 'substitute decision making' may be appropriate, without closely interrogating what substitute decision-making means. The argument is therefore expressed in terms of 'supported' *versus* 'substitute' decision-making.

2.90 The ALRC considers that the focus of analysis needs to be on how support is translated into a principles-based model that may guide law reform. How should support be articulated as the principal idea—consistent with the Convention and the concerns of the UNCRPD? What is the standard by which supporters and anyone appointed to act on behalf of another are to act? What is the standard to apply when the will and preferences of a person are not evident and cannot be determined? What is a human rights compatible approach? The standing and impact of Australia's Interpretative Declaration in relation to art 12 is relevant to these matters.

Implications for law reform

2.91 In September 2013, Australia appeared before the 10th session of the UNCRPD.[111] In its concluding observations, the UNCRPD recommended that Australia review its Interpretative Declarations in order to withdraw them.[112]

2.92 The ALRC asked what impact the Interpretative Declaration regarding art 12 had on (a) the 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.[113] In the Discussion Paper, the ALRC suggested that, in view of concerns identified by the UNCRPD and some stakeholders, the time was opportune to review it, with a view to withdrawing it.[114]

2.93 The ALRC considers that the clear momentum is towards supported decision-making and supporting the ability to communicate wishes and preferences with respect to decision-making. Australia was a leader in advocating the CRPD and is well placed to continue this role. The developments at the Commonwealth level, particularly through the introduction of the National Disability Insurance Scheme and the decision-making model recommended in this Report provide a template and a catalyst for propelling reform federally. In such a context, the Interpretative Declaration may be seen, perhaps, to be unnecessary.

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111 Office of the High Commissioner for Human Rights, *10th Session of the Committee on the Rights of Persons with Disabilities* (12 November 2013).

112 Committee on the Rights of Persons with Disability, above n 96.

113 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) Question 1.

114 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 2–1.

2.94 In its present form it may also be considered unclear or as representing an overabundance of caution. While Interpretative Declarations can be modified at any time,[115] they may also be understood as essentially historical notes, marking a government's understanding at a particular time. As noted above, other States Parties made similar declarations at the time.

2.95 In this context, the ALRC considered whether to recommend that the Interpretative Declaration in relation to art 12 be withdrawn. Some would advocate this because they see the Declaration as hindering 'Australia's reform efforts and its continued leadership in the field of promoting equal recognition before the law for persons with disabilities'.[116] On the other hand, the Australian Government Attorney-General's Department submitted that 'this focus on the Interpretative Declaration is unhelpful, as of itself the United Nations Convention on the Rights of Persons with Disabilities has no effect in domestic law in the absence of laws or policies adopted by the Australian Parliament'.[117]

2.96 Insofar as the Declaration is simply stating that there are occasions when a person may be appointed to act on behalf of another—as a substitute—the ALRC considers that this is a correct understanding of the CRPD. The ALRC also considers that the UNCRPD was principally condemning a best interests approach, not a will and preferences approach. As set out in Chapter 4, the ALRC uses the term 'representative' in such cases and sets out a standard which embodies the 'will and preferences' approach.

2.97 The ALRC concludes that there is an opportunity to send a clear message and to provide conceptual clarity in place of any confusion, or negative messaging,[118] arising out of the Interpretative Declaration. If the Declaration remains as it is, or without further explanation, it may be seen to create 'a sense of complacency';[119] and may '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'.[120]

2.98 However the ALRC acknowledges that there are many ways to do this—regardless of whether the Declaration itself remains.[121] For example, in Australia's

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115 International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [2.4.8].

116 Centre for Disability Law and Policy NUI Galway, *Submission 130*.

117 Australian Government Attorney-General's Department, *Submission 113*.

118 A point made in a number of submissions: eg, Disability Discrimination Legal Service Inc and Villamanta Disability Rights Legal Service Inc, *Submission 115*; Scope, *Submission 88*; Carers Alliance, *Submission 84*; NMHCCF and MHCA, *Submission 81*; WWDA, *Submission 58*; National Disability Services, *Submission 49*; Disability Advocacy Network Australia, *Submission 36*; Cairns Community Legal Centre, *Submission 30*.

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

120 Disability Advocacy Network Australia, *Submission 36*.

121 The ALRC also acknowledges the comments of the Australian Government Attorney-General's Department that, where there are complaints under the Optional Protocol alleging violations of art 12, the Interpretative Declaration provides the basis for responding in setting out the understanding of obligations that Australia has accepted under the CRPD: Australian Government Attorney-General's Department, *Submission 113*.

Initial Report to the UNCRPD greater clarification of Australia's understanding of obligations under art 12 were set out:

> Australia strongly supports the right of persons with disabilities to legal capacity. In some cases, persons with cognitive or decision-making disabilities may require support in exercising that capacity. In Australia, substituted decision-making will only be used as a measure of last resort where such arrangements are considered necessary, and are subject to safeguards in accordance with article 12(4). For example, substituted decision-making may be necessary as a last resort to ensure that persons with disabilities are not denied access to proper medical treatment because of an inability to assess or communicate their needs and preferences. Australia's interpretive declaration in relation to article 12 of the Convention sets out the Government's understanding of our obligations under this article. Australia's guardianship laws and the safeguards contained in them aim to ensure abuse, exploitation and neglect does not occur, consistent with article 16 of the Convention.[122]

2.99 The adoption by the Australian Government of the National Decision-Making Principles and the Commonwealth decision-making model set out in this Report will provide impetus for the further reform of laws nationally to promote better compliance with the CRPD.

2.100 Submissions revealed distinct, and at times conflicting, themes:

- ambiguity in the Declaration—particularly about the meaning of fully supported or substitute decision-making arrangements;[123]
- concerns about the standard by which the person is to act, rather than about the appointment of a representative in itself;[124] and
- discomfort with the idea of 'substitute decision-making' altogether.[125]

2.101 The ALRC considers that the crucial issue is how to advance, to the extent possible, supported decision-making in a federal system—a matter also pointed out by the UNCRPD in its concluding observations on Australia.[126] This does *not* preclude the appointment of another to act on behalf of a person, either by the person themselves (such as by an advance directive or enduring power of attorney) or through an institutional mechanism such as a court or tribunal. Insofar as the Interpretative Declaration is asserting this, it is not incorrect as a matter of law, despite the somewhat confusing terminology in which it is expressed. The focus, in policy terms, then falls

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122 *Australia's Initial Report under the Convention on the Rights of Persons with Disabilities*, 3 December 2010 [55].

123 Disability Discrimination Legal Service Inc and Villamanta Disability Rights Legal Service Inc, *Submission 115*; 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*; Mental Health Coordinating Council, *Submission 07*.

124 Disability Discrimination Legal Service Inc and Villamanta Disability Rights Legal Service Inc, *Submission 115*; Offices of the Public Advocate (SA and Vic), *Submission 95*; B Arnold and Dr W Bonython, *Submission 38*; NSW Council for Intellectual Disability, *Submission 33*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

125 F Beaupert, P Gooding and L Steele, *Submission 123*.

126 Committee on the Rights of Persons with Disability, above n 96.

on the *limits* surrounding the appointment of another to act in a person's stead and also upon the *standard* by which the person is to act. These are the safeguards central to art 12(4). The consequence, in a federal system in which guardianship laws are state based, is to propel a critical evaluation of all decision-making models, by whatever name.

2.102 There are also dangers in action that is not anchored in a strong conceptual framework, and tested in implementation. The 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 pocketful of melted lollies on a hot summer's day'.[127] 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.[128]

2.103 Two key policy issues are how far 'support' can really go without attracting criticism of being a legal fiction;[129] and the need to underpin change in practice by evidence.

2.104 The policy impetus is clearly away from models that, in substance, form or language, appear as ones that are not reflective of the individual as decision-maker, based on their wishes and preferences to the greatest extent possible. 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 has great 'symbolic significance':[130]

> 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.[131]

2.105 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 needed for those who require decision-making support. In this respect there is force in the UNCRPD's observations about a lack of a 'detailed and viable framework for supported decision-making in the exercise of legal capacity'.[132] 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

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127 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.

128 Caxton Legal Centre, *Submission 67*. Citing Terry Carney, above n 16, 15. Carney and Beaupert, above n 118, 177. Carney and Beaupert, above n 117, 177.

129 Harmon, above n 30. See also Donnelly, above n 51, 185–187.

130 Carney, above n 47, 62.

131 Terry Carney, above n 16, 12.

132 Committee on the Rights of Persons with Disability, above n 96, [24].

> 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.[133]

2.106 Legal and policy reform must also include consideration of when 'it is not practicable to determine the will and preferences of an individual'.[134] 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. As Denmark urged, in its response to the Draft General Comment on art 12,

> Above all, the general comment should take into account that there will be individuals, such as those who are unconscious, who are living in a persistent vegetative state, have very advanced dementia, or have the most profound intellectual disabilities, who will not be in a position to understand that there is a decision to be made, the nature of that decision, or the consequence of any apparently expressed will or preference. If substitute care and treatment decisions are not made for these individuals, they will run the risk of being exploited, neglected, or even left to die. To assume that no one would ever require someone else to make a decision on their behalf would against this background not only be flagrantly wrong but ultimately irresponsible.[135]

2.107 In other words, *some* system of appointment of others to act is a necessary human rights backstop. The Offices of the Public Advocate (South Australia and Victoria) identified the danger that an 'overemphasis' on a person's autonomy may be 'to the detriment of protection for people who need guardianship *as a rights enhancing mechanism*'.[136] They argued that 'guardianship, *properly done*, is a positive use of state power that enhances the inclusion and legal personhood of the represented person'.[137]

2.108 Such concerns were also expressed by the NSW Council for Intellectual Disability:

> 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.[138]

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133 Caxton Legal Centre, *Submission 67*.

134 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [21].

135 Denmark, Submission No 19 to the UN Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention–Equal Recognition before the Law*, 2014.

136 Offices of the Public Advocate (SA and Vic), *Submission 95*. Emphasis added.

137 Ibid. Emphasis added. 'Guardians need to be properly resourced and the person's wishes must be paramount in all decisions'.

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

2.109 The need for support, and appropriate policy responses, is likely to increase as Australia's population ages.[139] Justice Connect and Seniors Rights Victoria observed that, as Australia's population is ageing, both the number of older people and their proportion of the population are increasing:

> It has been estimated that in the 30 years from 2007, the number of Australians aged over 65 years will more than double, increasing from 2.7 to 6.3 million and will constitute 24% of the population. An increase in the incidence of age-related disability, in particular dementia, is expected to accompany the ageing of the population. The ageing population together with the rising incidence of dementia amongst that population has led to a concerning rise in applications for guardianship and administrative appointments outside the more traditional scope of intellectual disabilities.[140]

2.110 Where institutional mechanisms of support cannot be avoided, 'new priorities, processes and language' are needed.[141] 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?

2.111 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.[142]

2.112 John Chesterman suggests that

> 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.[143]

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139 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.

140 Justice Connect and Seniors Rights Victoria, *Submission 120*. See also NSW Council for Intellectual Disability, *Submission 131*; Caxton Legal Centre, *Submission 67*.

141 ADACAS, *Submission 29*.

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

143 Chesterman, above n 99, 31.

2.113 The ALRC considers that the focus of reform initiatives needs to be towards providing greater 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.

2.114 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.[144]

2.115 For many, resourcing is a key issue:

> There is no escaping the reality that realising the right to equal recognition before the law for all people in our community requires resourcing from the grassroots up, as well as the top down.[145]

2.116 The most difficult policy challenges in this area concern those who require the most support—where a person's will and preferences are difficult, or impossible to determine and they need someone else to make decisions on their behalf. These hard cases should not, however, be treated as a barrier to building law and legal frameworks that signal the paradigm shift of the CRPD towards supported decision-making in practice, as well as in form.

144 Caxton Legal Centre, *Submission 67*.
145 PWDA, ACDL and AHR Centre, *Submission 136*.

3. National Decision-Making Principles

Contents

Summary

3.1 In this chapter the ALRC recommends a set of National Decision-Making Principles and accompanying Guidelines to 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.

3.2 The National Decision-Making Principles identify four central ideas in all recent law reform work on capacity. These are that:

- everyone has an equal right to make decisions and to have their decisions respected;
- persons who need support should be given access to the support they need in decision-making;
- a person's will and preferences must direct decisions that affect their lives; and
- there must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.

3.3 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.

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).

3.4 The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive decisions that they are supported in making, and that others may make on their behalf. The National Decision-Making Principles provide a conceptual overlay, consistent with the CRPD, for a Commonwealth decision-making model that encourages supported decision-making.

National Decision-Making Principles

Recommendation 3–1 Reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines (see Recommendations 3–2 to 3–4) to ensure that:

- supported decision-making is encouraged;
- representative decision-makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

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

Principle 3: Will, preferences and rights

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

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

3.5 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.

3.6 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 three sets of Guidelines.

3.7 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 review of guardianship and related regimes.

3.8 The National Decision-Making Principles[3] were strongly supported by stakeholders. The ACT Disability, Aged and Carer Advocacy Service (ADACAS), for example, said that the Principles 'provide a sound basis for legislative change'.[4] The Queenslanders with Disability Network (QDN) submitted that

> The National Decision-Making Principles and Guidelines developed by the ALRC are a major step forward in creating a unified, progressive approach to empowering people with disability.[5]

3.9 The National Decision-Making Principles will provide the basis for national consistency and 'could play an important role in creating a framework for reform' of Commonwealth, state and territory laws concerning decision-making by persons who may require support.[6] National Disability Services (NDS) supported the

> establishment of clearly articulated 'national decision-making principles' to guide reform of all Commonwealth, state and territory laws and legal frameworks that affect decision-making of people with disability. This appears to be the most effective strategy for building a more coherent approach to legal capacity. It should, over time, reduce the inconsistency and unnecessary administrative hurdles across different jurisdictions or areas of life that currently face people with disability, their families and service providers.[7]

3.10 The NDS emphasised the importance of the Commonwealth taking the lead in implementing change, and encouraged incremental implementation:

> The process of change should roll out slowly, providing opportunities for learning along the way. As indicated by the [ALRC], the Commonwealth may put into practice the various changes prior to states and territories. This will represent a useful opportunity to evaluate the practical ramifications. Similarly, the areas of law that have a clear role in addressing support for legal capacity, such as the National

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2 Terms of Reference (emphasis added).
3 As set out in the Discussion Paper: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Ch 3.
4 ADACAS, *Submission 108*.
5 Queenslanders with Disability Network, *Submission 119*.
6 Law Institute of Victoria, *Submission 129*.
7 National Disability Services, *Submission 92*.

> Disability Insurance Scheme (NDIS) Act, the Evidence Act and guardianship laws, may do the detailed work to develop specific legal solutions. These can then be more easily modified or adopted in other areas of law such as electoral, contract, banking and consumer protection.[8]

3.11 The adoption of the National Decision-Making Principles will provide a crucial starting point for change:

> The proposed principles should achieve a shift in practice to help embed the right of every adult to make their own decisions and to be provided with the support necessary to do so. They will also help to ensure that any decision made for a person with disability is directed by their will, preferences and rights. This shift will have different practical implications in the various relevant areas of law.[9]

The equal right to make decisions

> ***Principle 1: The equal right to make decisions***
>
> All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

3.12 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.

3.13 Stakeholders supported the emphasis on the right to make decisions. Some wanted the statement to retain the form of a presumption;[10] others that it should go further. A number of stakeholders also stated that it should be recognised that there are circumstances in which a person may not be able to exercise such a right for themselves—and where another may need to be appointed to act on their behalf.

3.14 In this Report, the ALRC adopts the paradigm shift evident in the language of, and discourse around, the CRPD. The ALRC considers that it is necessary to place the emphasis on the *right* of citizens to make decisions, rather than on the qualification intrinsic in 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.

3.15 This is not to suggest that legal agency may never be found to be lacking—for example through the application of common law doctrines about legal capacity when invoked in reviewing transactions. Nor is it meant to suggest that a person may never

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8 Ibid.
9 Ibid.
10 Offices of the Public Advocate (SA and Vic), *Submission 95*.

be appointed to act on behalf of another in making decisions. The ALRC agrees with many stakeholders on these points.[11]

3.16 The ALRC considered whether the principle should be expressed as applying more broadly than just to adults. The Queensland Law Reform Commission (QLRC) used 'adult' in its formulations of principle,[12] but the Victorian Law Reform Commission (VLRC) considered such a 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*.[13] The ALRC has sought to avoid confusion in the first principle by confining it to adults. Decision-making principles dealing with children involve a 'best interests' standard—a standard deliberately not used in this Inquiry.[14]

3.17 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 for reform. The remaining Principles are expressed in terms of 'persons'.

Support

> ***Principle 2: Support***
>
> Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

3.18 Decision-making principles should ask what decision-making support is needed so that people can exercise an equal right to make decisions. The emphasis must be on developing supported decision-making if the paradigm shift is to become a reality.

3.19 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'.

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11 Disability Discrimination Legal Service Inc and Villamanta Disability Rights Legal Service Inc, *Submission 115*; Max Jackson and Margaret Ryan, *Submission 101*; Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*; B Arnold and W Bonython, *Submission 38*; NSW Council for Intellectual Disability, *Submission 33*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. See Ch 2.

12 See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Final Report R67 (2010) ch 4 (The General Principles).

13 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 92; *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

14 See Ch 2.

3.20 There are two elements: how a person can be supported in their 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 requiring decision-making support at the forefront—as the decision-maker—and to recognise the position of 'supporters' in law, both through a mechanism of recognition set out in relevant Commonwealth laws, and by including supporters in information flows in certain situations. The 'supporter' model is discussed in Chapter 4.

3.21 The National Decision-Making Principles and Guidelines reflect a spectrum of decision-making, from fully independent to supported decision-making, including where a person needs someone else to make decisions on their behalf as a 'representative'. They are underpinned by a conceptualisation of autonomy as empowerment, noted in Chapter 1.

3.22 National Decision-Making Principle 2 (the Support Principle) expresses the concept of support at a high level.[15] The emphasis is on the person as a decision-maker who may require support to exercise their legal capacity—and not as a person with an impairment affecting their decision-making. 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.

3.23 The Support Principle is not prescriptive as to by whom, and how, the support may be given. The Principle reflects 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'.[16]

3.24 The Support Principle includes recognition of communication support.[17] It also reflects some of the general principles contained in the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act)—for example, that persons with disability 'should be supported to participate in and contribute to social and economic life to the extent of their ability'.[18]

3.25 Stakeholders strongly endorsed this principle. The Centre for Disability Law and Policy, National University of Ireland, Galway (CDLP Galway) said that the proposal sought to realise the declaration by the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) that 'supported decision-making must be

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15 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, *A Review of Queensland's Guardianship Laws*, Final Report R67 (2010) rec 7–14(d).

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

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

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

available to all'.[19] Justice Connect and Seniors Rights Victoria (Justice Connect) agreed, stating:

> We strongly support the proposal to introduce a decision making principle that a person 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.[20]

3.26 In practice, problems may arise from a lack of available supporters. Justice Connect observed:

> While it is always preferable for family members and friends with a longstanding relationship and knowledge of the person's wishes and preferences to act as a supporter or representative, there will be instances where a person has no such support available. One of the key risk factors of elder abuse is isolation. In our experience, many vulnerable older people do not have family members or friends willing to take up the role of supporter or representative.
>
> It is in these situations that Kirby J suggests that 'independent, dispassionate, neutral and professional public office holders can be especially useful and even necessary'.[21]

3.27 Justice Connect submitted that in order for a support principle to be meaningful, it would be 'necessary for the Commonwealth to provide funding to a new or existing body to provide assistance to people requiring decision-making support in the absence of available alternatives'. It said that, ideally, an independent body would be provided with sufficient resources and funding to employ suitably qualified people to take on the role 'equivalent to the operation of OPA/State Trustees in the Victorian jurisdiction, and other similar bodies in different states and territories'.[22]

3.28 In situations where a person does not have access to support, the state or territory may need to intervene by appointing someone to act as a supporter or representative. The review of state and territory guardianship and administration laws to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision-making model is discussed in Chapter 10.

Support Guidelines

Recommendation 3–2 ***Support Guidelines***

(1) *General*

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

19 Centre for Disability Law and Policy NUI Galway, *Submission 130*.
20 Justice Connect and Seniors Rights Victoria, *Submission 120*.
21 Ibid. Referring to *Holt v Protective Commissioner* (1993) 31 NSWLR 227.
22 Justice Connect and Seniors Rights Victoria, *Submission 120*. Justice Connect added that volunteer support programs could also be an option, if funding does not support the establishment of a new body.

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

(c) The role of persons who provide decision-making support should be acknowledged and respected—including family members, carers or other significant people chosen to provide support.

(d) Persons who may require decision-making support may choose not to be supported.

(2) *Assessing support needs*

In assessing what support is required in decision-making, the following must be considered.

(a) All adults must be presumed to have ability to make decisions that affect their lives.

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

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

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

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

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

3.29 The ALRC's approach recognises supported decision-making. This goes beyond general statements about the importance of support in the lives of persons with disability, to recommendations for a Commonwealth decision-making model under which supporters can be recognised in law. As discussed in Chapter 2, there is very strong support for legal models that reflect supported decision-making norms and aspirations.

3.30 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;[23] and
- receive reasonable and necessary supports, including early intervention supports.[24]

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23 *National Disability Insurance Scheme Act 2013* (Cth) s 4(4). The principle is focused on choice 'in the pursuit of their goals and the planning and delivery of their supports', which is the focus of the NDIS.

24 Ibid s 4(5).

3.31 The Support Guidelines reflect the ALRC's approach that assumptions about the extent of decision-making 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'.[25]

Paragraph (1)

3.32 Paragraph (1)(a) is framed broadly and applies beyond support in decision-making. The OPA (SA and Vic) suggested that it 'confuses the concept of decision-making support with support for participation and contributing to society, which may require a wider range of support services'.[26] The ALRC acknowledges this concern, but considers the provision sits appropriately within the aspirational framework of the National Decision-Making Principles.

3.33 The purpose of support is to enhance the ability of people to make decisions and exercise choice and control—as decision-makers. That control includes the choice to have a supporter and choose the supporter, or to decline support. Stakeholders suggested that the latter needs to be made clear,[27] and this is incorporated in paragraph (1)(d).

3.34 The ALRC's model includes formal recognition of supporters in Commonwealth laws and legal frameworks. Paragraph (1)(c) of the Support Guidelines reflects this and is consistent with the NDIS Act's general principle that: 'the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected'.[28] None of this detracts from the vital and continuing role that *informal* support plays in the lives of persons with disabilities. The model is designed to provide a channel for formal validation of such support, where the person chooses it, consistent with the Terms of Reference. Paragraph (1)(c) embraces both informal and formal support.

3.35 A 'supporter' is distinguished from a 'representative'. Where a person is being supported in decision-making, the decision is their own, but made with support. Where a representative is appointed, the decision is made on behalf of the person, but involving the person to the greatest extent possible. How supporters and representatives are to act is considered in Chapter 4. The Support Guidelines reflect the recognition of family members, carers or other significant people as supporters at a high level. How they are recognised and how they may act is discussed in Chapter 4.

Paragraph (2)

3.36 The second paragraph of the Support Guidelines reflects an approach to assessing the support needed to exercise legal agency that is functional (ability to make the particular decision in question), not outcomes-based (the result or wisdom of the

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25 Physical Disability Council of NSW, *Submission 32*.
26 Offices of the Public Advocate (SA and Vic), *Submission 95*.
27 Centre for Disability Law and Policy NUI Galway, *Submission 130*; F Beaupert, P Gooding and L Steele, *Submission 123*; Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*.
28 *National Disability Insurance Scheme Act 2013* (Cth) s 4(12).

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'.[29]

3.37 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 assessments of 'ability to exercise legal capacity' need to be refocused, by making the primary inquiry about the assessment of the support a person needs to exercise legal capacity, or agency. The second paragraph of the Support Guidelines reflects this approach.

3.38 The starting point in any assessment of support needs is a presumption of ability.[30] Paragraph (2)(a) 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 in Chapter 2. It places the onus on those who want to contest that a person has decision-making ability with respect to a particular transaction, or generally.

3.39 Legislative statements of this presumption often use the word 'capacity' and include the qualification 'unless it is established that he or she lacks capacity'. The ALRC's formulation keeps the qualification out of the Guidelines, reflecting the rights emphasis of the CRPD. The focus needs to be on assessment of the support necessary to exercise legal agency. The VLRC similarly recommended 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'.[31] An assessment of ability in terms of support acts to encourage support, enhancing a person's ability. Similarly, the *Mental Capacity Act 2005* (UK) provides 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'.[32]

3.40 The formulation in paragraph (2)(b) departs from status-based assessments. 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

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29 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 92. In recommending such an approach that was subsequently incorporated in the *Mental Capacity Act 2005* (UK), the Law Commission of England and Wales deliberately rejected status-based assessments: Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.5]–[3.6]. In that inquiry, the Law Commission received a 'ringing endorsement' of the functional approach: [3.6].

30 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 2008* (Alberta) 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*.

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

32 *Mental Capacity Act 2005* (UK) s 1(3).

> 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.[33]

3.41 Bruce Arnold and Dr Wendy 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.[34]

3.42 Paragraphs (2)(d)–(e) reflect a functional assessment of ability. These Guidelines may apply to a decision, or types of decision, depending on the circumstances. As the Council of Social Service of NSW (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.[35]

3.43 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'.[36]

3.44 In the context of the Support Guidelines, the functional approach is directed towards an assessment of the support needs of the person who requires decision-making support. In other specific contexts, this approach may also inform decisions about the need to appoint another to assist or represent the person.

3.45 There are concerns that functional tests of ability may present inappropriate barriers to the exercise of legal agency. However, it is not practicable to completely do away with some functional tests of ability that have consequences for participation in legal processes. For example, the integrity of a criminal trial (and, arguably, the criminal law itself) would be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way. It may also breach the person's human rights by denying them a fair trial, implicating arts 12 and 13 of the CRPD.

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

34 B Arnold and 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*.

35 NCOSS, *Submission 26*.

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

3.46 Other law reform bodies have endorsed the functional approach.[37] In its extensive inquiry on Queensland's guardianship laws, the QLRC commented that the functional approach is a 'widely accepted modern capacity model',[38] and observed that

> 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 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.[39]

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 approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right—the right to equal recognition before the law. In all of those 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.[40]

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*'.[41] 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' necessarily inherent in a functional test—provided the emphasis is placed principally on the support necessary for decision-making and that any appointment is for the purpose of protecting the person's human rights.

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37 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, *A Review of Queensland's Guardianship Laws*, Final Report R67 (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.

38 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Final Report R67 (2010) [7.105].

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

40 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [15].

41 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law*, 2013 [21] (emphasis added).

3.49 Paragraph (2)(d) rejects an outcomes-based approach and captures what is described as 'the dignity of risk', which is underpinned by the framing principle of autonomy. As Dr Mary 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 [of England and Wales], 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]

Will, preferences and rights

Principle 3: Will, preferences and rights

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

3.50 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 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.

3.51 There are a range of formulations of this concept, 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'.[43] 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'.[44]

3.52 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 and preferences than does 'inform'. The ALRC also considers that the principle should not be qualified by words

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42 Donnelly, above n 29, 101. Quoting Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.4].

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

44 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Final Report R67 (2010) recs 7–14 (b), (c).

such as 'to the greatest extent practicable', which is contained, for example, in the QLRC formulations.[45] What happens when a person's will and preferences cannot be determined is considered as a separate issue in the Guidelines.

3.53 Article 12(4) of the CRPD uses the formulation 'rights, will and preferences'. The ALRC formulation follows the spectrum of decision-making based on the will and preferences of a person, through to a human rights focus in circumstances where the will and preferences of a person cannot be determined. The inclusion of 'rights' is the crucial safeguard. 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 decision to be made.

3.54 The emphasis should be shifted from 'best interests' to 'will and preferences' approaches. Even in those examples of approaches where 'best interests' are defined by giving priority to 'will and preferences',[46] the standard of 'best interests' is still anchored conceptually in regimes from which the ALRC is seeking to depart.

3.55 Stakeholders strongly supported this approach.[47] For example, QDN said that '[t]his is an important development in acknowledging the rights of an individual who is unable to make a decision independently'.[48] The Australian Research Network on Law and Ageing welcomed

> the emphasis of the Principles on the human rights of the person to whom the decision relates. In particular we note the importance of looking beyond the concept of promoting the personal autonomy of persons, to include the wider right of respect for the person's dignity. It has been recognized that dignity is a wider concept than autonomy, and a universal value to which all persons are entitled. It therefore has special relevance for those whose capacity is compromised, either because of conditions producing fluctuating capacity, or for more chronic situations.[49]

3.56 Principle 3 applies to both supporters and representatives. In the ALRC's model, where a person appoints a supporter, as set out in the Commonwealth decision-making model,[50] decisions remain those of the person, not of the supporter. The concern is to describe the relationship between the person being supported and the supporter,[51] and establish the expectations of a formal supporter role. Chapter 4 discusses the duties of supporters and representatives.

3.57 To provide greater clarity about the distinction between a supporter and a representative and full emphasis to will and preferences in decision-making, the Will, Preferences and Rights Guidelines (below) refer to both roles.[52] The Principle has a

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45 See Ibid ch 4 (The General Principles).

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

47 Justice Connect and Seniors Rights Victoria, *Submission 120*; Queenslanders with Disability Network, *Submission 119*; ADACAS, *Submission 108*; Australian Research Network on Law and Ageing, *Submission 102*; Offices of the Public Advocate (SA and Vic), *Submission 95*.

48 Queenslanders with Disability Network, *Submission 119*.

49 Australian Research Network on Law and Ageing, *Submission 102*.

50 See Ch 4.

51 See, eg, Justice Connect and Seniors Rights Victoria, *Submission 120*.

52 See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 3–6.

role in embodying the move away from objective 'best interests' approaches, which is most necessary when a person is appointed to make decisions on behalf of another. In the ALRC's model, this occurs when another person is appointed as a 'representative'. The significant shift is in the decision-making standard by which that person must act, and the constraints on the appointment of a representative in the first place. Given that such appointments are made under state and territory law, the full implementation of the ALRC's recommendations will be dependent on reform of state and territory legislation.

Will, Preferences and Rights Guidelines

Recommendation 3–3 ***Will, Preferences and Rights Guidelines***

(1) *Supported decision-making*

(a) In assisting a person who requires decision-making support to make decisions, a person chosen by them as supporter must:

(i) support the person to express their will and preferences; and

(ii) assist the person to develop their own decision-making ability.

(b) In communicating will and preferences, a person is entitled to:

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

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

(2) *Representative decision-making*

Where a representative is appointed to make decisions for a person who requires decision-making support:

(a) The person's will and preferences must be given effect.

(b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.

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

(d) A representative may override the person's will and preferences only where necessary to prevent harm.

3.58 The Will, Preferences and Rights Guidelines begin by clearly differentiating between supported and representative decision-making.[53] The starting point, in both cases, is that decisions must be directed by the will and preferences of the person needing decision-making support.

3.59 Paragraph (1) defines the meaning of supported decision-making, in terms of the role of the supporter and the right of the person being supported to express their will and preferences.

3.60 Paragraph (2) sets the standard for representative decision-making. Importantly, the Will, Preferences and Rights Guidelines address what should happen when the current will and preferences of a person cannot be determined. The focus should be on what the person's will and preferences would likely be. In the absence of a means to determine this, a new default standard is advocated—expressed not in terms of 'best interests', but in terms of human rights.

3.61 Paragraph (2)(a) provides that a person's will and preferences must be given effect, which is central to the paradigm shift signalled in the CRPD and involves an emphasis on participation and communication.

3.62 Paragraph (2)(b) provides the standard for how a representative should act, in circumstances where the supported person's will and preferences cannot *currently* be determined. The representative must seek to ascertain what the person would likely have wanted in the particular circumstances. This is essentially a past preferences approach.[54] It requires a consideration of past information about decision-making choices. A key source of such information is likely to be the person's family members, carers and other significant people in their life.

3.63 The *Mental Capacity Act 2005* (UK) includes a list of those who could provide such information.[55] Similar lists have been included in, for example, the *Mental Health Act 2014* (Vic);[56] and the Mental Health Bill 2013 (WA).[57] Consulting family members and others provides a further avenue for recognising the role of family members and carers.

3.64 Stakeholders endorsed the recognition of family as supporters who can provide relevant information regarding will and preferences. 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

53 This was also suggested by Offices of the Public Advocate (SA and Vic), *Submission 95*.

54 See Ch 2.

55 *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 2008* (Alberta) cA4.2, s 2(d).

56 For example, s 71(4).

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

> 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.[58]

3.65 Paragraph (2)(c) embodies a human rights approach, where the will and preferences *cannot* be determined by any means. The underlying idea in this guideline is that the default position should not be expressed in terms of a 'best interests' standard.

> The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preference' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.[59]

3.66 The move away from a best interests standard was also strongly supported by stakeholders.[60] There are different ways that this shift can be expressed. The VLRC, for example, recommended that the 'promotion of the personal and social wellbeing of the person' replace 'best interests'.[61] The QLRC recommended that powers should be used in a way that 'promotes and safeguards' and is 'least restrictive' of an adult's 'rights, interests and opportunities'.[62]

3.67 The kinds of human rights encompassed by the 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.

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58 Mental Health Coordinating Council, *Submission 07*.

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

60 Eg, Centre for Disability Law and Policy NUI Galway, *Submission 130*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Queenslanders with Disability Network, *Submission 119*; Australian Research Network on Law and Ageing, *Submission 102*; Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.

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

62 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Final Report R67 (2010) [5].

3.68 While the ALRC has sought distance from the 'best interests' standard of previous eras, the Law Council of Australia submitted that

> the 'best interests' of an individual should be consistent with their will and preferences in the majority of circumstances. If these are inconsistent, or if one is unable to be ascertained, the objective and subjective elements of each approach can be balanced by reference to appropriate international human rights standards.
>
> The Law Society of New South Wales advises that 'best interests' standards should be retained as a last resort for people with disabilities whose will and preferences cannot be determined, for example, to prevent elder abuse.[63]

3.69 Some have suggested the retention of the 'best interests' approach as a fallback.[64] Part of the issue with the 'best interests' standard was said to be that it was poorly understood. The Office of the Public Advocate (Qld) observed that

> what is in a person's best interests has often been conflated with 'medical judgement' or another professional's judgement. Such determinations do not take into account the particular views, wishes and needs of the person.
>
> 'Best interests' is often applied in an unsystematic way without any unpacking of relevant considerations, including the values and principles applied in the decision-making process.[65]

3.70 The OPA (Qld) also argued that, without 'careful guidance, education, training and advice', a rights-based approach could be similarly fraught and that the 'kind of cultural change that needs to be achieved will be difficult to effect without a holistic strategy'.[66]

> [S]upporters and other decision-makers must be provided with guidance about how to apply a rights-based approach, including how to evaluate and weigh different considerations. Formal guidelines or codes of practice under the relevant legislation should also be provided to guide decision-makers in implementing a rights-based approach.[67]

3.71 The importance of developing codes of practice was also emphasised by the Mental Health Coordinating Council:

> Whilst we agree that there needs to be a consistent approach to the assessment of capacity in the context of representative decision making, promoting individual autonomy as circumstances require, it is important that the process does not become too proscriptive and therefore run the risk of leading to, for example, harm or neglect. At the end of the day the legislation must have an underpinning code of practice that provides the key framework and principles of best practice.[68]

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63 Law Council of Australia, *Submission 142*.

64 Eg, the NSWCID 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*.

65 Office of the Public Advocate (Qld), *Submission 110*.

66 Ibid.

67 Ibid.

68 Mental Health Coordinating Council, *Submission 94*.

3.72 In its General Comment on art 12, the UNCRPD suggested that, if the will and preferences of a person could not be determined, the new standard to replace 'best interests' should be the 'best interpretation of will and preferences'.[69]

3.73 CDLP Galway referred to this 'best interpretation' approach in submitting that,

> Whereas good efforts should be made to determine the will and preference of the relevant person, where the 'best interpretation' arrived at leads to a conflict of human rights (eg right to health in conflict with right to self-determination), it may be better for outside decision-makers to adhere to subjective guidance and follow the principle of 'best interpretation' rather than setting forth 'objective' rules which would allow the representative to decide which balance of human rights to achieve.[70]

3.74 CDLP Galway also referred to amendments to Irish legislation, which inserted the following definition of 'best interpretation':

> the interpretation of the relevant person's past and present communication (using all forms of communication, including, where relevant, total communication, augmented or alternative communication, and non-verbal communication, such as gestures and actions) that seems most reasonably justified in the circumstances.[71]

3.75 It was suggested that 'this language could be used to guide the ALRC in its development of final recommendations on how will and preferences may be determined in situations of last resort'.[72] Such an approach may sometimes be instructive in terms of how current and past will and preferences are determined under paragraphs (2)(a) and (b) of the Will, Preferences and Rights Guidelines.

3.76 Consistently with the CRPD, it is important to leave the 'best interests' language behind in advancing supported decision-making in Australian laws and legal frameworks. However, it is not clear that the 'best interpretation' approach should necessarily be the default standard when a person's will and preferences are not known, nor are capable of being made known. Judges have developed other approaches in such contexts, for example:

- what a reasonable and ordinary man might do in the position of a 'lunatic' with respect to the disposition of his surplus income—the standard developed by Lord Eldon LC in the leading case concerning the 'substituted judgment' approach;[73] and

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69 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [21]. This paragraph was added between the draft and the final form of the General Comment on art 12, with respect to art 12(4).

70 Centre for Disability Law and Policy NUI Galway, *Submission 130*.

71 Ibid. Quoting the From Mental Capacity to Legal Capacity (Amendment) (No 2) Assisted Decision-Making (Capacity) Bill (2013) [2.1.5].

72 Centre for Disability Law and Policy NUI Galway, *Submission 130*.

73 *Ex Parte Whitbread, in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99, 35 ER 878. See William Thompson and Richard Hale, 'Surplus Income of a Lunatic' (1894) 8 *Harvard Law Review* 472, 474–475. The authors then trace the application of Lord Eldon's principle in later cases. See also 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.

- the 'wise and just husband and father' approach in relation to family provision litigation.[74]

3.77 The danger in such approaches is that they reveal a certain blurring of the subjective and objective in the creation of a 'legal fiction'.[75] They also run the risk of contradicting other principles advocated by the UNCRPD in its General Comment, in particular that

> All forms of support in the exercise of legal capacity (including more intensive forms of support) must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests.[76]

3.78 The ALRC considers that it is better to use human rights standards as the benchmark, accompanied by appropriate guidelines, codes of practice and other explanatory material, developed over time. Such material should be accompanied by appropriate training and guidance.

3.79 Where a representative is appointed, the decision-making standard to be applied is, therefore, to give priority to the will and preferences of the person 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 included specifically in the Safeguards Guidelines.[77] This approach uses objective standards—because the subjective cannot be determined.

3.80 The NSW Council for Intellectual Disability (NSWCID) questioned whether human rights provide an adequate basis for decisions where a person's will and preferences cannot be ascertained. The NSWCID noted that there is limited understanding of human rights and there are many international instruments. Different rights may point to different outcomes 'so that quite complex balancing exercises are required to make a decision'.

> The result of all this might be that only highly educated people were qualified to make representative decisions. We are concerned about the prospect of removing from eligibility as representatives down to earth practical family members who have a lifetime's knowledge of a person with disability.[78]

3.81 The NSWCID preferred the standard recommended by the VLRC—that representatives be required to exercise their powers 'in a manner that promotes the personal and social wellbeing of the person', with guidance from a list of relevant factors.

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74 See, eg, Rosalind Croucher, 'The Concept of Moral Duty in the Law of Family Provision—A Gloss or Critical Understanding?' (1999) 5 *Australian Journal of Legal History* 5.

75 See Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' [1990] *Yale Law Journal* 1, 22.

76 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [29](b).

77 See, eg, *Mental Capacity Act 2005* (UK) s 1(6); *Adult Guardianship and Trusteeship Act 2008* (Alberta) 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*.

78 NSW Council for Intellectual Disability, *Submission 131*.

3.82 Autonomy is a key principle of the CRPD, but 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.[79]

3.83 The human rights approach is also reflected in the paragraph 2(d) of the Will, Preferences and Rights Guidelines, which provides that a representative may override the will and preferences of a person only where necessary to prevent harm. This is consistent with the CRPD in that, for example, art 17 of the CRPD may require the representative to make a decision that protects the person's 'physical and mental integrity', notwithstanding the decision conflicts with the person's expressed will and preferences. A qualification of this kind tests the limits of autonomy, particularly where the limitation concerns harm to oneself. Examples 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. Safeguards may be included in terms of ensuring that the course of action proposed is the 'least restrictive' option.[80] The latter approach is captured in the Safeguards Principles, considered below.

3.84 Whenever a limit is included, considerable care is needed in translating it into practice. A provision that a person's will and preferences may be overridden based on the outcome of a decision—in this case, harm—runs contrary to a focus on ability that is not outcomes-based.[81] However, it is not necessarily inconsistent with a principle of autonomy, as autonomy is not an absolute concept. The classical conceptualisation of autonomy, by John Stuart Mill, recognised some limit—that it may be limited in order 'to prevent harm to others'.[82] 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.[83]

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79 Donnelly, above n 29, 277.

80 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.

81 See above.

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

83 Donnelly, above n 29, 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.

3.85 Overriding will and preferences on the basis of preventing harm to others is one aspect of a harm principle; another concerns the issue of preventing harm to oneself. 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.[84]

3.86 Intervening to preserve the life of a person against their will and preferences is what CDLP Galway described as one of the 'hard cases'. They give the example of a person with anorexia:

> Many people with anorexia express a will to live, but a preference to not eat. In these cases, an outside decision-maker may be involved, but would still be restricted from making a decision that was contrary to the individual's expressed will and preference. PEG feeding, for example, would only be allowed if the individual agreed to it. These situations will always be difficult—they are difficult under 'best interests' determinations and they will continue to be difficult under an approach that prioritises will and preference.[85]

3.87 While emphasising the support paradigm and the paramountcy of will and preferences, CDLP Galway said that this 'does not mean that vulnerable individuals who are having difficulty expressing their will and preference are going to be left by the wayside in emergency situations':

> For example, in a situation in which an individual is displaying behaviours of serious self-harm, the support paradigm does not leave the individual to perish. Instead, it asks support people around the person to closely examine what is happening and to support the individual by taking actions that will facilitate her or his decision-making ability to a point at which she or he can clearly express her or his will and preferences. This could mean a variety of things, including but not limited to assisting the individual in stopping the self-harming behaviour and interacting with the individual in a caring and understanding manner and/or attempting to create an environment that the individual feels safe and comfortable in to allow her or him to be in an optimal decision-making scenario. Throughout any interaction, the goal remains of arriving at the will and preference of the individual. Further, according to the terms of the CRPD, any emergency interventions must adhere to the principle of non-discrimination by ensuring that criteria for crisis interventions do not discriminate on the basis of disability (for example, by using mental health diagnosis or mental capacity assessments).[86]

3.88 How does one achieve an intervention which is both respectful of will and preferences, but is also least restrictive of the person's human rights? CDLP Galway

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84 B Arnold and W Bonython, *Submission 38*.

85 *Centre for Disability Law and Policy NUI Galway, Submission 130* (citations omitted).

86 Ibid.

argued that permitting intervention in the way they described is not the same, nor should it be, 'equated to substitute decision-making systems that currently exist':

> There are clear distinctions, which are 1) using 'will and preference' as the guiding paradigm as opposed to 'best interest,' 2) not denying legal capacity to individuals with disabilities on a different basis, and 3) not imposing outside decision-makers against the will of the individual.
>
> However, there are times in which a decision needs to be made and the relevant individual is not able to make a decision or needs assistance in making the decision. The foregoing explanation is meant to show that Article 12 can and does address these situations without the need for substituted decision-making. However, it is also important to stress that these solutions are ONLY intended to apply to the 'hard cases', and should not encroach into cases where an individual is expressing a will and preference—even where the will and preference of the individual is contrary to medical advice or to advice of mental health professionals. It should also not be used to impose an outside decision-maker on a person who is expressing an unpopular or unorthodox decision. The solutions proposed for these 'hard cases' only apply at the end of a process where there is a genuine inability to understand a person's will and preference or where it is impossible to realise the person's will and preferences without breaching some other aspect of the law.[87]

3.89 The Australian Guardianship and Administration Council (AGAC) submitted similarly that,

> in certain circumstances, the views of the person might lead to outcomes that are significantly detrimental to the person's health and welfare. In these circumstances, recognition of the representative's authority to make decisions contrary to the wishes of the person is essential.[88]

3.90 CDLP Galway said that, while intervention 'in some exceptional cases which conflicts with the individual's will and preferences should be permissible', they need to be 'disability-neutral and not justified on the basis of an individual's decision-making ability'.[89]

3.91 The development of codes of practice, guidance and accountability measures will, over time, lead to a shift in 'culture' and practice. An important aspect of this cultural shift arises in decisions where the person involved has expressed will and preferences that are likely to be financially detrimental. The issue is captured in the phrase 'dignity of risk'. While the UNCRPD has referred to the need to protect people from 'undue influence', it has also said that protection must 'respect the rights, will and preferences of the person, including the right to take risks and make mistakes'.[90]

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87 Ibid.
88 AGAC, *Submission 91*.
89 Centre for Disability Law and Policy NUI Galway, *Submission 130*.
90 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [22].

Safeguards

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

3.92 The Terms of Reference require the ALRC to consider whether 'the powers and duties of decision-making supporters and substituted decision-makers' are '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'.

3.93 Article 12(4) of the CRPD sets out safeguards obligations. The article requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards. In particular, it requires that such safeguards:

- prevent abuse in accordance with international human rights law;
- 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.[91]

3.94 The Safeguards Principle and Guidelines reflect these requirements.

Safeguards Guidelines

Recommendation 3–4 ***Safeguards Guidelines***

(1) *General*

Safeguards should ensure that interventions for persons who require decision-making support are:

(a) the least restrictive of the person's human rights;

91 *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).

(b) subject to appeal; and

(c) subject to regular, independent and impartial monitoring and review.

(2) *Support in decision-making*

(a) Support in decision-making must be free of conflict of interest and undue influence.

(b) Any appointment of a representative decision-maker should be:

(i) a last resort and not an alternative to appropriate support;

(ii) limited in scope, proportionate, and apply for the shortest time possible; and

(iii) subject to review.

3.95 These Guidelines capture the essential elements of safeguards that should be incorporated in laws and legal frameworks that deal with decision-making by people who need support to make decisions.

3.96 Stakeholders generally supported the 'least restrictive' intervention and 'last resort' appointment approaches. These are consistent with the position of the Australian Government as set out in the Interpretative Declaration on art 12 of the CRPD, discussed in Chapter 2.

3.97 The Law Council referred to some current good practice examples of requirements on guardians 'to restrict as little as possible the freedom of decision making and action of a person in need of, or under, guardianship'[92] and of reluctance to make guardianship orders in the first place. The QDN, for example, emphasised that it is 'critical that appointments of representatives and supporters be time and task specific'.[93]

3.98 Paragraph (2)(a) reflects the need for safeguards to be directed to the potential problem of conflict between a supporter or representative and the person being supported. Stakeholders identified this as an issue. For example, CDLP Galway submitted:

> It is vital to recognize the role of the family as a natural support system, and the crucial role of carers and others in supporting persons who may require decision-making support. However, this principle must always be accompanied by safeguards in order to minimize conflicts of interest which inevitably arise. While the family should be recognized as a natural support system, they should only be assigned the

92 Law Council of Australia, *Submission 142*. Referring to the NSW Civil and Administrative Tribunal website and restrictions in the *Guardianship Act 1987* (NSW).

93 Queenslanders with Disability Network, *Submission 119*.

> role of the support in cases where the person gives consent to family members assuming such a role.[94]

3.99 Similarly, Justice Connect said that:

> One concern with appointing a supported or substitute decision maker is the level to which that person is able to divorce themselves from their own bias and concerns, and act in accordance with the will and preferences of the supported person.[95]

3.100 The circumstances in which representative decision-makers are appointed need to be reviewed, and should be central to review of state and territory legislation in the light of the National Decision-Making Principles and the Commonwealth decision-making model. Implementing paragraph (2)(b) of the Safeguards Guidelines should result in more constraint in the appointment of representative decision-makers.

3.101 The ALRC recognises that this is an iterative process that will take some time. The goal is for supported decision-making to become the dominant model—not only in aspiration, but also in practice. The OPA (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.[96]

3.102 CDLP Galway acknowledged that paragraph (2)(b) sets out an 'important safeguard', but said that 'there should be something to distinguish it from the already existing safeguards in the antiquated substituted decision-making regimes'. As observed by the UNCRPD in its General Comment, the 'most important safeguard for a decision-making regime is respect for the rights, will, and preferences of the relevant person'.[97]

3.103 In the National Decision-Making Principles, respect for the will and preferences of the person is embodied in the standard by which a representative is to act, as set out in Will, Preferences and Rights Guidelines. To distinguish the old approach from the new, it is also necessary to move away from status-based assessments of legal capacity and to emphasise the role of support, as reflected by the Support Guidelines.

3.104 Stakeholders acknowledged that access to appeal and review mechanisms is an important safeguard.

> Safeguards should not just respect due process or judicial review of the interventions that restrict legal capacity. There is a need for checks and balances in order to respect the process as well as the autonomy of the relevant person. For example, monitors could be appointed in certain support agreements to ensure that significant decisions are made on the basis of the relevant person's will and preference. Also, the infrastructure at Commonwealth and State or Territory levels established to oversee

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94 Centre for Disability Law and Policy NUI Galway, *Submission 130*.
95 Justice Connect and Seniors Rights Victoria, *Submission 120*.
96 Office of the Public Advocate (Qld), *Submission 05*.
97 Centre for Disability Law and Policy NUI Galway, *Submission 130*.

> and implement new legislation in this arena will be crucial, and accessible complaints mechanisms must be established within the implementing bodies to ensure ease of access for those using support to exercise legal capacity, as well as the usual recourse to the courts ... Additionally, there should be training and support for the supporters to ensure that they fully understand their role and the scope of their powers. Lastly, there should be an appeal process to an independent and impartial tribunal or court for instances when the relevant person is unable to choose his or her own representative and where an outside decision-maker is appointed to make particular decisions.[98]

3.105 This statement illustrates how safeguards need to considered at all relevant points along the spectrum of decision-making support, and in relation to all persons and organisations involved in the particular category of decision.

98 Ibid.

4. Supported Decision-Making in Commonwealth Laws

Contents

Summary

4.1 To encourage the adoption of supported decision-making at a Commonwealth level, the ALRC recommends a new model for decision-making (the Commonwealth decision-making model). This chapter outlines the model, based on the positions of '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 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 recommendations about amending the objects or principles provisions in relevant Commonwealth legislation; the appointment, recognition, functions and duties of supporters and representatives; and appropriate and effective safeguards. The chapter

also discusses the interaction of supporters and representatives with state and territory appointed decision-makers, such as guardians and administrators.

4.4 The ALRC recommends that mechanisms should be developed for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments and to facilitate review and monitoring; and that the Australian Government provide guidance and training in relation to supported decision-making.

Supported decision-making at a Commonwealth level

Recommendation 4–1 A Commonwealth decision-making model that encourages supported decision-making should be introduced into relevant Commonwealth laws and legal frameworks in a form consistent with the National Decision-Making Principles and Recommendations 4–2 to 4–9.

4.5 In the ALRC's view, it is desirable to introduce statutory mechanisms for formal supported decision-making at a Commonwealth level.

4.6 The ALRC recommends introducing mechanisms for the appointment of 'supporters' for adults who may require decision-making support, in some areas of Commonwealth law. The introduction of provisions relating to 'representatives' to address circumstances in which a person may desire, or require, someone else to make decisions for them, is also recommended.

4.7 A range of stakeholders expressed support for the legislative recognition of supported decision-making or gave 'in principle' support for the model proposed in the Discussion Paper.[1]

4.8 The National Association of Community Legal Centres (NACLC), for example, submitted that the introduction of statutory mechanisms for formal supported decision-making at a Commonwealth level is an 'important first step in the reform of laws and legal frameworks to ensure people with disability in Australia enjoy equal recognition before the law and recognition of their right to legal capacity on an equal basis with others'.[2]

4.9 Pave the Way suggested that the decision-making model should be implemented through a single Commonwealth Act, so that 'all relevant Commonwealth agencies

1 See, eg, Law Council of Australia, *Submission 142*; National Association of Community Legal Centres, *Submission 127*; Advocacy for Inclusion, *Submission 126*; Illawarra Forum, *Submission 124*; Office of the Public Advocate (Qld), *Submission 110*; Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*; 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.

2 National Association of Community Legal Centres, *Submission 127*.

recognise decisions that are made with support as well as recognising the role of supporters and representatives'.[3]

4.10 The Commonwealth decision-making model represents a significant shift in approaches to decision-making. The question of how the ALRC's model would interact with decision-making regimes under state and territory law also requires further consideration.

4.11 The ALRC considers that the model should be applied first to decision-making under the National Disability Insurance Scheme (NDIS) and in some other areas of Commonwealth responsibility—social security, aged care and eHealth records. It is intended that the Commonwealth decision-making model will also influence reform of state and territory laws.[4]

Levels of support

4.12 Article 12 of the *UN Convention on the Rights of Persons with Disabilities* (CRPD)[5] and the Support Principle[6] contain the central concept of decision-making support. The Commonwealth decision-making model is based on the idea 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. 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'.[7]

4.13 Rather than starting by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision-making[8]—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 needs decision-making support 'to exercise legal agency is dependent on the integrity, quality and appropriateness of support available'.[9]

4.14 A person may require varying levels of support to make a decision:

- 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.

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3 Pave the Way, *Submission 90*.
4 See Ch 10.
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).
6 National Decision-Making Principle 2.
7 Office of the Public Advocate (Qld), *Submission 05*. See 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.
8 See Ch 2.
9 PWDA, ACDL and AHR Centre, *Submission 66*.

- 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 follow through to ensure their decision is given effect.

4.15 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.

4.16 There is one other category of support—full support.[10] In such circumstances a person may choose someone else to make decisions for them, or it may be necessary to appoint someone to do so. Under the Commonwealth decision-making model, a representative would first attempt to 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 what the person would likely want, or on the basis of the person's 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.

4.17 Representative decision-making 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'.[11] Importantly, the functions and duties of representatives differ from, and build on, those of nominees under existing Commonwealth laws, such as plan nominees appointed under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act).[12]

4.18 Stakeholders expressed concerns about the potential risks arising from a combination of supported decision-making and decision-making by a substitute. In particular, there was concern that substitute decision-making could become predominant—what Professor Terry Carney and Dr Fleur Beaupert refer to as 'net widening'.[13]

4.19 The Australian Guardianship and Administration Council (AGAC) stated that, while they agreed in principle with the application of the model to Commonwealth laws,

> we are concerned about the details of implementing this in a practical sense and the very real risk of fragmentation, confusion and a potential for a lesser level of support being the functional outcome. In short it runs the risk of making everyday decision

10 The concept of fully supported decision-making and its development is discussed in more detail in Ch 2.
11 PWDA, ACDL and AHR Centre, *Submission 66*.
12 See Ch 5.
13 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.

> making more, not less complex, by adding an additional layer of formal decision making appointment.[14]

4.20 The Offices of the Public Advocate (South Australia and Victoria) (OPA (SA and Vic)) stated that providing a legislative framework for supported decision-making is desirable for a number of important reasons, including

> to respect the rights of people with cognitive impairment to participate in the decisions that affect their lives; to reflect the sometimes evolving or fluctuating nature of capacity noting that capacity is decision-specific; to ensure guardianship laws are compliant with the CRPD; and to reinforce the supremacy of the rights paradigm in laws that impact on people who require decision-making support.[15]

4.21 However, they acknowledged that, in practice, 'relationships of support currently operate informally, and often very effectively' and there are risks in 'formalising otherwise successful decision-making arrangements'.[16] Advocacy for Inclusion also cautioned against 'over-formalising' supported decision-making. This risks 'hindering the autonomy and decision-making rights of people with disabilities' and takes away their control 'by potentially setting out how decision-making arrangements should operate, who they could appoint as a supporter, and what the supporter might be obliged to do'. However,

> there will be cases where a person with disability does not have access to respectful, trusting, natural relationships. In these cases, if the person with disability chooses they should be supported to establish relationships with formal supporters who have undergone the appropriate checks, and who have undertaken training in supported decision-making. Supported decision-making should be considered a mostly informal arrangement, while facilitated decision-making should be considered a formal arrangement.[17]

4.22 Circumstances that can lead to the appointment of formal decision-makers include that supporters have difficulty dealing with third parties, such as telecommunications companies, hospitals and health services on behalf of persons with disability; and the need to fulfil administrative requirements demanded by government agencies.[18] The Office of the Public Advocate (Qld) observed that

> The legal recognition of 'supporters' potentially addresses many of these problems. It may mean that a person with disability can continue to receive informal support to make decisions and communicate with third parties, without the need for their legal decision-making capacity to be revoked.[19]

4.23 Justice Connect and Seniors Rights Victoria (Justice Connect) submitted that a 'mechanism for the appointment of support decision-makers may act as a valuable (and less restrictive) alternative to … guardianship and administration orders' for older

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14 AGAC, *Submission 91*.
15 Offices of the Public Advocate (SA and Vic), *Submission 95*.
16 Ibid.
17 Advocacy for Inclusion, *Submission 126*.
18 Office of the Public Advocate (Qld), *Submission 110*.
19 Ibid.

people.[20] Encouraging alternatives to guardianship and administration was considered desirable by many stakeholders.

Operation and effect of the model

Operation

4.24 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 a category of decisions. At the other is representative 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.

4.25 The development of the Commonwealth decision-making model was influenced by 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.[21]

4.26 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 should incorporate a number of key elements based on the model outlined below.

4.27 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'.[22]

4.28 The ALRC focuses on a number of key elements of the model, rather than being 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 department or agency might record the appointment, other than to highlight the need for information sharing between Commonwealth departments and agencies.

Effect

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

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20 Justice Connect and Seniors Rights Victoria, *Submission 120*.

21 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.

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

4.30 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'.[23]

4.31 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.[24] It would allow third parties to interact with supporters about decision-making with greater confidence.

4.32 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, which is one of the key elements of the Support Guidelines.[25] This may help address some of the difficulties and frustrations expressed by stakeholders in the course of this Inquiry about insufficient recognition of 'natural' supporters.[26] Recognition of supporters 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 Australian Government systems.[27]

4.33 To guide the adoption of supported decision-making at a Commonwealth level, the ALRC makes a range of recommendations that form a Commonwealth decision-making model.

Terminology

4.34 In the Discussion Paper, the ALRC asked whether the terms 'supporter' and 'representative' were the most appropriate to use in the Commonwealth decision-making model.[28]

4.35 As discussed in Chapter 2, the terminology relating to capacity and decision-making is often a contested area, but the development of a new lexicon of terms may

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23 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).

24 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, 2010.

25 See Ch 3.

26 See, eg, Carers 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 Inc, *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 W Bonython, *Submission 38*; Office of the Public Advocate (SA), *Submission 17*; Mental Health Coordinating Council, *Submission 07*.

27 See, eg, Office of the Public Advocate (Qld), *Submission 110*; AGAC, *Submission 51*. Pave the Way observed that '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': Pave the Way, *Submission 09*.

28 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–2.

help to signal the 'paradigm shift' in attitudes to decision-making reflected in the CRPD. The ALRC concludes that retaining the terminology proposed in the Discussion Paper is the best option to effect this.

4.36 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 indicates that ultimate decision-making power and responsibility remains with the person, with support being provided to assist them in making the decision themselves.

4.37 The term supporter is used by the VLRC in its guardianship report.[29] The VLRC described a supporter as a 'new legal mechanism'. A supporter

> could assist some people with impaired decision-making ability to continue to exercise legal capacity. Unlike substitute decision makers, supporters would not have the power to make decisions on behalf of a person, but they would be authorised to do certain things to assist the person to make their own decision.[30]

4.38 The term 'representative' is used in the Commonwealth decision-making model 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.[31] 'Representative' was preferred over 'nominee' to signal the shift from existing decision-making arrangements in 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.

4.39 In general, stakeholders agreed with the chosen terminology,[32] although there were some divergent views. The Office of the Public Advocate (Vic) observed that 'representative' connotes an appointment that is 'less permanent' in nature than a substitute decision-maker, and that the representative is there 'with the will of the person', even though sometimes a representative may be appointed by a court or tribunal.[33]

4.40 However, AGAC pointed to a difference of opinion among its members about the potential for confusion concerning the use of the term 'representative':

> Some members have raised concerns that the use of the term is potentially too broad and may lead to duplication of appointments under state legislation, and also possible conflict between multiple decision makers appointed under different regimes. Other members argued that 'representative' is closely aligned with concepts of agency,

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

30 Ibid 126. The *Powers of Attorney Act 2014* (Vic), enacted in August 2014, implements some of the VLRC's recommendations in creating the role of a 'supportive attorney': see *Powers of Attorney Act 2014* (Vic) pt 7.

31 This formulation is 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 1996* (British Columbia).

32 See, eg, Queenslanders with Disability Network, *Submission 119*; Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.

33 Offices of the Public Advocate (SA and Vic), *Submission 95*.

> where principals have the capacity to instruct. Conversely, other members felt that it is appropriate.[34]

4.41 KinCare Services objected to the use of the term 'supporter' to identify individuals or organisations with formal support relationships because 'exclusively informal networks have long been identified as "support" groups, and to attach this term to formal partnerships may bring about confusion'.[35]

Objects and principles of Commonwealth legislation

Recommendation 4–2 The objects and principles provisions in Commonwealth legislation concerning decision-making by persons who require decision-making support should reflect the National Decision-Making Principles.

4.42 The first key component of the ALRC's recommended approach to reform of Commonwealth laws and legal frameworks is the inclusion of supported decision-making principles under relevant legislation.

4.43 The ALRC recommends amendment of existing objects or principles provisions contained in relevant legislation, or where there are no such provisions, their inclusion, to reflect the National Decision-Making Principles.

4.44 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.

4.45 This approach was supported by a number of stakeholders.[36] 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.[37]

Supporters

4.46 The Commonwealth decision-making model recommended by the ALRC promotes formal supported decision-making. At the core of supported decision-making is the idea that all persons, except in very limited circumstances, have some level of decision-making ability and that, with appropriate support, they can be supported to

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34 AGAC, *Submission 91*. AGAC stated that members agreed, however, that there is a need to move from old language to remove the 'stigmatising effect' of terms such as 'financial manager' and 'guardian'.

35 KinCare Services, *Submission 112*.

36 See, eg, Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.

37 Disability Advocacy Network Australia, *Submission 36*.

make a decision. The nature and level of the support may vary but the decision remains that of the person who requires the decision-making support.

4.47 A supporter under the model is an individual or organisation appointed by a person 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 financial decisions.

4.48 A person may appoint whomever they want as their supporter and may appoint more than one. For example, a person may appoint a family member, friend or carer. A supporter may perform a range of functions, including in relation to information, advice or communication. The ALRC does not consider that there should be a requirement that a supporter be unpaid.[38] 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.[39] Advocacy organisations, which may not be directly paid by the person, but receive funding from government or other sources, may in certain instances be appropriately appointed as a supporter.[40] A person may also appoint, or revoke their appointment of, a supporter at any time.

4.49 There is currently no provision in Commonwealth legislation for a supporter or supporter-type role, which reflects the ideals of supported decision-making. The mechanisms closest to the role of a supporter are Centrelink correspondence nominees[41] and nominated representatives in relation to eHealth.[42] However, as outlined below, these roles differ significantly from that of a supporter, particularly with respect to the duties owed to the person who needs decision-making support.[43]

What about informal supporters?

4.50 Informal supporters and support networks play a vital role in decision-making of persons with disability. Support under art 12 of the CRPD 'encompasses both informal and formal support arrangements, of varying types and intensity'.[44] 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

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

39 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.

40 See, eg, discussion of the 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.

41 *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].

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

43 See the discussion of social security and eHealth in Ch 6.

44 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [15].

> from family, friends or mentors), or sometimes with professional support (for example, doctors or accountants).[45]

4.51 A number of stakeholders emphasised the important role informal supporters play in decision-making and that entitlement to support should include informal support.[46] 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.[47]

4.52 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.[48] In the ALRC's view, the recognition of supporters should not diminish the involvement of, or respect for, informal support, including in relation to decision-making.

4.53 A number of the elements of the Commonwealth decision-making model recognise the valuable role played by informal supporters. For example, the ALRC recommends that formal supporters have an obligation to support a person to consult family members, carers and other significant people in their life in the process of making decisions. A similar duty applies to representatives. There are also specific mechanisms in some areas of Commonwealth law considered in following chapters.

4.54 Importantly, however, some informal arrangements are 'in fact more restrictive ... because decisions [are] made informally on a substitute basis by others'.[49] The formalisation of such arrangements and associated safeguards may ensure people are able to exercise choice and control over decision-making in their lives.

Recognition of supporters

Recommendation 4–3 Relevant Commonwealth laws and legal frameworks should include the concept of a supporter and reflect the National Decision-Making Principles in providing that:

(a) a person who requires decision-making support should be able to choose to be assisted by a supporter, and to cease being supported at any time;

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

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45 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.5].
46 See, eg, Carers NSW, *Submission 23*; Office of the Public Advocate (Qld), *Submission 05*.
47 MDAA, *Submission 43*.
48 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 13.
49 Office of the Public Advocate (SA), *Submission 17*. See also AGAC, *Submission 51*.

(c) supported decisions should be recognised as the decisions of the person who required decision-making support.

4.55 To introduce the concept of formal supported decision-making at a Commonwealth level, the ALRC recommends that relevant laws and legal frameworks should include the concept of a supporter and establish supporter arrangements. These laws and legal frameworks should reflect the National Decision-Making Principles and include a number of key elements relating to the recognition of supporters.

4.56 The most important element is recognition that, where a supporter is chosen, ultimate decision-making authority remains with the person who requires decision-making support, and that supported decisions must be recognised as the decision of the person who required that support.[50] These elements are intended to encourage support to be provided where this is needed to enable a person to make or convey a decision. This in turn maximises the autonomy of the person, and allows for dignity of risk.

4.57 The other element of the recommendation relates to ensuring that a person is able to exercise choice and control over their supporter or supporters. This is not provided for under any existing Commonwealth decision-making regimes.[51]

4.58 The ACT Disability, Aged and Carer Advocacy Service (ADACAS) submitted that the provision of a signed document should be a sufficient basis for a Commonwealth agency to recognise a supporter. Any other approach, it said, 'reinforces the old fashioned view that people with disabilities lack capacity'. Further, 'specific recognition of supporters should only be required by the Commonwealth where they need a level of access that would otherwise be prevented by law'—including for privacy reasons, receipt of monies or 'where the supporter conveys … decisions purportedly made by the person being supported'.[52]

4.59 The OPA (SA and Vic) observed that further consideration will be required as to the status of supporter arrangements, and information about where any 'appointment instruments' are to be lodged.[53]

4.60 Any new legislative scheme for recognising supporters is likely to have limited practical impact if people do not have access to an appropriate supporter. Under the CRPD, Commonwealth, state and territory governments have an obligation to provide

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50 The VLRC made a similar recommendation: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 46.

51 For example, social security legislation does not make provision for the person with a nominee arrangement to request suspension or revocation: *Social Security (Administration) Act 1999* (Cth) s 123E. Stakeholders emphasised the importance of this power: see, eg, Physical Disability Council of NSW, *Submission 32*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 54.

52 ADACAS, *Submission 108*.

53 Offices of the Public Advocate (SA and Vic), *Submission 95*.

support to persons with disability to assist them in decision-making.[54] There seems no reason why individual advocates or advocate organisations should not be recognised as supporters. Only the person supported would have the authority to choose a supporter, and would also have the power to suspend or revoke the arrangement at any time.

4.61 The OPA (SA and Vic) suggested that further consideration be given to the possible role of government, including Australian Government departments and state and territory offices of the public advocate and public guardians, in providing supporters. Another possibility is the development of organisations specialised in providing advice and support, such as the Nidus Personal Planning Resource Centre in British Columbia, Canada.[55]

Functions and duties

Functions of a supporter

Recommendation 4–4 A supporter assists a person who requires support to make decisions and may:

(a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;

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

(c) assist the person to communicate the decisions; and

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

4.62 A supporter may perform a number of functions for a person who requires decision-making support. The ALRC recommends that relevant Commonwealth laws and legal frameworks should provide that supporters may exercise some or all of the functions outlined in Recommendation 4–4.

4.63 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 explanation of information is provided for under a number of existing and proposed models of supported decision-making.[56]

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54 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity': *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(3).

55 Offices of the Public Advocate (SA and Vic), *Submission 95*. Nidus is a non-profit, charitable organisation established by citizens and community groups involved in the development of the British Columbia *Representation Agreement Act*, to ensure the public had access to information and assistance with Representation Agreements: see Nidus, *History* <www.nidus.ca>.

56 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 43; *Adult Guardianship and Trusteeship Act 2008* (Alberta) div 1, s 4(2); *Decision Making, Support and Protection to Adults Act 2003* (Yukon) sch A, pt 1, s 5(1).

4.64 It is important that supporters are able to handle relevant personal information of the person they are supporting. Stakeholders highlighted the difficulties that family members and carers often face in attempting to obtain access to information. The operation of the *Privacy Act 1998* (Cth) and the recognition of supporters under that Act is discussed in Chapter 6.

4.65 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 function or duties. This communication-related role is currently provided for under a number of decision-making models.[57]

4.66 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. 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 under some current decision-making regimes overseas, including in the United Kingdom and Yukon, Canada.[58]

Supporter duties

Recommendation 4–5 Relevant Commonwealth laws and legal frameworks should provide that supporters of persons who require decision-making support must:

(a) support the person to make decisions;

(b) support the person to express their will and preferences in making decisions;

(c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person;

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

(e) support the person to consult, as they wish, with existing appointees, family members, carers and other significant people in their life in making decisions; and

57 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 43; *Adult Guardianship and Trusteeship Act 2008* (Alberta) div 1, s 4(2); *Decision Making, Support and Protection to Adults Act 2003* (Yukon) sch A, pt 1, s 5(1).

58 *Mental Capacity Act 2005* (UK) s 36(3); *Decision Making, Support and Protection to Adults Act 2003* (Yukon) sch A, pt 1, s 5(1).

(f) assist the person 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 formally appointed to make decisions for the person.

4.67 The duties of supporters should be set out in the legislation relevant to the area of Commonwealth law. In response to the Discussion Paper, stakeholders broadly supported this statement of duties.[59]

4.68 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 wider range of decisions than initially envisaged.

4.69 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. This duty is similar to the duty imposed on nominees under the NDIS Act to act in a manner that promotes personal and social wellbeing,[60] but adds elements relating to financial and cultural wellbeing.

4.70 Given the potential role of supporters in supporting people to make decisions which relate to finances, reference to financial wellbeing seems important. In addition, the importance of cultural wellbeing and sensitivity was highlighted by a number of stakeholders.[61] However, National Disability Services (NDS) noted that it is 'unclear exactly how cultural wellbeing will be promoted in relation to decision-making; this will require thoughtful evaluation as there are some risks of conflict between cultural considerations and individual rights'.[62] The OPA (SA and Vic) submitted that 'financial' and 'cultural' wellbeing need not be listed separately, as these aspects of wellbeing can be considered encompassed by the term 'personal and social wellbeing'.[63]

4.71 In addition, there should be 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

59 National Association of Community Legal Centres, *Submission 127*; ADACAS, *Submission 108*; Offices of the Public Advocate (SA and Vic), *Submission 95*; National Disability Services, *Submission 92*.

60 *National Disability Insurance Scheme Act 2013* (Cth) s 80(1).

61 See, eg, MDAA, *Submission 43*.

62 National Disability Services, *Submission 92*.

63 Offices of the Public Advocate (SA and Vic), *Submission 95*.

who may require decision-making support.[64] However, the duty should be to facilitate consultation only as desired by the person requiring decision-making support.[65]

4.72 In order to facilitate the appropriate interaction of supporters with existing state and territory appointed decision-makers, a supporter should also have a duty to facilitate consultation with existing appointees. The recommended definition of 'existing appointee' is similar to the one in the NDIS Act.[66] A duty to facilitate consultation with existing appointees may help address concerns about 'access to critical and relevant information' by state or territory appointed decision-makers.[67]

4.73 Finally, supporters should also have an obligation 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* (Cth) (the Nominee Rules).[68] The nature and content of the obligation will 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.

4.74 NDS observed that assisting the person to develop their own decision-making ability, while important, is potentially a complex task. This complexity, and the skills required to discharge this duty, must be considered 'when applying the model to different areas of law'. Moreover, it is also likely to have training and funding implications.[69] Dr Fleur Beaupert, Dr Piers Gooding and Linda Steele submitted that this duty should be expressed as being 'to assist the person requiring support to exercise his or her legal capacity with less support in the future if he or she so wishes'.[70]

4.75 Pave the Way considered the duty to be 'too onerous' and expressed the view that, according to the CRPD, the state (rather than the supporter or representative) is obliged to provide resources that aim to develop people's decision-making ability.[71]

4.76 ADACAS suggested that, for the purpose of examining supporters' duties and safeguards, it is necessary to distinguish carefully between the different categories of supporters—for example, support by family and friends, introduced volunteers, paid care workers, independent advocates and professional decision supporters.[72]

4.77 In a similar vein, NACLC stated that the ALRC should give further thought as to how 'professional supporters' (such as social workers or lawyers) might operate in

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64 See, eg, Carers Queensland Inc, *Submission 14*.

65 'If the person making decisions is unable to consult themselves even with support, and this is undertaken by the supporter, then the person should either be present or aware of the consultations': Offices of the Public Advocate (SA and Vic), *Submission 95*.

66 *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

67 Financial Services Council, *Submission 35*.

68 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.10. See also *Mental Capacity Act 2005* (UK) s 4(4).

69 National Disability Services, *Submission 92*.

70 F Beaupert, P Gooding and L Steele, *Submission 123*.

71 Pave the Way, *Submission 90*.

72 ADACAS, *Submission 108*.

practice, and in relation to the 'interaction of any duties owed by a supporter under the relevant piece of Commonwealth legislation and any other duties or obligations they owe (such as under professional conduct rules and regulations, or other relevant legislation) and the potential for conflict of interest'.[73] It also observed that some duties, such as the duty to develop the capacity of the person with disability, extend beyond the role played by a community legal centre lawyer.[74]

4.78 The ALRC considers that basic duties of the type recommended should be applicable to supporters of any kind. The exact nature and content of these duties is likely to require further articulation in specific areas of Commonwealth law, dependent on the context. It is implicit that supporters should only have to perform these duties to the extent reasonable in the circumstances and as desired by the person being supported.

4.79 While supporters should have a high level of responsibility, there may be concerns about the unintended consequences of statutory duties—and, in particular, people being deterred from acting as supporters.[75]

4.80 A notable issue is whether supporters should have any personal liability for decisions made by the person being supported. The VLRC commented that determining the extent to which supporters should be liable in such circumstances is 'challenging'.[76] 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'.[77] However, the VLRC concluded that the law should 'recognise that the support relationship is one of 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.[78]

4.81 In the Discussion Paper, the ALRC asked whether the relationship of supporter to the person who requires support should be regarded as a fiduciary one.[79] Stakeholders had mixed views on this issue.

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73 National Association of Community Legal Centres, *Submission 127*.

74 Ibid.

75 See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) [4.53]–[4.58].

76 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.128].

77 Ibid.

78 Ibid [8.128]–[8.130]. See Ibid recs 59–61.

79 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–3. Fiduciary obligations are a creation of the Chancery courts so that, within certain relationships, and in certain situations, 'equity enforces stringent duties of loyalty and propriety which go far beyond the obligations which people owe to each other at common law': Thomson Reuters, *The Laws of Australia* [15.2.10].

4.82 The Law Institute of Victoria (LIV) expressed concern that the 'imposition of fiduciary duties might discourage people from accepting the role of supporter, especially if the duty results in supporters needing to take out insurance'.[80] As this might frustrate the objective of encouraging recognition of supported decision-making, the LIV argued that a lesser duty should be imposed on supporters than applies to substitute decision-makers.[81]

4.83 Other stakeholders agreed that supporters should not be subject to fiduciary duties.[82] NDS, for example, argued that such duties are unnecessary—first, because the role of a supporter can be revoked by the person being supported; and secondly, because, where supporters are in paid positions, this provides scope to hold them to account through a contractual relationship (for example, a supporter could be held liable if they are paid to manage correspondence, and negligence in this task results in financial disadvantage for the client).[83]

4.84 In contrast, the OPA (SA and Vic) submitted that it was appropriate to impose fiduciary duties on supporters, and this would be 'unlikely to deter a well-intentioned, honest supporter':

> In considering this issue, there is a need to distinguish between lack of skill or diligence (negligence) and lack of honesty (breach of fiduciary duty). We suspect that supporters are more likely to be deterred by concerns about whether they are skilled enough or have enough time to perform the role, rather than concerns about such things as whether they might inadvertently benefit themselves or a related party.[84]

4.85 More generally, the ALRC acknowledges that the issue of the potential liability of supporters (and representatives) is a difficult one. There has been insufficient opportunity to fully canvass the issues involved and, therefore, it would be inappropriate to make any recommendation in this regard. It is also possible to argue that, given the many categories of supporters and representatives, and the widely varying contexts in which decision-making takes place, it may be best to leave

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80 Law Institute of Victoria, *Submission 129*.

81 Ibid.

82 ADACAS, *Submission 108*; National Disability Services, *Submission 92*; Pave the Way, *Submission 90*. Some stakeholders submitted that, in contrast, representatives should be subject to fiduciary duties, given their different role: ADACAS, *Submission 108*; Springvale Monash Legal Service, *Submission 104*.

83 National Disability Services, *Submission 92*.

84 Offices of the Public Advocate (SA and Vic), *Submission 95*. The OPA (SA and Vic) also noted that supporters may be voluntary or paid employees of an agency and subject to additional safeguards—for example, if engaged by an advocacy organisation they would be required to abide by the code of conduct or guidelines of that organisation and also be covered by its liability insurance. See also Justice Connect and Seniors Rights Victoria, *Submission 120*; I Watts, *Submission 114*.

consideration of this issue to those drafting Commonwealth laws in specific areas,[85] or to resolution by the courts.[86]

Safeguards

4.86 Article 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.[87]

4.87 There needs to be a number of safeguards and recognition of the purpose of each safeguard. 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'.[88]

4.88 The OPA (Vic) highlighted that supported decision-making opens up 'the possibility of conflict, undue influence, abuse and exploitation'.[89] 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.[90]

4.89 AGAC observed that supported decision-making schemes must 'value-add' to informal decision-making schemes by providing accountability structures and transparency. It stated that, 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'.[91] In this context, AGAC stated that, sometimes, a 'guardianship or

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85 For example, the *Social Security (Administration) Act 1999* (Cth) provides nominees with statutory protection against criminal liability for things done in good faith, and by the nominee in his or her capacity as nominee; and that a nominee does not commit a breach of statutory duty in doing any act where there are reasonable grounds for believing that it is in the best interests of the person being represented: *Social Security (Administration) Act 1999* (Cth) ss 123N, 123O.

86 The fiduciary concept is said to be a 'fluid one, taking a wide variety of relationship forms and giving rise to a wide variety of obligations'. Courts may be required to ascertain whether a particular relationship is fiduciary, identify the nature of the particular fiduciary relation, and define the precise obligations flowing from it: Thomson Reuters, *The Laws of Australia* [15.2.10].

87 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.120].

88 Caxton Legal Centre, *Submission 67*.

89 Office of the Public Advocate (Victoria), *Supported Decision-Making: Background and Discussion Paper* (2009) 25.

90 B Arnold and W Bonython, *Submission 38*.

91 AGAC, *Submission 51*.

administration order can be a tool to empower the person with the disability to exercise his or her own choice of support' where supporters have not been acting in their interest.[92]

4.90 While it is difficult to protect people who may require decision-making support from abuse and neglect in all instances, there are potential safeguards against exploitation by supporters under the Commonwealth decision-making model. The key safeguards include:

- the recommended duties of supporters;
- the ability of the person who requires decision-making support to revoke the appointment at any time;
- provision for the appointment of more than one supporter; and
- guidance and training for people who require decision-making support, their supporters and Commonwealth departments and agencies interacting with them.

4.91 In the Discussion Paper, the ALRC asked what safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model.[93] For example, in British Columbia, Canada, a monitor must be appointed to oversee the person providing support to safeguard against financial abuse, except in certain circumstances.[94] Suggestions made to the VLRC in its guardianship inquiry included: the registration of arrangements; police checks on appointments; and appointment of monitors.[95]

4.92 Stakeholders generally agreed with the importance of the key safeguards listed above, while noting the complexity of issues involved.[96] The OPA (SA and Vic) suggested that additional safeguards might involve a register of appointments and police checks being conducted in relation to appointments.

4.93 In view of the possibilities of undue influence, abuse and exploitation, safeguards appropriate to the scope of the appointment are essential.[97] The possible conflicts of interest in relation to paid supporters were identified as a particular concern:

> Some of the current projects in the area of supported decision making are using disability workers in the support role and this needs to be evaluated. It is conceivable that the role could expand to this wider group if conflict of interest considerations were managed as part of supporter selection and training.[98]

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92 AGAC, *Submission 91*.
93 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–4.
94 *Representation Agreement Act 1996* (British Columbia) ss 12(1), (2).
95 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012), [8.57].
96 Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*.
97 Offices of the Public Advocate (SA and Vic), *Submission 95*.
98 Ibid.

4.94 The NSW Council for Intellectual Disability (NSWCID) agreed that excessive regulation may 'unduly interfere with the relationship between the person and supporter'. However it stated that

> there needs to be some process for informing supporters of their responsibilities and to seek intervention by a tribunal if a supporter is not fulfilling their responsibilities to a person who lacks decision making capacity—this may entail an application to have a representative appointed as occurs now with applications for guardianship.[99]

4.95 The Victorian Deaf Society highlighted the importance of 'a paper trail that formalises and legalises the relationship' and proper oversight, for example, by a case manager.[100] Advocacy for Inclusion suggested that an 'independent body should be established to provide formal monitoring and safeguards for people with disabilities in supported and facilitated decision-making arrangements'.[101]

4.96 In relation to safeguards, it may be necessary to distinguish between support provided by family and friends and support provided by paid professionals. For example, as discussed in relation to the NDIS,[102] advocacy or other organisations providing professional support services may be subject to quality assurance and other accreditation standards that should not apply to 'natural' supporters, such as family or friends.

Representatives

Recommendation 4–6 Relevant Commonwealth legislation should include the concept of a representative and provide for representative arrangements to be established that reflect the National Decision-Making Principles.

4.97 In certain circumstances, a person may require someone else to make decisions for them. The ALRC recommends the introduction of representatives as a mechanism for this in areas of Commonwealth law.

4.98 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 appointment mechanism as 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 person's human rights relevant to the situation in making a decision where their will and preferences cannot be determined at all.

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99 NSW Council for Intellectual Disability, *Submission 131*.
100 Vicdeaf, *Submission 125*.
101 Advocacy for Inclusion, *Submission 126*.
102 See Ch 5.

4.99 As with supporters, the introduction of representatives would occur under specific Commonwealth legislation and needs to be tailored to suit the particular legislative context. As discussed below, a number of core elements should be included in any Commonwealth scheme for representatives.

Appointment

4.100 Representatives might be appointed under the Commonwealth decision-making model in a number of ways. The preferable form of appointment involves a person appointing their own representative.[103] 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.[104]

4.101 A representative should not generally be appointed without a request from the person, except where the person needs a representative but is unable to request appointment themselves, even with support. However, other appointment mechanisms need to be considered to account for circumstances where a person may not be in a position to appoint their own representative, but requires a decision-maker in an area of Commonwealth law and may or may not have a decision-maker appointed for them under state or territory legislation with relevant duties or powers. In such circumstances, the initiative might come from a carer or other person who offers to be the representative.[105]

4.102 The ALRC considered what mechanisms there should be at a Commonwealth level to appoint a representative for a person who requires decision-making support.[106] There are different options for appointment through a Commonwealth mechanism, or in a specific area of Commonwealth law.

4.103 First, jurisdiction might be conferred on a Commonwealth court or tribunal (or other body) to appoint representatives. Appointment might operate in a similar way to the appointment of state and territory guardians and administrators. That is, the Australian Government could develop 'a single scheme for assessment of the need for a representative in these [Commonwealth] decision making areas, with a system for impartial appointment and review'.[107] ADACAS suggested that 'the appointment of representatives should be made by an independent body' at a Commonwealth level, mirroring the functions of state and territory tribunals.[108]

4.104 The ALRC has not pursued the idea of a new court or tribunal jurisdiction or Commonwealth body with responsibility for appointing representatives across different areas of Commonwealth law. The areas in which Commonwealth legislation needs to

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103 See, eg, ADACAS, *Submission 108*; Springvale Monash Legal Service, *Submission 104*.
104 Eg, in the appointment of enduring powers of attorney.
105 See, eg, *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.15.
106 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 4–5.
107 AGAC, *Submission 51*.
108 ADACAS, *Submission 108*. See also NSW Council for Intellectual Disability, *Submission 131*.

provide separately for the appointment of representatives are few, and there is no need to create what might be seen as a parallel or duplicate guardianship system.[109]

4.105 Another option is 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.[110]

4.106 Many stakeholders expressed concerns about the appointment of representatives by the heads of Commonwealth agencies, such as NDIA and Centrelink.[111] The Springvale Monash Legal Service, for example, stated that, given 'the imposition on the individual liberty of the represented person, the appointment of a substituted-decision maker should ideally be made by a tribunal or a court'.[112] ADACAS submitted that agencies should not have power to appoint representatives because 'there is a clear conflict of interest' as 'it can be expected that diligent representatives will find themselves in conflict with Commonwealth agencies at some point'.[113]

4.107 Others were prepared to countenance the possibility, provided it was appropriately framed. The OPA (SA and Vic) stated that, in limited circumstances and subject to qualifications,[114] representatives 'appointed by CEOs/Departmental Secretaries under Commonwealth laws could play decision-making roles on behalf of individuals who do not have the capacity to make particular decisions'.[115]

4.108 Finally, Commonwealth laws could provide mechanisms under which state and territory appointees would be recognised as representatives for the purposes of Commonwealth legislative schemes. That is, there would be a 'more fully developed symbiosis with State and Territory substitute decision making schemes'.[116] NDS considered that the 'least bureaucratic mechanism' for appointing representatives would be through these existing courts or tribunals, rather than the 'specific Commonwealth agency responsible for each affected area of law':

> This allows a common approach, and indeed a common representative across different areas of life and perhaps across jurisdictions. This approach also allows the chosen mechanism to build expertise and infrastructure for making good determinations, instead of spreading across several small subunits within larger agencies. This external mechanism could potentially monitor both representative and supporter arrangements.[117]

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109 Unless perhaps there were to be a national law dealing with supported decision-making, replacing existing state and territory guardianship and administration law.

110 *National Disability Insurance Scheme Act 2013* (Cth); *Social Security (Administration) Act 1999* (Cth). See Chs 5–6.

111 See, eg, National Association of Community Legal Centres, *Submission 127*; ADACAS, *Submission 108*; Mental Health Coordinating Council, *Submission 94*; Children with Disability Australia, *Submission 68*; Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*.

112 Springvale Monash Legal Service, *Submission 104*.

113 ADACAS, *Submission 108*.

114 In relation to decision-making under the NDIS: see Ch 5.

115 Offices of the Public Advocate (SA and Vic), *Submission 95*.

116 AGAC, *Submission 51*.

117 National Disability Services, *Submission 92*.

4.109 NDS strongly supported encouraging the appointment of existing representatives, such as state-appointed guardians for Commonwealth duties, where appropriate, although this should not be automatic.[118] ADACAS also accepted that there may be a case for the Commonwealth recognising state and territory appointments.[119] The OPA (SA and Vic) stated, if representatives were to be appointed under Commonwealth laws (as proposed by the ALRC), existing state and territory tribunal appointments should be recognised 'where certain thresholds are met'. In addition,

> There needs to be clarity around who can appoint, and who can be appointed as, representatives (taking note, for example, of earlier personal and tribunal appointments at state and territory level), and there would be a place for the articulation in federal legislation of general principles governing when tribunal appointments would be required.[120]

4.110 The Safeguards Guidelines provide that the appointment of a representative decision-maker should be a last resort and not a substitute for appropriate support and that any appointment should be limited in scope, be proportionate, and apply for the minimum time. Further, decisions and interventions (which would include any appointment of a representative) must be the least restrictive of the person's human rights; subject to appeal; and subject to regular, independent and impartial monitoring and review.[121]

4.111 Under the Commonwealth decision-making model, any appointment mechanism for representatives should comply with these requirements. For the purposes of describing the model, the ALRC does not intend to be any more prescriptive than this, because the best appointment mechanism will depend on the exact role of the representative within the particular area of Commonwealth legislative responsibility.

4.112 Appointment mechanisms need to be 'proportionate'. For example, the NSWCID has suggested that there should be

> a straightforward process for a close family member to become representative of a person for processes like Centrelink and eHeath records … On the other hand, there will be situations where the enormity or contentiousness of the situation or the alleged inappropriateness of a proposed representative means that the issue of whether there should be a representative and who that should be needs to be determined by a tribunal analogously to guardianship proceedings in the current state and territory tribunals.[122]

4.113 In some cases, including in relation to the NDIS, there should be a confined power for the agency head to appoint a representative. In doing so, the agency head should consider whether an existing state or territory appointed decision-maker (or

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118 Ibid.
119 ADACAS, *Submission 108*.
120 Offices of the Public Advocate (SA and Vic), *Submission 95*.
121 See Ch 3.
122 NSW Council for Intellectual Disability, *Submission 131*.

existing Commonwealth supporter or representative) should be appointed.[123] The appointment mechanism for representatives under the NDIS is discussed in more detail in Chapter 5.

Functions and duties

Functions of a representative

Recommendation 4–7 A representative assists a person who requires support to make decisions or, where necessary, makes decisions on their behalf and may:

(a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;

(b) provide advice to the person about the decisions that might be made;

(c) communicate the decisions; and

(d) endeavour to ensure the decisions made are given effect.

4.114 The ALRC recommends that a representative perform the same basic functions as a supporter, with minor changes to reflect the fact that—while having a duty to support the person to make their own decisions where possible—the representative may make decisions on the person's behalf, reflecting the person's will and preferences.

Representative duties

Recommendation 4–8 Relevant Commonwealth laws and legal frameworks should provide that representatives of persons who require decision-making support must:

(a) support the person to make decisions or make decisions on their behalf reflecting their will and preferences;

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

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

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

123 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).

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

(f) consult with existing appointees, family members, carers and other significant people in their life in making decisions; and

(g) assist the person to develop their own decision-making ability.

For the purposes of paragraph (f), '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 formally appointed to make decisions for the person.

4.115 A representative should have the same basic duties as a supporter, and additional duties reflecting the fact that a representative may make decisions on the person's behalf, reflecting the person's will, preferences and rights.

4.116 The core duties the ALRC considers are appropriate for representatives include the duty to support the person who requires decision-making support to express their will and preferences. As discussed in Chapter 3, this standard is preferred to an objective 'best interests' test, which currently applies to nominees under existing Commonwealth legislation and to state and territory appointed decision-makers.[124]

4.117 This shift away from the best interests test received significant support from a wide range of stakeholders.[125] In circumstances where a representative needs to determine the will and preferences of the person, because the person is unable to communicate them, 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 person's 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 decisions on behalf of a person based on a subjective assessment of their best interest'.[126]

4.118 What steps are reasonable to discharge the duties of a representative? It would have to be considered in the particular decision-making context. For example, it would be unreasonable to expect a representative to fulfil the duty to assist the person to develop their own decision-making ability in circumstances where a person does not have, and is unlikely ever to develop, the ability to make decisions.

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124 See, eg, *Social Security (Administration) Act 1999* (Cth) s 123O.
125 See, eg, PWDA, ACDL and AHR Centre, *Submission 66*; Qld Law Society, *Submission 53*.
126 PWDA, ACDL and AHR Centre, *Submission 66*.

4.119 The statement of representatives' roles and duties set out in the Discussion Paper[127] and, in particular, the focus on assisting people to express their will and preferences was broadly supported by stakeholders.[128]

4.120 Beaupert, Gooding and Steele submitted that the functions of a representative should refer to 'making representative decisions on a person's behalf, only in situations where the person's will and preferences and what they would likely want cannot be determined'.[129]

Safeguards

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

4.121 Consistent with National Decision-Making Principle 4 and art 12(4) of the CRPD, the ALRC recommends that the appointment and conduct of representatives be subject to appropriate and effective safeguards.

4.122 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.[130]

4.123 Stakeholders emphasised the importance of safeguards and made a range of suggestions in this regard.[131] Justice Connect suggested a range of recordkeeping and audit requirements that should be imposed on representatives. In addition:

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127 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposals 4–7, 4–8.

128 Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*; National Disability Services, *Submission 92*.

129 F Beaupert, P Gooding and L Steele, *Submission 123*.

130 *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).

131 See, eg, Vicdeaf, *Submission 125*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Offices of the Public Advocate (SA and Vic), *Submission 95*.

> It may be appropriate to establish an independent regulatory body or Commonwealth agency (or confer state based tribunals with the power) to monitor and undertake investigations. It may also be appropriate for that body to receive declarations and carry out random audits.[132]

4.124 Other stakeholders also referred to the desirability of an independent body to provide formal monitoring and safeguards for representative decision-making.[133]

4.125 Review and appeal mechanisms were another area of concern. NACLC observed that the complexity of existing mechanisms 'significantly affects the ability of some people with disability to seek review of government and substitute decision-maker decisions'.[134] More generally, some concern was expressed about the absence of a 'definite proposal for appointment, reviews, monitoring and safeguards' under the Commonwealth decision-making model.[135]

4.126 Clearly, there need to be safeguards with respect to representatives—both to protect people who require decision-making support from abuse, neglect or exploitation and to protect the appointed representative. However, the ALRC does not intend to be prescriptive about the nature or operation of the safeguards which should apply. As with appointment mechanisms, the appropriate safeguards are dependent on the decision-making context.

4.127 Article 12(4) of the CRPD represents the key safeguard elements of any Commonwealth representative scheme. In the light of art 12(4), it may be necessary for the Australian Government to consider the following elements in implementing the 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;[136]
- reporting obligations on representatives with respect to decisions, for example by provision of a report, inventory or accounts;[137]
- the powers of any Commonwealth body conferred with jurisdiction to appoint a representative should include the power to respond to instances of abuse, neglect or exploitation;

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132 Justice Connect and Seniors Rights Victoria, *Submission 120*.
133 Advocacy for Inclusion, *Submission 126*; Vicdeaf, *Submission 125*.
134 National Association of Community Legal Centres, *Submission 127*.
135 Office of the Public Advocate (Qld), *Submission 110*.
136 Note, however the VLRC did not favour this form of compliance requirement: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.105].
137 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.

- the role of Commonwealth departments and agencies in monitoring, auditing and investigating the conduct of representatives;[138] and
- the broader applicability of safeguards envisaged under a NDIS quality assurance and safeguards framework.

Interaction with other appointed decision-makers

4.128 One of the major difficulties in applying the Commonwealth decision-making model is determining the appropriate interaction of supporters and representatives with other supporters and representatives, as well as state and territory appointed decision-makers, such as guardians and administrators. The NSW Government observed that important issues in relation to this interaction include:

> Whether state-based appointees should automatically be appointed under the Commonwealth scheme.
>
> If different persons are appointed, whether a Commonwealth appointee's authority would override the authority of a state-based appointee where the scope of their appointments may intersect (for example, would a decision by a representative under the NDIS affecting a person's accommodation override a decision by a state-based guardian in relation to accommodation?).
>
> The mechanism for resolution of disputes between Commonwealth appointees and state-based appointees. It is important to recognise that state-based appointments include both Tribunal/Court appointed and principal-appointed arrangements, such as enduring guardianship.
>
> The institution of double-duties upon appointees under both Schemes and whether this might make people reluctant to be appointed.
>
> The recognition of Commonwealth appointees in State-based legislation and vice versa.[139]

4.129 Stakeholders raised a wide range of interaction issues and possible scenarios.[140] In some cases, support for the Commonwealth decision-making model was qualified by concerns about whether it would be able to interact successfully with state and territory appointments of substitute decision-makers, such as guardians and administrators.[141]

4.130 One starting point was that, ideally, where appointments are made under both Commonwealth and state or territory legislation, the same person should be appointed—to avoid multiple representatives, duplication of roles and duties, and

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138 See, however, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.106]–[18.107].

139 NSW Government, *Submission 135*.

140 See, eg, National Association of Community Legal Centres, *Submission 127*; Vicdeaf, *Submission 125*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Office of the Public Advocate (Qld), *Submission 110*; ADACAS, *Submission 108*; Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*.

141 Offices of the Public Advocate (SA and Vic), *Submission 95*.

problems where different representatives for the same person disagree about how to support decision-making. That is,

> 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.[142]

4.131 Where different Commonwealth and state and territory representatives are appointed, this may 'create conflict and ambiguity for the person and the support agency about who should provide support, obtain personal information and make decisions in a given situation'.[143] Justice Connect stated that this situation

> has the potential to create inconsistency between roles and responsibilities of supporters or representatives appointed under Commonwealth laws, and those appointed under existing state and territory legislation. In turn, this may further confuse the vulnerable or cognitively impaired people who require assistance making decisions and their supporters and representatives who already deal with complicated State and Territory laws.[144]

4.132 It was said to be 'highly desirable' that the same person be appointed.[145] The appointment of an existing state or territory appointed decision-maker should be 'permitted and encouraged'.[146]

4.133 To some extent, this is already the case under some existing Commonwealth schemes. For example, the Nominee Rules provide that the CEO is to have regard to a 'presumption' that a court-appointed decision maker or a participant-appointed decision-maker should be appointed as an NDIS nominee.[147] However, there may be circumstances where it is not appropriate for a state or territory appointed decision-maker to be a representative for Commonwealth purposes.

Existing state or territory appointment

4.134 The following section explains how the ALRC envisages Commonwealth decision-making schemes would interact with those at the state and territory level. This issue is closely related to the chosen mechanism for appointing representatives; and highlights the need for parallel reform of state and territory guardianship and administration laws to integrate with the Commonwealth decision-making model. Chapter 5 examines in more detail how the model might interact with state and territory systems, in the particular context of the NDIS.

4.135 Under supporter and representative schemes, a Commonwealth agency would be responsible for recognising that a person is a representative for the purposes of the particular scheme being administered, whether or not the agency actually appoints the person. The agency would have to be satisfied that the person actually needs a

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142 Office of the Public Advocate (Qld), *Submission 05*.
143 Office of the Public Advocate (Qld), *Submission 110*.
144 Justice Connect and Seniors Rights Victoria, *Submission 120*.
145 ADACAS, *Submission 108*.
146 Justice Connect and Seniors Rights Victoria, *Submission 120*.
147 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(a). See Ch 5.

representative—that is, a representative decision-maker is being appointed, or recognised as a last resort and not as a substitute for appropriate support.[148]

4.136 Some assessment of the person's support needs must take place before a representative is appointed for them. If there is an existing state or territory appointed guardian or administrator, there would be more reason to suggest the person also needs a representative for the purposes of the Commonwealth scheme, particularly where the appointment has been made in accordance with criteria consistent with the National Decision-Making Principles.

4.137 Even so, the appointment of that person as a representative should not be automatic. While there may be a presumption of appointment or recognition, the agency's decision may depend on the nature and scope of the state or territory appointment. Where the existing appointee has been appointed by the person themselves, for example under a power of attorney, the presumption may be seen as stronger—because it reflects the person's will and preferences. Against that, however, a tribunal appointment provides procedural standards and safeguards.

4.138 In some contexts, the agency may still decide that the appointee under state or territory law is not suitable for appointment, and appoint another person as the representative.

4.139 In the ALRC's view, the Commonwealth representative's authority would override the authority of a state or territory appointee where the scope of their appointments overlap. That is, where a matter concerns a decision being made for the purposes of the Commonwealth legislation, the Commonwealth representative is responsible.[149]

4.140 AGAC raised an example of possible interaction issues. It expressed concern about the possibility of Centrelink appointing a representative who is different from an existing state-appointed administrator or financial manager with responsibility for managing all other aspects of a person's financial affairs for a person whose primary income is a Centrelink benefit.[150] In the ALRC's view, this situation can be expected to arise only rarely because the administrator or financial manager would generally be appointed as the Centrelink representative, if one is needed.[151] Even where this does not occur, the problems caused may not be insuperable, given consultation and cooperation. In any case, if the administrator is effectively unable to perform any residual role, there may be no continuing need for the state or territory appointment.

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148 Consistently with the Safeguards Guidelines. While attention is being given here to the interaction of representatives, the whole thrust of the Commonwealth decision-making model is to encourage supported decision-making and to minimise the need to appoint representatives in the first place.

149 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.

150 AGAC, *Submission 91*.

151 Except perhaps where Centrelink is not aware of the existing appointment. See 'Information sharing' below.

No existing appointment

4.141 Where there is no existing appointment, and no other potential representative exists, such as a family member or other supporter, agencies may need to explore other options.

4.142 In some circumstances, these options may include applying to a state or territory guardianship board or tribunal for the appointment of a person with powers and responsibilities comparable to those of a representative under the relevant Commonwealth scheme. This possibility, which raises a range of interaction and other issues, is discussed in more detail in the context of the NDIS in Chapter 5.

4.143 Under some state or territory regimes, it may already be possible for a Commonwealth agency, or some other person, to apply for the appointment of a state or territory guardian or administrator to ensure that a person is available to make decisions.

4.144 This has already occurred in NSW, for example, where the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) has appointed the Public Guardian, in part, to ensure that there is someone to perform the duties of a nominee for a participant in the NDIS.[152] The NCAT stated that the appointment of a guardian 'solely for this purpose', where there is a friend or relative who could be considered as a nominee by the National Disability Insurance Agency, would not be consistent with the principles of the NSW legislation.[153]

4.145 If Commonwealth agencies were to have regular recourse to state and territory guardianship and administration systems to find people suitable for appointment as representatives, this would have resource and funding implications for state and territory governments.

Implications for state and territory laws

4.146 The interaction between Commonwealth and state and territory systems may be difficult in practice if states and territories retain 'existing decision-making systems, particularly given the substitute decision-making nature of many such systems'.[154] The OPA (Qld) observed that proposals to address possible conflict between systems would require 'extensive cooperation and communication between state-based guardianship tribunals and public guardians, and individual Commonwealth agencies who may have appointed representative decision makers'.[155]

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152 See *KCG* [2014] NSWCATGD 7.

153 See Ibid [70]. Referring to *Guardianship Act 1987* (NSW) ss 4, 14(2). Most importantly, s 14(2) requires NCAT, in considering whether to make a guardianship order to have regard, among other things, to the importance of preserving the person's existing family relationships and the practicability of services being provided to the person without the need for the making of such an order.

154 National Association of Community Legal Centres, *Submission 127*. The NSWCID stated that a 'national approach is highly desirable that involves a high degree of consistency and symbiosis between State/Territory and Commonwealth approaches': NSW Council for Intellectual Disability, *Submission 131*.

155 Office of the Public Advocate (Qld), *Submission 110*.

4.147 In fact, a number of issues arise that may require legislative change to resolve, if state or territory guardians and administrators are to perform roles under Commonwealth schemes.

4.148 The first concerns duties and obligations. A person appointed by a state or territory body, such as NCAT, would have duties under state or territory legislation,[156] as well as under the Commonwealth law. While these duties may sometimes be interpreted as consistent, there may be times when they conflict.

4.149 Most obviously, under state legislation, a guardian may have a duty to make decisions in the best interests of the person represented, while having a duty under Commonwealth legislation to ensure that the person's own will and preferences direct the decision. While it seems clear that, when making decisions for the purposes of Commonwealth legislation, Commonwealth legislative duties would apply, the person may then be in breach of duties owed as a guardian under state or territory legislation making it difficult, if not impossible, for them to continue to act in the latter role.[157]

4.150 Legislative change may also be required to allow state or territory appointees to be appointed under orders that better align with duties and responsibilities under Commonwealth legislation—for example, so that they can make both lifestyle and financial decisions under the NDIS.

Information sharing

Recommendation 4–10 The Australian and state and territory governments should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments and to facilitate review and monitoring.

4.151 Information sharing will be important in ensuring the effective operation of the Commonwealth decision-making model and its interaction with state and territory systems. Information about appointments needs to be shared between Commonwealth departments and agencies, and between the Commonwealth and state or territory bodies.

4.152 The ALRC recommends that the Australian and state and territory governments develop methods of information sharing. Information sharing could take a number of forms and serve different functions, including avoiding unnecessary duplication of appointments and facilitating review and monitoring of existing appointments.

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156 For example, under the *Guardianship Act 1987* (NSW) a guardian has a duty to ensure that the 'freedom of decision and freedom of action' of the person represented is 'restricted as little as possible'; and that the person is 'encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs': *Guardianship Act 1987* (NSW) s 4.

157 See, however, *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.7. This is discussed in Ch 5.

4.153 At the more formal end of the spectrum, information sharing could take the form envisaged by VLRC, which recommended that supported decision-making arrangements and orders be registered online and not come into force until registration.[158] This type of register 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.

4.154 Less formally, Commonwealth departments and agencies could develop or revise existing memoranda of understanding with state and territory bodies with respect to information sharing. Informal information sharing arrangements are already in place between some Commonwealth agencies and public trustees and guardians in some jurisdictions. For example, the NSW Trustee and Guardian has entered a number of arrangements under memoranda of understanding with Commonwealth agencies to 'share data in order to ensure that the needs of persons are protected and to minimise the duplication of effect'.[159]

4.155 AGAC highlighted that Commonwealth appointments may sometimes need to be reviewed because a representative's appointment at state or territory level has been varied or revoked.[160] This may be another reason to develop information sharing about appointments.

4.156 Stakeholders were positive about the idea of new registers of decision-makers and other information sharing mechanisms.[161] The Queensland Law Society, for example, submitted that strategies should include a register of decision-makers under state laws, including enduring powers of attorney and advance healthcare directives.[162]

4.157 The LIV has previously supported information sharing through a national register for powers of attorney, with the aim of reducing the extent of abuse of these instruments and increasing certainty for third parties about whether an enduring power is current and valid. Consistently, the LIV supported the development of mechanisms for sharing information about supporter and representative appointments and suggested that the Australian Government consider 'which agency would be responsible for administering and maintaining the register, funding arrangements, the use and accessibility of the register, and privacy issues of such a register'.[163]

158 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.123], [8.124].
159 AGAC, *Submission 91*.
160 Ibid.
161 Law Institute of Victoria, *Submission 129*; Justice Connect and Seniors Rights Victoria, *Submission 120*; Office of the Public Advocate (Qld), *Submission 110*; Qld Law Society, *Submission 103*; Offices of the Public Advocate (SA and Vic), *Submission 95*.
162 Qld Law Society, *Submission 103*.
163 Law Institute of Victoria, *Submission 129*.

Guidance and training

Recommendation 4–11 The Australian Government should ensure that persons who require decision-making support, and their supporters and representatives, are provided with information and guidance to enable them to understand their functions and duties.

Recommendation 4–12 The Australian Government should ensure that employees and contractors of Commonwealth agencies who engage with supporters and representatives are provided with information, guidance and training in relation to the roles of supporters and representatives.

4.158 Consistent information and advice, and targeted guidance and training for all parties involved in the Commonwealth decision-making model is of vital importance in ensuring its effective operation.

4.159 Guidance and training also contributes to the fulfilment of Australia's obligations under art 4 of the CRPD to promote training in the rights recognised in the CRPD so as to better provide the assistance and services guaranteed by those rights.[164] It may also respond to recommendations made by the UNCRPD that Australia

> 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.[165]

4.160 It will be important to develop and deliver accessible and culturally appropriate information, guidance and training for:

- people who require decision-making support;[166]
- supporters and representatives;[167] and
- the employees and contractors of Commonwealth agencies which operate under the recommended model.

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164 *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.

165 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its 10th Session (2–13 September 2013)' (United Nations, 4 October 2013) 26.

166 Office of the Public Advocate (SA), *Submission 17*; Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011.

167 Carers NSW, *Submission 23*; Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011.

4.161 This approach was strongly encouraged by stakeholders.[168] For example, NDS observed that

> To effectively implement both the supporter and representative role and more broadly the national decision-making principles, there is a need for an awareness-raising and learning and development strategy. Specific guidance and training needs to be available for the decision-maker, supporters, representatives and Commonwealth agencies interacting with the decision-maker.[169]

4.162 One obvious concern was for guidance and training that focuses on the concept of supported decision-making itself.[170] The point at which supported decision-making moves to representative decision-making needs to be closely monitored by supporters, and by the Commonwealth agencies responsible for implementing the scheme.[171]

> [A] key element in educating supporters is that they have a support role only: the supporter is 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.[172]

4.163 Another concern was training in developing people's decision-making ability. Stakeholders 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'.[173] NSWCID 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.[174]

4.164 Scope submitted that resources and supports are required to build decision-making ability and that

> An evidence base is growing that supports the notion that all people, regardless of their level of cognitive impairment, can have their preferences heard through highly collaborative, detailed and lengthy supported decision making processes. These processes are reliant on strong circles of support that work collaboratively to support people to participate in decisions that reflect their preferences.[175]

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168 National Association of Community Legal Centres, *Submission 127*; Qld Law Society, *Submission 103*; Mental Health Coordinating Council, *Submission 94*; National Disability Services, *Submission 92*; AGAC, *Submission 91*; Scope, *Submission 88*.

169 National Disability Services, *Submission 92*.

170 See, eg, Carers NSW, *Submission 23*; Office of the Public Advocate (SA), *Submission 17*.

171 AGAC, *Submission 91*.

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

173 Disability Services Commissioner Victoria, Submission No 61 to the Victorian Law Reform Commission, *Guardianship Inquiry*, May 2011, 6.

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

175 Scope, *Submission 88*. References omitted.

4.165 More broadly, stakeholders highlighted that the development and integration of supported decision-making will require significant cultural and attitudinal change within the community.[176] NACLC, for example, suggested that, in addition to education and training for those engaged directly in the decision-making, a national community awareness and education campaign should be recommended.[177]

176 See, eg, National Association of Community Legal Centres, *Submission 127*; Scope, *Submission 88*.
177 National Association of Community Legal Centres, *Submission 127*.

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.

5.2 The ALRC recommends that the Commonwealth decision-making model be applied to the NDIS, which already incorporates elements of supported decision-making. This will require some amendment of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) and Rules to provide for legal recognition of 'supporters' and 'representatives', including provisions for their appointment, removal and associated safeguards.

5.3 The ALRC also recommends that the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) should retain the power to appoint a 'representative' for a participant as a measure of last resort. There are circumstances

where the exercise of this power is necessary—in the absence of a Commonwealth guardianship tribunal or equivalent body—to ensure that people with a disability are properly supported in relation to the NDIS.

5.4 There should be a presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative. Amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.

5.5 In the light of the shift towards a supported decision-making model, the ALRC also recommends that the Australian Government provide guidance and training in relation to decision-making and the NDIS.

The NDIS

5.6 The introduction of the NDIS followed a long-standing 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 persons with disability. The establishment of the NDIS represents a new area of Commonwealth responsibility and '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]

5.7 The NDIS was designed to empower people with disability and facilitate their choice and control.[2] With respect to decision-making, while the NDIS Act contains some provisions which facilitate supported decision-making, it ultimately retains a mechanism for substitute decision-making through the use of 'nominees'.[3]

5.8 While not all persons with disability are eligible for the NDIS, it represents the primary area of Commonwealth law in which the Commonwealth decision-making model should apply.

5.9 The NDIS is still in its early stages with roll-out at several trial sites. The ongoing roll-out of the NDIS and the scheduled reviews, outlined below, provide timely opportunities for implementing and evaluating a supported decision-making model.

Background

5.10 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

1 Office of the Public Advocate (Qld), *Submission 05*.
2 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 3(1).
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, Vol 1, 5.

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.

5.11 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 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]

5.12 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 NDIA.

5.13 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. In July 2014, the NDIS commenced further trial sites in the Australian Capital Territory, the Barkly region of the Northern Territory, and in the Perth Hills area of Western Australia.[12] 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

5.14 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]

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6 Select Council on Disability Reform, *Meeting Communiqué* (October 2011).
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 See, eg, National Disability Insurance Scheme, *NDIS Opens for Business in the ACT* <www.ndis.gov.au>.
13 See, eg, National Disability Insurance Scheme, *Roll out of the NDIS* <www.ndis.gov.au>.
14 J Whalan AO, P Acton and J Harmer AO, 'A Review of the Capabilities of the National Disability Insurance Agency' (January 2014).

- a COAG report on cost drivers of the NDIS;[15]
- consideration of the NDIS in the course of the National Commission of Audit;[16]
- 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]
- a review of the Intergovernmental Agreement by the Ministerial Council;[19] and
- a KPMG interim report for the Board of the NDIA on the optimal approach to transition to the full NDIS.[20]

5.15 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.[21]

5.16 As many of these reviews and evaluations will be conducted following the conclusion of the ALRC's Inquiry, the recommendations in this Report may inform their work.

Decision-making under the NDIS

5.17 Current decision-making arrangements under the NDIS Act incorporate elements of both supported and substitute decision-making, as well as informal and formal decision-making. The three key decision-making mechanisms include: autonomous decision-making by participants; informal supported decision-making; and substitute decision-making by nominees.

5.18 A person can make an access request to be a participant under the NDIS.[22] If the person meets the access criteria, the person becomes a participant on the day the CEO of the NDIA decides that they meet the access criteria.[23]

5.19 The main object 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'.[24] The Act provides that 'the supportive relationships, friendships and connections with others of people with disability should be recognised'.[25]

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15 Requested by COAG Disability Reform Council: COAG Disability Reform Council, *Meeting Communiqué*, 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).

17 NDIS Evaluation, *Evaluation of the Trial of NDIS* <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 'Review of the Optimal Approach to Transition to the Full NDIS' (Interim Report, KPMG).

21 Parliamentary Joint Standing Committee on the National Disability Insurance Scheme, *Homepage* <www.aph.gov.au>.

22 *National Disability Insurance Scheme Act 2013* (Cth) s 18.

23 Ibid ss 28, 22–27 (access criteria).

24 Ibid s 3(1)(e).

25 Ibid s 5(e).

5.20 If a person is a participant, the CEO must facilitate the preparation of a plan with them. A plan will cover, among others matters, general support to be provided to the participant, as well as any 'reasonable and necessary' supports that will be funded under the NDIS.[26]

Nominees

5.21 The NDIS Act provides for a nominee scheme which is modelled largely on the existing substitute decision-making scheme under social security law. These provisions may limit the scope for autonomous decision-making by participants.

5.22 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.[27] 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,[28] but in practice is confined to making requests to the NDIA or receiving notices from the NDIA on behalf of the participant.

Appointment

5.23 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.[29] The same person can be appointed as both a plan and correspondence nominee.[30]

5.24 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.[31] 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.[32]

5.25 The Nominee Rules also acknowledge that appointment of a nominee on the initiative of the CEO of the NDIA is to be a measure of last resort:

> 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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26 Ibid ss 32 (CEO must facilitate a plan), 33 (matters that must be included in a plan).
27 Ibid s 78.
28 Ibid s 79. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.9, 3.10.
29 *National Disability Insurance Scheme Act 2013* (Cth) ss 86, 87. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11—3.15.
30 *National Disability Insurance Scheme Act 2013* (Cth) s 88(1).
31 A number of other rules are also relevant, including for example, *National Disability Insurance Scheme (Children) Rules 2013* (Cth).
32 *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.[33]

5.26 In appointing a nominee, the CEO must take into consideration 'the wishes (if any) of the participant regarding the making of the appointment'[34] and have regard to a number of other matters.[35] In determining whether to appoint a particular nominee, there are also a range of matters the CEO must take into account.[36] Appointment of a nominee may be indefinite or for a particular period of time.[37]

5.27 Where requested by the participant, the CEO must cancel the appointment of a nominee who was appointed at a participant's request.[38] 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.[39]

Duties

5.28 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'.[40] 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.[41]

5.29 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'.[42] 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.[43]

5.30 The ALRC understands that, in some trial sites, there have been very few appointments of plan nominees.[44] For example, to date, no nominee appointments have been made in the NDIS trial site in NSW. As discussed below, use of the CEO's power

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33 Ibid rr 3.1, 3.4.
34 *National Disability Insurance Scheme Act 2013* (Cth) s 88(2)(b).
35 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.14. See also *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).
36 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.5–4.8.
37 Ibid rr 4.9–4.11.
38 *National Disability Insurance Scheme Act 2013* (Cth) s 89. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 6.
39 *National Disability Insurance Scheme Act 2013* (Cth) s 90. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 6.
40 *National Disability Insurance Scheme Act 2013* (Cth) s 80. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3, 5.4.
41 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.8–5.14.
42 Ibid r 5.5.
43 Ibid r 5.6.
44 See discussion of informal supporters in Ch 4.

to appoint a nominee may manage situations where persons with disability have no natural support networks or no-one they know who can be appointed.

Reform of decision-making under the NDIS

5.31 The NDIS Act provides for supported decision-making in a manner largely consistent with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles. However, some amendments will be necessary to bring the NDIS in line with the ALRC's Commonwealth decision-making model.

5.32 First, the ALRC recommends amendment of the objects and principles provisions of the NDIS Act.

5.33 Secondly, the existing NDIS nominee scheme should be replaced with a scheme for 'supporters' and 'representatives', as described in Chapter 4. In particular, the NDIS Act, Rules and Operational Guidelines should be amended to provide a mechanism for the recognition of supporters appointed by participants and representatives. In effect, the reforms would result in the current 'correspondence nominee' role being subsumed by the supporter role and plan nominees being replaced by representatives.

5.34 Stakeholders highlighted the importance of ensuring that the NDIS should continue as a benchmark model for supported decision-making. For example, the Queenslanders with Disability Network (QDN) noted that

> The NDIS can play a leading role in demonstrating to people with disability and their families, how supported decision-making can lead to better outcomes. This will create an expectation that will drive demand for reform in other jurisdictions to adopt a uniform supported decision-making framework.[45]

5.35 The NDIA expressed support for the objectives of the ALRC's proposals with regard to applying the National Decision-Making Principles and Commonwealth decision-making model, which it considered are consistent with both the objectives of the NDIS Act and the NDIA's strategic plan.[46]

5.36 More generally, stakeholders strongly endorsed the need for supported decision-making in the NDIS to enable participants 'to obtain support to make and implement their own decisions'.[47] This is likely to be of particular significance for many 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,

45 Queenslanders with Disability Network, *Submission 119*.

46 National Disability Insurance Agency, *Submission 118*.

47 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*.

where local family and neighbourhood networks can be particularly strong and supportive'.[48]

5.37 The application of the Commonwealth decision-making model may go some way to helping avoid the appointment of guardians and other substitute decision-makers 'in lieu of appropriate support, assistance, information or case management'[49] in most cases. However, as discussed below, there may still be a role for state-appointed decision-makers in instances where a person requires an NDIS representative.

5.38 The ALRC does not intend to be overly prescriptive about the mechanism for recognising supporters in the context of the NDIS. Nor has the ALRC examined funding mechanisms or practical matters involving resources and responsibilities. Whether there is a general duty to provide support and who should bear the cost of support are consequential issues.

Objects and principles

Recommendation 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.

5.39 The ALRC recommends 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 the particular division of the Act dealing with supporters and representatives.

5.40 Stakeholders such as the Disability Advocacy Network Australia (DANA) 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.[50]

5.41 Section 3 of the NDIS Act contains general objects of the Act. Section 4 contains general principles guiding actions under the Act, including that:

- people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability;

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

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

50 Disability Advocacy Network Australia, *Submission 36*.

- 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.[51]

5.42 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 judgments and decisions that people with disability would have made for themselves should be taken into account.[52]

5.43 While the intent of the objects and principles provisions in many ways reflects the CRPD and National Decision-Making Principles, some amendment is required, not least to recognise will and preferences decision-making.

5.44 For example, the focus under the general principle in 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'.[53] Such amendments would reflect the recommended shift from substitute decision-making to supported decision-making; the shift away from 'best interests' towards 'will, preferences and rights'; and the idea that decision-making authority should remain with the participant.

Supporters

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

51 *National Disability Insurance Scheme Act 2013* (Cth) s 4.
52 Ibid s 5.
53 Ibid s 4(8).

5.45 The Commonwealth decision-making model recommended 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 formalise the role played by nominees as supporters, such as family members.

5.46 As discussed in Chapters 2 and 3, the central idea, already recognised by the NDIS Act, is that participants should be supported to make their own decisions. 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 functions each supporter might play.

5.47 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 in decision-making. Provisions which recognise and facilitate the involvement of informal supporters in the NDIS are consistent with the National Decision-Making Principles.[54]

5.48 The ALRC recognises the danger of over-formalising the role of informal supporters, but argues that it is necessary to provide some mechanism for legislative recognition, especially when dealing with third parties. Even where people have 'natural' or informal support from families, they may want to appoint a particular person to help them deal with the NDIS. Providing some legal recognition of such a role may help prevent situations where the NDIA is not sure whom to deal with, for example, where there is conflicting communication or advice from family members.

Appointment

5.49 The NDIS represents a fundamental shift in funding for, and provision of, disability services in Australia. In addition to existing mechanisms, such as the Sector Development Fund,[55] supporters would play a key role in ensuring prospective participants and participants receive appropriate support to engage with the NDIS.

5.50 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 would be the only mechanism by which a supporter may be appointed.[56] 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

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54 See, eg, Ibid 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).

55 '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>.

56 See discussion in Ch 4 in relation to potential alternative mechanisms for appointment of a representative.

guardian under state or territory law because they incorrectly assume it is necessary, or simply to facilitate registration as a participant with the NDIS.[57]

5.51 Most importantly, applying the Commonwealth decision-making model to the NDIS should ensure that, where a supporter is appointed, ultimate decision-making authority remains with the participant. Any decision made by a participant with the support of a supporter should be recognised by the NDIA, service providers and others as the decision of the participant.

5.52 A participant should be entitled to appoint whomever they want as their supporter, if they want one. Stakeholders have highlighted, however, that there are many instances where a person will not have any available support, and an independent body may be required to provide support. Justice Connect and Seniors Rights Victoria suggested that,

> ideally, an independent body would be provided with sufficient resources and funding to 'employ suitably qualified people to take on the role' equivalent to the OPA/State Trustees in the Victorian jurisdiction.[58]

5.53 Advocacy for Inclusion also submitted that, where a person has no existing natural support, 'they should have access to formal supporters who have undergone appropriate checks and training so that they can select a person they are comfortable with'.[59]

5.54 Other stakeholders emphasised the importance of independent advocacy in supporting NDIS participants.[60] There seems no reason why individual advocates or advocate organisations should not be appointed as a participant's supporter. Only a participant would have the authority to appoint a supporter and would also have the power to suspend or revoke the appointment at any time.

5.55 The National Disability Advocacy Program (NDAP), managed by the Department of Social Services, funds advocates at NDIS trial sites. These advocates can 'assist people to participate in decision making and increase their capacity to understand the service delivery options available to enable them to meet their goals'.[61] Funding also allows advocates to provide assistance to people seeking merits review of NDIA decisions before the Administrative Appeals Tribunal (AAT), by providing a support person.

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57 See, eg, AGAC, *Submission 51*.
58 Justice Connect and Seniors Rights Victoria, *Submission 120*.
59 Advocacy for Inclusion, *Submission 126*.
60 See, eg, MHCA, *Submission 77*; Disability Advocacy Network Australia, *Submission 36*.
61 Department of Social Services, *National Disability Advocacy Program* <www.dss.gov.au>.

5.56 One option, which might help 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.[62] This might include support to allow a participant to make supported decisions in the management of their own funds.[63]

5.57 It may be inappropriate, however, to use individual participant funding for decision-making support. Arguably this should be provided separately by the NDIA or other government agency—through programs such as the NDAP—in order to ensure compliance with international obligations of State Parties under the CRPD with respect to the provision of support. The Nominee Rules provide that it is 'expected that the Agency will assist nominees in fulfilling' a duty to develop the capacity of participants.[64] This may be a basis for arguing that NDIA responsibility for support was envisaged, to at least 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 be funded under the NDIS.

Functions and duties

Functions of a supporter

5.58 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.[65] The scope of the role of a correspondence nominee is narrower, and more closely reflects the functions of a supporter, who is able to make requests to or receives notices from the NDIA on behalf of the participant.[66]

5.59 The functions of a supporter under the NDIS should include those set out in Recommendation 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.

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62 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 Operational Guidelines, such as the *Operational Guidelines on Planning and Assessment—Supports in the Plan*.

63 Queenslanders with Disability Network, *Submission 119*.

64 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.11.

65 *National Disability Insurance Scheme Act 2013* (Cth) s 78; *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.7.

66 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.

Supporter duties

5.60 The recommended duties of a supporter amend and expand upon the duties of nominees under the existing system. The ALRC recommends that a supporter's duties should include:

- supporting the NDIS participant to make the decision or decisions for which they are appointed;
- supporting the NDIS participant to express their will and preferences in making a decision;
- acting in a manner promoting the personal, social, financial and cultural wellbeing of the NDIS participant;
- acting honestly, diligently and in good faith;
- supporting the NDIS participant to consult with 'existing appointees', family members, carers and other significant people in their life in making a decision; and
- assisting the NDIS participant to develop their own decision-making ability.

5.61 A key duty owed by supporters is the duty to develop the decision-making ability of the participant. A similar duty is already owed by nominees under the NDIS Rules, which provide that a nominee has a duty to 'apply their best endeavours to developing the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary'.[67] The importance of the duty to assist a person to develop their own decision-making capacity is discussed in Chapter 4.

5.62 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'.[68] It is important that there be a similar duty on supporters to support a participant to make decisions and to express their will and preferences.

5.63 It is appropriate to add financial and cultural wellbeing to this list, reflecting the role supporters may play in supporting participants to make decisions relating to NDIS funds, and the importance of culturally sensitive and appropriate support.[69] This idea of sensitivity to cultural and linguistic circumstances is not an existing duty owed by nominees. However, in deciding whom to appoint as a nominee, the CEO is to have

67 Ibid r 5.10.
68 Ibid rr 4.8(b)(C), 4.8(b)(D).
69 See, eg, MDAA, *Submission 43*.

regard to the degree to which the proposed nominee is 'sensitive to the cultural and linguistic circumstances of the participant'.[70]

5.64 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.[71] If more than one person is appointed as plan nominee, each of them also owes a duty to consult with the others.[72] In order to reflect the supported rather than substitute decision-making role played by supporters, the ALRC considers that the supporter duty be modified to be a duty to facilitate consultation with the same categories of people.

5.65 The 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.

Representatives

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

5.66 In certain circumstances, a participant may not be able to make decisions themselves or with support, and may need a representative to be appointed for them. This should only occur in line with the National Decision-Making Principles and as a last resort.

5.67 The ALRC recommends that the current 'nominee' provisions be amended to allow the appointment of a representative. The change in terminology from 'nominee' to 'representative' is consistent with the National Decision-Making Principles. However, the provisions dealing with representatives will operate much the same as the nominee provisions, with some exceptions as discussed below.

5.68 Many of the elements contained in the ALRC's model for 'representatives' are already incorporated into the NDIS Act, Rules or Operational Guidelines. For instance, consistent with the ALRC's approach, nominees are appointed as a last resort, and there are duties on nominees to ascertain the will and preferences of the participant and to act in a manner that promotes the personal and social wellbeing of the participant.

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70 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(b)(iv).
71 Ibid r 5.8.
72 Ibid r 5.9.

5.69 The role of a representative is to support a participant to express their will and preferences in making decisions and, where necessary, to determine the will and preferences of a participant and give effect to them. If the will and preferences of the participant cannot be ascertained, the representative should 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.

Functions and duties

Functions of a representative

5.70 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.[73]

5.71 Despite this provision, some stakeholders expressed concern that the role played by plan nominees is 'a global appointment', and it 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'.[74]

5.72 The scope of the role of a correspondence nominee is narrower and more closely reflects the functions performed 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.[75]

5.73 The ALRC considers that a representative should perform some or all of the functions articulated in Recommendation 4–7. These parallel the functions of supporters and are discussed in more detail below.

5.74 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

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73 Ibid r 3.8.

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

75 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.

interaction with the NDIA and planning, and those who are involved in financial decisions.[76]

Representative duties

5.75 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 Recommendation 4–8. A representative should have the same duties as a supporter, and a number of additional duties. It is important that representatives owe specific duties under the NDIS Act and Rules, even where they are an existing state or territory appointed decision-maker and are subject to duties under state and territory legislation.

5.76 The key duties the ALRC recommends that a representative should owe under the NDIS Act and Rules are:

- providing support to a participant to express their will and preferences in making decisions;
- where it is not possible to determine the current will and preferences of the participant, determining what the person would likely want based on all the information available;
- where the first two avenues 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 participant;
- providing 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 participant to make their own decisions.

5.77 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 is similar to but does not require provision of support to express will and preferences. However, there is some suggestion that this type of duty was intended under the NDIS Rules because, 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'.[77] Nonetheless, it is necessary for a representative to have an explicit duty to support a participant to express their will and preferences.

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76 As suggested by Office of the Public Advocate (SA), *Submission 17*.

77 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.8(b)(C), 4.8(b)(D), 4.8(b)(E).

5.78 While the focus of 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 full support in 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 the NDIA, service providers, family members and others to establish an understanding of factors 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, and make the decision that is least restrictive of these rights.

Appointment by the CEO

Recommendation 5–4 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to incorporate provisions dealing with the process and factors to be taken into account by the CEO of the National Disability Insurance Agency in appointing representatives. These provisions should make it clear that the CEO's powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed, and with particular regard to the participant's will, preferences and support networks.

5.79 In the ALRC's view, the power of the CEO to appoint a representative needs to be retained. Problems may arise where an NDIS participant has no informal networks to support them, and no state-based appointed decision maker is available to be appointed as a representative. In the absence of the creation of some new Commonwealth body, similar to a guardianship tribunal, the exercise of the power to appoint a representative by the CEO may be necessary and desirable, provided that the power is subject to appropriate safeguards.

5.80 Despite the concerns of some stakeholders, the NDIS Act and Rules make it clear that the CEO's powers are to be exercised as a measure of last resort, with particular regard to the participant's wishes and support networks and the existence of state or territory appointees. However, given the importance of this issue, some of these provisions should be elevated into the primary legislation.

5.81 The NDIS Act currently 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.[78] The CEO of the NDIA must take into account several factors in determining whether to appoint a particular nominee.[79] In addition, the CEO has the

78 *National Disability Insurance Scheme Act 2013* (Cth) ss 86, 87. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11–3.15.

79 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.5–4.8.

power to make an appointment for a particular period[80] and power to limit the scope of the appointment.[81] The Rules provide that:

> 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. In appointing a nominee in such circumstances, the CEO will have regard to the participant's wishes and the participant's circumstances (including their formal and informal support networks).[82]

5.82 This general principle is expanded upon in r 3.14, which provides that the CEO, when deciding to appoint a nominee must:

> (a) consult with the participant; and
>
> (b) have regard to the following:
>
> (i) whether the participant would be able to participate effectively in the NDIS without having a nominee appointed;
>
> (ii) the principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards;
>
> (iii) whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker;
>
> (iv) whether the participant has supportive relationships, friendships or connections with others that could be:
>
> (A) relied on or strengthened to assist the participant to make their own decisions; or
>
> (B) improved by appointment of an appropriate person as a nominee;
>
> (v) any relevant views of:
>
> (A) the participant; and
>
> (B) any person (including a carer) who assists the participant to manage their day-to-day activities and make decisions; and
>
> (C) any court-appointed decision-maker or participant-appointed decision-maker.

5.83 Rule 3.14 requires that the decision is taken with regard to the wishes of the applicant and in the context of available supports. The Rules also provide that

> An example of a circumstance in which a nominee might be appointed without a request from the participant is where the CEO considers that the participant needs a nominee, but is unable to request appointment himself or herself, even with support. In such circumstances, the initiative might come from a carer or other person who offers to be the nominee.[83]

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80 Ibid rr 4.9–4.11.
81 Ibid r 3.8.
82 Ibid r 3.4.
83 Ibid r 3.15.

5.84 Stakeholders expressed concern about provisions that enable the CEO or delegate to appoint a nominee on the initiative of the agency, rather than at the request of the participant.[84] DANA, for example, submitted that the 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.[85]

5.85 Similarly, the National Association of Community Legal Centres submitted the current provisions give the agency 'considerable power' to appoint a nominee and do not require 'consideration or facilitation of the decision-making capability of the person with disability'—and that such provisions should not be replicated under the Commonwealth decision-making model.[86]

Interaction with state and territory systems

Recommendation 5–5 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to provide that, before exercising the power to appoint a representative, the CEO of the National Disability Insurance Agency may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities. The CEO may then exercise the power to appoint that person as a representative under the NDIS Act.

5.86 Under 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 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'.[87] The Rules provide that the CEO must also 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

84 See, eg, Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*. A similar concern was expressed in relation to children's representatives: Children with Disability Australia, *Submission 68*.

85 Disability Advocacy Network Australia, *Submission 36*. See also National Association of Community Legal Centres, *Submission 127*. See also Physical Disability Council of NSW, *Submission 32*. The Physical Disability Council of NSW submitted that the provision 'is not consistent with person centred practice'.

86 National Association of Community Legal Centres, *Submission 127*.

87 *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

> person are comparable with those of a nominee, that person should be appointed as nominee.[88]

5.87 Further, the CEO is to 'consult, in writing, with any court appointed decision-maker or participant-appointed decision maker in relation to any appointment'.[89] Nominees themselves also have a duty to consult with 'any court-appointed decision-maker or any participant-appointed decision-maker'.[90]

5.88 As discussed in Chapter 4, one of the key difficulties in applying the Commonwealth decision-making model to the NDIS is determining how NDIS supporters and representatives interact with state and territory appointed decision-makers.

5.89 The NDIA stated that, in relation to interaction issues generally, it 'recognises the importance of ensuring that to the greatest extent possible the NDIS operates in a way that complements other arrangements for supporting people with disability including in relation to the management of NDIS funds'.

> The Agency is working collaboratively with others including state and territory guardianship and administration tribunals to address the issues raised by these and other questions. For example, the Agency has been entering into arrangements for the exchange of information, consistent with the privacy provisions of the NDIS Act, with state and territory guardianship and administration tribunals.[91]

5.90 The interaction issues are of particular relevance given the ongoing roll-out of the NDIS. Stakeholders expressed concerns about an increase in applications for the appointment of state or territory decision-makers since the introduction of the NDIS. For example, the Australian Guardianship and Administration Council (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.[92]

5.91 To address concerns about the duplication of representatives, and the development of a parallel Commonwealth system of appointments, the NDIS Act should be amended to provide that, before exercising the power to appoint a representative, the CEO of the NDIA may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities.

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88 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(a).
89 Ibid r 4.12.
90 Ibid r 5.8(a).
91 National Disability Insurance Agency, *Submission 118*.
92 AGAC, *Submission 51*.

5.92 If the NDIA is to have regular recourse to state and territory guardianship and administration systems to find people suitable for appointment as representatives, this will have resource and funding implications for state and territory governments.

State and territory appointments

5.93 The NSW Government expressed concern about the 'practical reality' that, where a participant has no informal support network, the NDIA is managing the plan on the participant's behalf and that 'the decisions being made by the NDIA are in the nature of substitute decisions with no independent monitoring or scrutiny'.[93]

5.94 The Guardianship Division of the Civil and Administrative Tribunal of NSW (NCAT) has received 'over 85 applications for the appointment of a guardian for a person who is, or will become a participant in the NDIS' in the Hunter Region launch site.[94] NCAT noted that applications were made by family members or care providers who were concerned about the operation of the NDIS.

5.95 In some cases, where a participant is seen to have adequate support from informal support networks, or strong advocates, NCAT has rejected the application for guardianship. For example, in *KTT*, NCAT commented

> The Tribunal was cautious about pre-empting the NDIA processes by making a guardianship order so that Mrs LBU was all the more likely to be appointed nominee by the NDIA.[95]

5.96 In contrast, NCAT appointed a Public Guardian in the case of *KCG*, where the person did not have a friend or family member who could support her. NCAT noted:

> The irony in reaching this conclusion is that a state based appointment is required for a person in Miss KCG's circumstances to ensure that her interests in relation to a Commonwealth scheme are protected, as it seems there is no Commonwealth equivalent of a Public Guardian, a Public Advocate or other independent body who could be appointed as a nominee on her behalf.[96]

5.97 The Office of the Public Advocate (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.[97] Similarly, the Office of the Public Advocate (Vic) stated that, while it was expected that state and territory-appointed guardians and administrators would be appointed as nominees under the NDIS, 'a review is required to ascertain the extent to which this is happening in practice in the launch sites'.[98]

5.98 The ALRC understands that very few nominees have been appointed by the CEO of the NDIA, and that this may have contributed to the number of applications for guardianship being made to relevant state tribunals.

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93 NSW Government, *Submission 135*.
94 Ibid.
95 *KTT* [2014] NSWCATGD 6, [29].
96 *KCG* [2014] NSWCATGD 7, [69].
97 Office of the Public Advocate (Qld), *Submission 05*.
98 Office of the Public Advocate (Vic), *Submission 06*.

Interaction issues

5.99 Stakeholders provided a range of opinions on how interaction issues might be dealt with. Many suggested that there should be a centralised process because, in most cases, 'it is highly desirable that the same person should fulfil both roles'[99]—that is, acting as plan nominee and performing guardianship roles more generally.

5.100 The OPA (Qld) submitted that it is logical to have a system of central registration and 'the state based decision-making regimes are an obvious vehicle for this'. Tapping into the existing state based system would ensure that it 'also connects people with an existing system of safeguards in the form of opportunities for tribunal review and oversight of Public Guardians and Trustees'. While this will 'not provide all the safeguards needed, it helps to have people connected with an existing and substantial system'.[100] Children with Disability Australia submitted that if a representative is to be appointed 'other than at the participant's initiative it should be dealt with by the relevant systems for obtaining administration or guardianship orders'.[101]

5.101 While stakeholders agreed that it would be desirable to have one decision-maker, there were differing views on how this should be achieved. For example, the OPA (SA and Vic) suggested that one option would be for 'the Commonwealth to cross-vest state and territory Tribunals with the power to appoint federal representatives, but this seems unnecessarily complex'.[102]

5.102 The ALRC considers that the starting point should be that, where a representative is required, the NDIS Act should encourage the appointment of existing state or territory appointees as NDIS representatives. This may require amendment to the NDIS Act to make it more explicit that the CEO should appoint existing state appointees where possible, and the ALRC recommends elevating such provisions from the Rules and into the Act itself.

5.103 In addition, state and territory guardianship and administration legislation should be amended, if necessary, to facilitate the appointment of guardians and administrators as NDIS representatives. The OPA (SA and Vic) argued that NDIS nominee arrangements should 'better align with state and territory appointments':[103]

> OPA Vic, for instance, cannot at the moment play the role of NDIS nominee (as a result of the limitations of our state legislative authority, which requires amendment if we are to be able to play the role of nominee). And while there is no reason why OPA as guardian of last resort could not in theory act as a plan nominee and make decisions about goals, services and supports, clearly OPA should not take on financial management responsibilities. It appears that the NDIA can particularise the role of nominee, however we note that an equivalent administrator nominee/representative

99 ADACAS, *Submission 108*. ADACAS argued that the Commonwealth should recognise state-appointed representatives unless exceptional circumstances exist, in which case the matter should be referred to an independent tribunal for resolution.
100 Office of the Public Advocate (Qld), *Submission 110*.
101 Children with Disability Australia, *Submission 68*.
102 Offices of the Public Advocate (SA and Vic), *Submission 95*.
103 Ibid.

> function could be devised for situations where a public trustee would be best placed to perform this role.[104]

5.104 These comments highlight that this alignment may require state and territory legislative change. For example, at present, while a plan nominee may manage the funding for supports under the NDIS participant's plan, this is not a role a guardian is able to undertake under some state and territory legislation, including the *Guardianship and Administration Act 1986* (Vic).[105]

5.105 In Chapter 10, the ALRC recommends that state and territory governments review laws that deal with decision-making by persons who need decision-making support by having regard to interaction with supporter and representative schemes under Commonwealth legislation.

Conflicts of duties

5.106 Another important issue concerns possible conflicts of duties where a state or territory appointee is also appointed as a representative under the NDIS Act. A person appointed by a state or territory body, such as NCAT, would have duties under state or territory legislation, as well as under the Commonwealth law.

5.107 While these duties may sometimes be interpreted as consistent, there may be times when they conflict. Most obviously, under state legislation, a guardian may have a duty to make decisions in the best interests of the person represented, while having a duty under Commonwealth legislation to ensure that the person's own will and preferences direct the decision.

5.108 When making decisions for the purposes of Commonwealth legislation, Commonwealth legislative duties would apply, but the person may then be in breach of duties owed as a guardian under state or territory legislation making it impossible for them to continue to act in the latter role.

5.109 However, the Nominee Rules contain some recognition that state and territory appointees may have different roles and duties than those provided under the NDIS. Provisions that require a plan nominee appointed on the initiative of the CEO to act only if the participant is not capable of acting, are 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).[106]

5.110 This rule appears to operate so that a nominee who has duties to act under state or territory legislation can continue to do so in relation to decisions under the NDIS—including acting when the participant is themselves capable of doing so—although obligations to consult and develop the capacity of the participant are not affected by the clause.

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104 Ibid.
105 Ibid.
106 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.7.

5.111 In addition, the Act itself contains a standard constitutional 'concurrent operation' clause providing 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'.[107] This provision also enables regulations to prescribe 'kinds of laws of States and Territories as examples of laws' to which concurrent operation applies.[108]

5.112 It is not clear exactly how concurrent operation of laws might affect conflicts of duties under the NDIS, and under state and territory legislation. This is an issue that might need future clarification as the NDIS evolves.

Management of NDIS funds

5.113 Under the NDIS Act, a participant has a choice between requesting that NDIS funds be self-managed by the participant, managed by the participant's plan nominee, a plan management provider nominated by the participant, or the NDIA.[109] 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.[110]

5.114 There are also 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'.[111]

5.115 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.[112] 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'.[113]

5.116 QDN observed that under the NDIS

> 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.[114]

5.117 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

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107 *National Disability Insurance Scheme Act 2013* (Cth) s 207(1).
108 Ibid s 207(2).
109 Ibid ss 42(2), 43(1).
110 Ibid s 43(2).
111 Ibid s 44.
112 Ibid s 43(4).
113 Ibid s 43(5).
114 Queenslanders with Disability Network, *Submission 59*.

making decisions about fund management. Participants should also be entitled to nominate a plan management provider, or the NDIA to manage their funds.

5.118 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 Financial Services Council 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'[115] and that 'the NDIS should pay amounts directly to product/service providers after due consultation with the relevant appointed decision-maker'.[116]

5.119 The preferable approach is for participants to self-manage their funding for supports to the extent they desire. One possible benefit is said to be that

> the capacity to manage their own funds, also allows participants to recruit their own staff. Many people with disability identify this as being one of the most influential elements in achieving 'choice and control' in their lives. By facilitating a participant's capacity to manage their own funds through the use of supported decision-making, people with disability (who in many cases will spend extended periods of time with paid support workers) will be empowered to recruit the support workers that best suit their needs. This could be the catalyst for major improvements in many aspects of a participant's life.[117]

5.120 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. Where the NDIA does harbour concerns, safeguards such as trial periods may be used to ensure that any problems that may arise are addressed. QDN observed that this is 'an example of how the "dignity of risk" that is much talked about, can be put into practice'.[118]

5.121 At the same time, given the amounts of money sometimes involved, there need to be protective provisions. The ALRC does not recommend any change to the power of the CEO to refuse to allow self-management where there is an 'unreasonable risk to the participant'.[119] However, the ALRC suggests that the NDIS Rules, in prescribing criteria the CEO is to apply in considering whether an unreasonable risk to the participant would exist,[120] include regard to the person's will and preferences and decision-making support available to them.

Safeguards

5.122 The appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

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115 Financial Services Council, *Submission 35*.
116 Ibid.
117 Queenslanders with Disability Network, *Submission 119*.
118 Ibid.
119 *National Disability Insurance Scheme Act 2013* (Cth) s 44.
120 Under Ibid s 44(3).

5.123 There are a range of existing complaint, review and appeal mechanisms under the NDIS. For example, participants may seek internal review of a reviewable decision,[121] make a complaint to the Commonwealth Ombudsman, or seek review of a reviewable decision by the AAT.[122]

5.124 In the trial sites, existing state and territory quality assurance frameworks and safeguards also apply.[123] The Department of Social Services is currently developing a number of options for a national quality assurance and safeguards framework or approach as part of the NDIS for consideration by COAG. 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;
- 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; and
- 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.[124]

5.125 Issues concerning safeguards should be considered in the course of developing the national quality assurance and safeguards framework as part of the NDIS.

5.126 A number of stakeholders, including the Disability Services Commission of Victoria, advocated for 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.[125]

5.127 The ALRC does not make recommendations with respect to the specific safeguards that may be required in the context of the NDIS. Nor does the ALRC comment on systemic issues relating to safeguards under the NDIS raised by stakeholders, such as the funding of legal support for participants to seek administrative review of NDIA decisions.[126]

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121 Ibid ss 99, 100.
122 Ibid s 103.
123 'Intergovernmental Agreement, Schedule A: Bilateral Agreement for NDIS Launch between the Commonwealth and New South Wales' (7 December 2012).
124 National Disability Insurance Scheme, *Safeguards* <www.ndis.gov.au>.
125 See, eg, MHCA, *Submission 77*; Disability Services Commissioner Victoria, *Submission 39*.
126 See, eg, Law Council of Australia, *Submission 83*; NCOSS, *Submission 26*.

5.128 However, there are two matters the ALRC considers might be reviewed in the context of the NDIS quality assurance and safeguards framework.

5.129 First, the NSW Government observed that there are provisions in the *Guardianship Act 1987* (NSW) that prohibit the appointment of paid carers and other persons with a conflict of interest as substitute decision makers.[127] It submitted that if such appointments were allowed under the Commonwealth model, there would need to be appropriate supervision and support from an independent body, with powers to seek the removal of supporters and representatives if required.[128] At present, under the NDIS Act, the CEO has power to cancel or suspend the appointment of a nominee for a range of reasons,[129] including on the request of the participant and where there are reasonable grounds to believe that the person is likely to cause, 'physical, mental or financial harm to the participant'.[130] This may be sufficient, but might be reviewed.

5.130 Secondly, AGAC raised concerns about the operation of s 65 of the NDIS Act. This provision is said to prevent a guardianship tribunal from having access to information held by the NDIA, when this information may be critical to the tribunal's consideration of whether a guardianship or administration order is needed.[131] This provision may also require review.

Guidance and training

5.131 Guidance and training for all people involved in decision-making under the NDIS is vitally important to ensure the effective operation of the supported decision-making model.

5.132 The NDIA has developed approaches to education, training and community engagement (including through video, quotes, stories, and webinars) and has produced a range of guidance material for people with disability, family and carers, service providers, and participants.[132]

5.133 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'.[133]

5.134 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 Nominee Rules are applied appropriately in practice:

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127 *Guardianship Act 1987* (NSW) ss 6B(2), 17(1)(b), 25M(1)(a).
128 NSW Government, *Submission 135*.
129 *National Disability Insurance Scheme Act 2013* (Cth) ss 89–91.
130 Ibid s 91(1).
131 AGAC, *Submission 91*.
132 See, eg, National Disability Insurance Scheme, *Homepage* <www.ndis.gov.au>.
133 National Disability Insurance Scheme, *Disability Support Organisations—Capacity Building Strategy Grants* <www.ndis.gov.au>.

> 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.[134]

5.135 National Disability Services suggested that it would 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.[135]

5.136 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.[136]

5.137 Accordingly, participants and supporters and representatives (or potential supporters and representatives) should be provided with information and advice to enable them to understand their functions and duties. In addition, the ALRC recommends that employees and contractors of Commonwealth agencies who engage with supporters and representatives are provided with information, guidance and training in relation to the roles of supporters and representatives.[137] 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 guidance and training.

5.138 The focus of guidance and training 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.

Other issues

5.139 Stakeholders raised a range of other concerns about the NDIS, some of which extend beyond the Inquiry's scope. They involve systemic and practical concerns with the structure and operation of the NDIS, including those relating to:

- eligibility to become a participant under the NDIS;[138]

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134 Office of the Public Advocate (SA), *Submission 17*.
135 National Disability Services, *Submission 49*.
136 MHCA, *Submission 77*.
137 See Recs 4–11, 4–12.
138 See, eg, MHCA, *Submission 77*; Women's Legal Services NSW, *Submission 57*; Physical Disability Council of NSW, *Submission 32*; Mental Health Coordinating Council, *Submission 07*.

- the operation of the NDIS for people with particular types of disability, for example psychosocial disability;[139]
- the interaction between the NDIS and other systems, particularly with respect to funding responsibility;[140]
- registration and oversight of providers of support;[141] and
- decreased funding of state and territory services, and potential gaps where people with disability are not eligible for the NDIS.[142]

5.140 While these concerns are important, the issues do not relate directly to the concepts of legal capacity or decision-making ability.

139 See, eg, MHCA, *Submission 77*. See also Mental Health Council of Australia, *Providing Psychological Support through the NDIS*, March 2014.
140 See, eg, Office of the Public Advocate (Qld), *Submission 05*.
141 See, eg, Ibid.
142 See, eg, MHCA, *Submission 77*.

6. Supporters and Representatives in Other Areas of Commonwealth Law

Contents

Summary

6.1 In Chapter 4, the ALRC recommends 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. These schemes already contain some decision-making mechanism or make some provision for supporters and representatives however they are described, and 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 some of these areas, the ALRC considers that legislation should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model and suggests how this might be done. However, any reform needs to be proportionate to the situation, and the role of the supporter or representative. In relation to privacy and banking, the ALRC recommends new guidelines to encourage supported decision-making, rather than legislation.

6.5 One overarching issue is the interaction between Commonwealth decision-making schemes and state and territory appointed decision-makers. In each area, the interaction of Commonwealth supporters and representatives 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 persons 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 It is important that providing mechanisms for the appointment of formal supporters and representatives under the *Social Security (Administration) Act* should not diminish the involvement of, or respect for, informal support.

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*

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1 See also 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 (including family tax benefit and child care) in *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) pt 8 ss 219TA—219TR.

3 See, eg, Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

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. 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 as nominee.[15] However, if a correspondence nominee fails to satisfy a particular

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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; 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.

15 Ibid ss 123M, 123N.

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

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

6.15 To ensure better compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), the ALRC recommends 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 noted by stakeholders, such as the Law Council of Australia.[17]

6.17 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the *Social Security (Administration) Act* should not diminish the involvement of, 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 generally and in the specific context of social security law.[18]

6.18 While the role played by correspondence nominees is broadly 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 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.[19]

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16 See, eg, Ibid s 123J.

17 Law Council of Australia, *Submission 83*.

18 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*.

19 Some stakeholders expressed support for the proposals in the Discussion Paper: see, eg, National Association of Community Legal Centres, *Submission 127*; National Mental Health Consumer & Carer Forum, *Submission 100*.

6.20 In doing so, the ALRC recognises the importance of informal arrangements in the context of social security. NACLC observed that, in the experience of community legal centres, many clients with disability have a preference for informal arrangements:

> Often, people are apprehensive about invoking more formal, costly and potentially disempowering personal decision-making systems that involve state and territory guardians and administrators.

6.21 While supportive of the Commonwealth decision-making model, NACLC suggested that the ALRC consider ways in which to 'ensure that the application of the Commonwealth decision-making model will not have unintended consequences such as the over-formalisation of arrangements and could more fully articulate how the provision of statutory supported decision-making mechanisms can co-exist with informal support arrangements, including in relation to decision-making'.[20]

Objects and principles

6.22 Section 8 of the *Social Security (Administration) Act* contains general principles of administration. However, there are no principles relating to decision-making. The ALRC considers 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

6.23 Under the Commonwealth decision-making model, a principal would be entitled to appoint one or more supporters to support them to make decisions related to social security. 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.

6.24 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 persons 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.[21] It may also address some of the privacy-related difficulties encountered by those who support persons with disability, given one of the potential roles of a supporter is to handle the relevant personal information of the principal.

6.25 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 would formally retain ultimate

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20 National Association of Community Legal Centres, *Submission 127*.
21 MDAA, *Submission 43*.

decision-making responsibility. The role of a supporter, under the model, is to support the principal to make a decision, rather than the supporter themselves making a decision.

6.26 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'.[22]

6.27 In addition, a principal would be entitled to terminate 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.[23]

Representatives

6.28 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.

6.29 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 full support in decision-making.

6.30 Chapter 4 discusses possible appointment mechanisms, including appointment by Commonwealth agency heads or delegates, in confined circumstances. Concerns expressed in relation to the powers of the Chief Executive Officer of the National Disability Insurance Agency to appoint a nominee, discussed in Chapter 4, may apply to the similar powers of Centrelink delegates.[24]

6.31 The key amendment 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 contained in the *Social Security (Administration) Act*.

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

23 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*.

24 National Association of Community Legal Centres, *Submission 127*. For powers see Department of Social Services, *Guide to Social Security Law* (2014) [8.5.1]–[8.5.2].

6.32 Finally, this would require that the appointment and conduct of representatives be subject to appropriate and effective safeguards. In relation to social security law, these safeguards might include: mechanisms for review and appeal of the appointment of representatives; potential monitoring or auditing of representatives by Centrelink; and the retention of existing safeguards. For example, the power of DHS to require the provision of a statement from a payment nominee outlining expenditure of the principal's payments by the nominee, could be applied to representatives.[25]

Guidance and training

6.33 The ALRC considers guidance and training for all parties involved in decision-making under social security law is important in ensuring the effective operation of this model of decision-making. This is particularly so in the light of stakeholder concerns about existing difficulties in navigating the social security system, interacting with Centrelink, and obtaining information.

6.34 Accordingly, the ALRC considers it is necessary for Centrelink to develop and deliver guidance and training for:

- Centrelink payment recipients who require decision-making support;
- supporters and representatives; and
- Centrelink employees and others involved decision-making or engagement with customers.

6.35 The focus of guidance and training 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

6.36 Stakeholders also raised a range of systemic issues concerning social security. Stakeholders consistently emphasised the complexity of the social security system and the difficulties persons 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 persons with disability who are Aboriginal or Torres Strait Islanders, from a culturally and linguistically diverse community, or who live in a rural, regional or remote community.[26]

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25 *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].

26 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).

6.37 While these are important issues in the lives of persons with disability, the issues do not relate directly to individual decision-making, and the ALRC therefore does not make recommendations in these areas.

Aged care

6.38 This section outlines how the National Decision-Making Principles and the Commonwealth decision-making model may apply to aged care to ensure equal recognition before the law and legal capacity for older persons with disability.

6.39 Older people receiving aged care services who have intellectual, cognitive, physical or mental disabilities may find it difficult, without support, to exercise their rights to health services and an adequate standard of living and social protection.[27] Caxton Legal Centre referred to 'Mrs L', an 83-year old woman who experienced multiple difficulties in asserting her rights at her nursing home and the Queensland Civil and Administrative Tribunal:

> Mrs L ... was a physically frail woman of European origin, who had a heavy accent. She was in a nursing home, but wished to be returned to the care of her husband. There was no medical evidence of dementia, but the nursing home had assumed she had dementia because she was difficult to understand following a surgical complication that affected her speech. Mrs L was also extremely depressed at the separation from her husband.
>
> At the guardianship hearing, questions were asked about her ability to cook and care for herself. Mrs L was a proud woman and acknowledged later that she felt too embarrassed to admit in front of strangers in an intimidating setting that she was too frail to cook. However, this was taken by the tribunal to mean she 'lacked insight' and therefore must have impaired capacity. There were also misunderstandings by a tribunal member about the type of food Mrs L was describing, as a result of her heavy accent. An interpreter had been requested for Mrs L but was not provided. The Adult Guardian and Public Trustee were appointed.[28]

6.40 Aged care is an increasingly important area of federal responsibility in the context of Australia's ageing population. The Australian Government regulates residential aged care and home care, under the *Aged Care Act*[29] and under the Home and Community Care program.[30]

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27 As required under *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 25(b), 28.

28 Caxton Legal Centre, *Submission 67*.

29 From 1 January 2014, the Australian Aged Care Quality Agency 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 of Care Principles 2014* (Cth), *Quality Agency Reporting Principles 2013* (Cth) and other legislative instruments issued pursuant to the *Aged Care Act 1997* (Cth).

30 On 1 July 2012, the Australian Government assumed full funding, policy and operational responsibility for the Home and Community Care (HACC) services for older people (over the age of 65 or 50 for Aboriginal and Torres Strait Islander people) in all states and territories except Victoria and Western Australia. Victoria agreed to transition responsibility for HACC for older people to the Commonwealth from 1 July 2015 and WA agreed to do the same from 2016–17. State and territory governments will continue to fund and administer HACC services for people under the age of 65 or under 50 for Aboriginal and Torres Strait Islander people.

6.41 Under the *Australian Aged Care Quality Agency Act 2013* (Cth), the Australian Aged Care Quality Agency is responsible for the accreditation, monitoring and quality assurance of Commonwealth subsidised residential aged care providers, and for monitoring the quality of home and community aged care services.

6.42 The Australian Government responded to the Productivity Commission's recommendations in the 'Caring for Older Australians' report[31] with the 'Living Longer Living Better' reforms to aged care.[32]

6.43 Both Houses of Parliament have examined issues concerning dementia in recent years. The House of Representatives Standing Committee on Health and Ageing recommended uniform definitions, laws and guidelines relating to capacity, in state and territory legislation.[33] The Senate Committee on Community Affairs recommended the creation of a new Medicare item that encourages health practitioners to undertake longer consultations with a patient and at least one family member or carer where the patient has presented with indications of dementia.[34] The Committee also recommended the review of accreditation standards for residential aged care facilities in relation to managing symptoms of dementia.[35]

6.44 The Commonwealth decision-making model responds to calls for clear, national guidance for decision-making in aged care that is compliant with the CRPD.[36] The model would provide for the recognition of supporters who assist aged care consumers in their decision-making and representatives to make decisions directed by the will, preferences and rights of aged care consumers.

Individual decision-making in aged care

6.45 At present, decisions in aged care are made in three ways: by the aged care recipients themselves; informally by their families or carers; or by formally appointed substitute decision-makers such as guardians.

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31 'Caring for Older Australians' (Inquiry Report No 53, Productivity Commission, 2011). The Productivity Commission was requested to develop detailed options for redesigning the aged care system to meet the challenges facing it in coming decades, including the increasing incidence of dementia, severe arthritis and serious visual and hearing impairments, and the need for psycho-geriatric care.

32 See *Aged Care (Living Longer Living Better) Act 2013* (Cth) and associated legislation. Changes such as income testing for home care packages, new accommodation payment arrangements for residential aged care, and the removal of the distinction between high and low levels of care in residential care commenced on 1 July 2014: Department of Social Services, *Reform Overview* <www.dss.gov.au>.

33 House of Representatives Standing Committee on Health and Ageing, *Thinking Ahead: Report on the Inquiry into Dementia-Early Diagnosis and Intervention*, 2013 recs 4–5.

34 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 1.

35 Ibid recs 8–10, 13–15.

36 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26; 'Caring for Older Australians', above n 31, rec 15.10; Law Council of Australia, *Submission 83*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Office of the Public Advocate (Qld), *Submission 05*.

6.46 Informal decision-making for an aged care recipient seems routine and customary in aged care. The Victorian Law Reform Commission report on guardianship 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.[37] On the other hand, government agencies and service providers seem to prefer the formality of legal arrangements for aged care decisions.

6.47 The Australian Guardianship and Administration Council (AGAC) submitted that 'informal decision making' or 'de facto arrangements' were initially approved as 'less restrictive alternatives' when compared to formal guardianship appointments. However, AGAC also expressed concern that informal decision-making lacks safeguards against abuse as required by art 12(4) of the CRPD.[38]

6.48 AGAC's experience has been that where Commonwealth agencies have assumed that most persons with disability have formally appointed guardians and designed forms on this basis, state and territory tribunals have been periodically 'inundated by applications for appointment of guardians or administrators' to give effect to decisions relating to aged care, for example, for asset assessment required for application for residential aged care.[39]

6.49 The current legal framework provides for some elements of supported and representative decision-making in aged care. Section 96–5 of the *Aged Care 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.

6.50 There is a differentiation between 'representation' for binding contracts and 'authorisation' for obtaining and receiving information for the aged care recipient. However, there is inconsistency in the use of the term 'representative' throughout the Commonwealth laws and legal frameworks for aged care recipients. This is evident in the disparate references to a 'legal representative' to imply a guardianship arrangement;[40] 'representative' to refer to an advocate;[41] and an undefined 'appropriate person'.[42]

6.51 The new *Quality of Care Principles 2014* (Cth) set out the responsibilities of approved providers in providing residential and home care services. These principles also define the 'representative' of a care recipient more clearly than in the Act.

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37 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 15, 318.
38 AGAC, *Submission 51*.
39 Ibid.
40 *Aged Care Act 1997* (Cth) s 52F–2.
41 Ibid s 81.1(1)(c)(ii).
42 Ibid s 44.8A.

6.52 A representative under the *Quality of Care Principles* means either: a person nominated by the care recipient as a person to be told about matters affecting the care recipient; or a person who nominates themselves and who the relevant approved provider is satisfied has a connection with the care recipient and is concerned for the 'safety, health and well-being of the care recipient'.[43] Section 5(2) of the *Quality of Care Principles* states that a person who has a connection with a care recipient includes:

- a partner, close relation or other relative of the care recipient;
- a person who holds an enduring power of attorney given by the care recipient;
- a person who has been appointed by a state or territory guardianship board (however described) to deal with the care recipient's affairs; or
- a person who represents the care recipient in dealings with the approved provider.[44]

6.53 This definition of representative is similar to both supporters and representatives in the Commonwealth decision-making model. The intention behind the new definition in the *Quality of Care Principles* is to recognise the role of 'informal substitute decision-makers' as representatives of care recipients in their dealings with approved providers without conferring on them powers of a formal, state or territory appointed decision-maker such as a guardian or financial manager.[45]

6.54 This move to acknowledge the role of informal supporters of aged care consumers is consistent with the ALRC's overall approach. The requirement for a representative to have a connection and concern for the safety, health and wellbeing of an aged care consumer is also broadly consistent with the National Decision-Making Principles. However, in support of further reform in aged care, stakeholders emphasised the need to preserve aged care consumers' right to their autonomy, and the importance of supporting them in decision-making.

6.55 Caxton Legal Centre noted the 'omission of the CRPD' in the Living Longer Living Better reforms with respect to art 12.[46] The Centre for Rural and Regional Law and Justice, and the National Rural Law and Justice Alliance stressed the value of supported decision-making and co-decision-making arrangements, which are particularly relevant in the regional and rural context.[47]

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43 *Quality of Care Principles 2014* (Cth) s 5(1).

44 *Quality of Care Principles 2014* (Cth) notes nothing in this section intends to affect the powers of a substitute decision-maker appointed for a person under a state or territory law.

45 Explanatory Statement, *Quality of Care Principles 2014* (Cth) s 5.

46 Caxton Legal Centre, *Submission 67*.

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

6.56 Others reflected on addressing the 'balance between duty of care and the dignity of risk' in aged care decision-making.[48] The OPA (SA and Vic) submitted that the operation of the Commonwealth model needs to do this 'while protecting older people from exposure to abuse'.[49] 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.[50]

6.57 One issue which encapsulates these concerns is the use of restrictive practices on aged care recipients. The Mental Health Coordinating Council drew attention to the chemical restraint of some older people and people with mental illness who are deemed to be 'challenging' in 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.[51]

6.58 The OPA (SA) suggested amendment of the *User Rights Principles*[52] to minimise and eliminate the use of restrictive practices in aged care.[53] The Office recommended that there should be a clear definition of each restrictive practice, a requirement that non-coercive measures be considered and clear authority before any restrictive practice is used.[54]

The Commonwealth model and aged care

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

6.59 To ensure better compliance with art 12 of the CRPD, the ALRC recommends that the *Aged Care Act* be amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model.

Objects

6.60 Division 2 of the *Aged Care Act* lists the objects of the legislation in regulating and funding aged care. They include: encouraging aged care services that 'facilitate the

48 Offices of the Public Advocate (SA and Vic), *Submission 95*.
49 Ibid.
50 The Illawarra Forum, *Submission 19*.
51 Mental Health Coordinating Council, *Submission 07*.
52 *User Rights Principles 2014* (Cth) replaced *User Rights Principles 1997* (Cth) on 1 July 2014. *User Rights Principles* are among principles made pursuant to *Aged Care Act 1997* (Cth) s 96–1.
53 Office of the Public Advocate (SA), *Submission 17*. See also Office of the Public Advocate (Vic), *Submission 06*.
54 Restrictive practices are discussed in Ch 8.

independence of, and choice available to' recipients[55] and helping recipients 'to enjoy the same rights as all other people in Australia'.[56] The extensive set of objects does not, however, directly apply them to decision-making arrangements.

6.61 The ALRC recommends that s 2–1 of the *Aged Care Act* be amended to incorporate principles relating to supported decision-making. The application of the Commonwealth decision-making model should help deliver the rights and responsibilities of aged care recipients contained in the *User Rights Principles 2014* (Cth).[57]

Supporters and representatives

6.62 The *User Rights Principles* mention representatives in the context of the right of a home care recipient to participate in their care decisions, if they do not have capacity to make those decisions themselves.[58]

6.63 The *User Rights Principles* also recognise some roles analogous to those of a supporter under the Commonwealth model. The *User Rights Principles* provide that a person whom a care recipient has asked to act for them and 'advocates and community visitors' who are acting for the care recipients, have the right to access aged care services to check the approved providers have met their responsibilities.[59] For example, approved providers must assist the care recipient to understand information about their rights and responsibilities.[60] Under the existing framework, a person acting for a care recipient can check whether or not this has occurred. However, the person must either be a paid advocate or a community visitor.[61]

6.64 The Commonwealth decision-making model could inform further reform of aged care legislation towards a rights-based and consumer-focused approach that acknowledges the role played by family, friends and carers. The model provides a structured approach for the involvement and regulation of representatives in decisions by aged care consumers. Supporters and representatives would be guided in their functions and be certain of their responsibilities.

6.65 Under this Commonwealth model, all aged care consumers have the right to make their own decisions.[62] Supported decision-making in the aged care context means that people who 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 personal or health care services they receive. For representative decision-making in aged care, the 'will, preferences and rights' standard would replace the existing 'best interests' test.

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55 *Aged Care Act 1997* (Cth) s 2–1(1)(g)(ii).
56 Ibid s 2–1(1)(h).
57 *User Rights Principles 2014* (Cth) schs 1–2. These provisions contain the charters of care recipients' rights and responsibilities for residential care and home care.
58 Ibid sch 2(1)(2)(d).
59 Ibid ss 8, 18.
60 Ibid ss 11(3), 20(3).
61 Ibid ss 8(3), 18.
62 See Ch 3.

6.66 The Commonwealth decision-making model would apply from the first trigger for decision-making by an aged care consumer, such as an assessment of care needs by the Aged Care Assessment Team.[63] The decision to undergo assessment of care needs is often made under pressure when a crisis has arisen for the potential aged care consumer. This is why there are likely to be benefits in terms of efficiency and effectiveness for both consumers and approved providers, where an aged care consumer who needs support has a supporter with them or if they do not have a supporter available to them, a representative who will make decisions for them according to their will, preferences and rights.

6.67 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. Under the Commonwealth decision-making model, depending on the aged care consumer's ability to make decisions and the availability of support, these decisions may be made by themselves, with the assistance of a supporter or by their representative.

6.68 There are myriad decisions made in aged care, on a daily, if not an hourly basis, which cannot practically be governed by a formalised supporter and representative model. The supporter and representative model might apply only to certain types of decisions, be trialled by new approved providers of home care services or otherwise tailored to suit the needs of the aged care consumers and approved providers.

6.69 The accreditation and quality monitoring system is an important safeguard of rights in the aged care sector. A suite of accreditation standards and guidelines made under the *Aged Care Act* regulates service providers.[64] There is recognition of representatives of aged care consumers in the assessor's guide to accrediting residential aged care services.[65]

6.70 If the Commonwealth decision-making model were to be adopted, these standards and guidelines would need to be revised to recognise the roles of supporters and representatives. 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.[66] The current requirement for a person to act as a representative is that the approved provider is satisfied that the nominated person has a connection with the resident, and is concerned for the 'safety, health and well-being' of the resident.[67] Under the Commonwealth decision-making model, this would change to the standard of the 'will, preferences and rights' and the representative would have a duty to act in a way that promotes the 'personal, social, financial and cultural wellbeing' of the person.[68]

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63 The Aged Care Assessment Service in Victoria.

64 The four accreditation standards for residential aged care facilities are set out in the *Quality of Care Principles 2014* (Cth). Approved providers must meet 44 outcomes which relate to these standards.

65 'Results and Processes Guide' (Australian Aged Care Quality Agency, June 2014).

66 Department of Social Services, 'The Residential Care Manual' (2014) 6.

67 Ibid.

68 See Chs 3–4.

6.71 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'.[69] The Commonwealth decision-making model would give consistent guidance, so that an aged care consumer would be presumed to have the ability to make decisions and entitled to support in making those decisions. If a representative is appointed, the consumer would be entitled to have the representative make decisions that accord with the will, preferences and rights of the consumer.

Safeguards against elder abuse

6.72 Stakeholders raised significant concern over elder abuse and the need for safeguards in protecting the rights of aged care consumers.[70] Elder abuse is defined by the World Health Organization as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'.[71] It can be physical, psychological, emotional, sexual or financial abuse. It can also be the result of intentional or unintentional neglect.[72]

6.73 Advocacy and safeguarding of rights through having supporter and representative duties, as well as the guardianship systems around Australia are critical to preventing elder abuse. Under an effective, nationally coordinated model, the aged care consumer will receive the kind of assistance they need from supporters whose role and duties are specified. The aged care consumers will know that they are ultimately responsible for the decision made with the assistance of a supporter.

6.74 Where a representative makes a decision for the aged care consumer, the decision will be based on the will and preferences of the person requiring support and safeguards should apply, consistent with the Safeguards Guidelines. This would ensure that decisions and interventions are:

- least restrictive of the person's human rights;
- subject to appeal; and
- subject to regular, independent and impartial monitoring and review.[73]

6.75 The representative will have duties under the model and, when they are also the aged care consumer's guardian, they will be bound by duties under state and territory legislation.

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69 Department of Social Services, 'Home Care Packages Program Guidelines' (July 2014) [3.1.4].

70 Offices of the Public Advocate (SA and Vic), *Submission 95*; AGAC, *Submission 91*; Caxton Legal Centre, *Submission 67*; The Illawarra Forum, *Submission 19*; Office of the Public Advocate (SA), *Submission 17*; Office of the Public Advocate (Vic), *Submission 06*.

71 World Health Organization, *Elder Abuse* <www.who.int/ageing/projects/elder_abuse/en/>.

72 Ibid.

73 See Ch 3.

6.76 It is 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 approved providers of aged care.[74]

Guidance and training

6.77 Guidance and training for all parties involved in decision-making under the Commonwealth legislative framework for aged care is critical to the effective operation of this model. The OPA (SA and Vic) submitted:

> Significant reform and concurrent sector and community education will be required to ensure that the operation of the Commonwealth decision-making model will balance duty of care and dignity of risk, while protecting older people from exposure to abuse.[75]

6.78 The Department of Social Services (DSS) should develop and deliver targeted guidance and training for:

- aged care consumers who require decision-making support;
- supporters and representative; and
- DSS and Australian Aged Care Quality Agency employees and others involved decision-making or engagement with aged care consumers.

6.79 The focus of guidance and training could include topics such as: the introduction of the supporter and representative model under the law on aged care and differences between current practice and the new model; interaction with state and territory decision-making systems; and supported decision-making in the context of aged care.

eHealth records

6.80 The following section discusses the *Personally Controlled Electronic Health Records Act 2012* (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'.

6.81 An eHealth record is an electronic summary of a person's health records, which the individual consumer and their healthcare providers can access online when needed. The eHealth record system was implemented nationally in July 2012, allowing people seeking healthcare in Australia to register for an eHealth record. Healthcare Provider Organisations can also register to participate in the eHealth record system, and authorise their employees to access the eHealth record system.

6.82 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

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74 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*. See further, Ch 10.

75 Offices of the Public Advocate (SA and Vic), *Submission 95*.

consent in confirming access settings for the eHealth record. This will include information such as medications, hospital discharge summaries, allergies and immunisations.[76]

Individual decision-making and eHealth records

6.83 Under the legislative framework for eHealth, there are protections against the mishandling of information.[77] Individuals can control their own eHealth record by choosing to restrict which healthcare provider organisations can access it and what information is included through exercising 'access controls'.[78] 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).[79]

6.84 The Office of the Australian Information Commissioner (OAIC) is the privacy regulator for the PECHR Act. The OAIC regulates the handling of personal information in the eHealth system by individuals, Australian Government agencies, private sector organisations and some state and territory agencies (in particular circumstances).[80]

6.85 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'

6.86 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.[81]

6.87 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.[82]

6.88 Consumers remain able to access and control their eHealth records themselves, and access by a nominated representative is subject to any access controls set by the consumer.

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76 Department of Health, *EHealth–General Individuals FAQs* <www.ehealth.gov.au>.
77 *Personally Controlled Electronic Health Records Act 2012* (Cth) pt 4.
78 See, eg, Ibid s 61.
79 Ibid s 73.
80 Office of the Australian Information Commissioner, *Submission 90*.
81 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.
82 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7. In practice, notification is automatically generated by the system. The Secretary of the Department of Health is the System Operator.

6.89 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.[83]

6.90 A nominated representative must always act in the 'best interests' of the consumer, subject to the consumer's directions.[84] A consumer may have more than one nominated representative.[85]

'Authorised representatives'

6.91 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.

6.92 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.[86]

6.93 If there is no such person, the System Operator may appoint someone else if satisfied that the person is an appropriate person to be the authorised representative.[87] 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'.[88]

6.94 For the purposes of the PCEHR Act and the eHealth system, an authorised representative is treated as if they 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.[89]

6.95 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.[90] A consumer may have more than one authorised representative.[91]

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83 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.
84 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7(6).
85 Ibid s 7(5).
86 Ibid s 7(4).
87 Ibid s 6(4)(b).
88 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.
89 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 6(7).
90 Ibid s 6(9).
91 Ibid s 6(8).

The Commonwealth model and eHealth records

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

6.96 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.

6.97 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.

6.98 The ALRC does not prescribe any 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. This is more confined than, 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.

6.99 However, the existing PCEHR Act provisions concerning nominated and authorised representatives should be reviewed and amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model.

6.100 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.

6.101 Apart from adopting consistent terminology, changes to these nominated representatives provisions should 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.

6.102 Authorised representatives provide substitute decision-making concerning eHealth records and, therefore, perform a role analogous to that of 'representatives' in the Commonwealth decision-making model. Changes to these PCEHR Act provisions

should include incorporating the 'will, preferences and rights' approach to decision-making; the recommended guidelines for determining decision-making ability; and the recommended factors for determining whether a person or organisation is suitable for appointment.

6.103 There are 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 authorised representatives to be appointed without undue administrative complexity. The NSW Council for Intellectual Disability (NSWCID), for example, cautioned that if a decision-making system is not easy to understand and use,

> service agencies and health professionals will tend to either ignore the system or deny access to services to people with disability. For example, doctors are much less likely to embrace the system of eHealth records with their patients who have intellectual disability if the system for supported or representative decision making is complex. Similarly, complex decision making systems can unduly delay important exchange of information in relation to a person so that the person suffers detriment.[92]

6.104 There should be a balance between safeguards and avoiding undue administrative complexity so that mechanisms are

> proportionate to the situation. For example, there should be a straightforward process for a close family member to become the representative of a person for processes like Centrelink and eHealth records.[93]

6.105 The OAIC expressed concern that adopting the 'supporter' and 'representative' terminology in place of the current terminology could 'create confusion and additional complexities within the PCEHR system' because authorised and nominated representatives perform functions under the PCEHR Act that are not necessarily equivalent to the roles of supporters and representatives under the Commonwealth decision-making model.[94]

6.106 In the ALRC's view, it is important to encourage the implementation of supported decision-making in this area of Commonwealth responsibility but unnecessary formality should be avoided. Decisions under the PCEHR Act involve only the handling of personal information. Therefore, there may be a case for provisions that are more minimal than those recommended in the Commonwealth decision-making model.

6.107 The ALRC concludes that it would be better if the same terminology were used as in the NDIS scheme and social security, notwithstanding the more limited role of supporters and representatives under the PCEHR Act. The main objective is to ensure that consistent obligations are imposed, especially to consider the will, preferences and rights of the person being supported.

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92 NSW Council for Intellectual Disability, *Submission 131*.
93 Ibid.
94 Office of the Australian Information Commissioner, *Submission 132*.

6.108 The ALRC understands that at present, authorised representatives are generally the parents of persons under the age of 18, who wish their child to opt-in to the system. In this context, a review of the PCEHR has recommended transition to an 'opt-out' model for the PCEHR scheme.[95] Issues concerning the availability and obligations of representatives will take on a different character, if a representative is needed in order for someone to be able to opt-out of the scheme.

Information privacy

6.109 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.

6.110 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.[96] 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.[97] Generally, individuals are not bound by the *Privacy Act*.[98]

6.111 Privacy of health information may be a special concern for persons with disability. Health and genetic information is 'sensitive information' that is subject to stronger protection under the APPs.[99] Separate Commonwealth legislation protects healthcare identifiers[100] and eHealth records.[101]

6.112 The major issue for stakeholders was to ensure that personal information is able to be shared appropriately in order to support persons 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.[102]

6.113 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

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95 Subject, among other things, to the establishment of clear standards for compliance for clinical users: see 'Review of the Personally Controlled Electronic Health Record' (Final Report, Panel on Review of the Personally Controlled Electronic Health Record, 2013) 29, rec 13.

96 *Privacy Act 1988* (Cth) sch 1.

97 '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.

98 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).

99 *Privacy Act 1988* (Cth) s 6(1).

100 *Healthcare Identifiers Act 2010* (Cth).

101 *Personally Controlled Electronic Health Records Act 2012* (Cth).

102 National Disability Services, *Submission 49*.

sharing of information.[103] 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'.[104] 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.[105]

Individual decision-making and the *Privacy Act*

6.114 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.

6.115 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.[106]

6.116 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.[107]

6.117 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'.[108] Essentially, therefore, the NSW *Health Records and Information Privacy Act* provides recognition for representatives, but not for supporters, as those terms are used in this Report.

6.118 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

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103 Public Interest Advocacy Centre, *Submission 41*.
104 NSW Council for Intellectual Disability, *Submission 33*.
105 ADACAS, *Submission 29*.
106 *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'.
107 Ibid s 8(3).
108 Ibid s 8.

if the nominee were the individual'.[109] 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.[110]

6.119 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'.[111]

6.120 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.[112]

6.121 The ALRC's 2008 recommendations would have provided recognition for both supporters and representatives. 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 arrangements were seen as a convenient way for the decision-maker to be recognised for ongoing dealings with the agency or organisation.[113]

The Commonwealth model and the *Privacy Act*

Recommendation 6–4 The Australian Information Commissioner should develop guidelines consistent with the Commonwealth decision-making model describing the role of supporters and explaining how 'APP entities' should recognise the role of supporters in assisting people to exercise their rights under the *Privacy Act 1988* (Cth).

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109 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 70–1.
110 Ibid Rec 70–2.
111 Ibid [70.96].
112 See, eg, NSW Council for Intellectual Disability, *Submission 33*; ADACAS, *Submission 29*.
113 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [70.101].

6.122 Successive Australian Governments have not responded to the ALRC's recommendations concerning decision-making arrangements under the *Privacy Act*.[114] There seems good reason to revisit this issue in the context of the present Inquiry.

6.123 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 permitted by APP 6.[115]

6.124 There are concerns, however, that such arrangements are not implemented consistently, or recognised by agencies and organisations.[116] 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.[117]

6.125 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.[118] Other stakeholders referred to the desirability of uniform Commonwealth, state and territory privacy regulation.[119]

6.126 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.

6.127 There is a downside to this approach, however, 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. On the other hand, more informal arrangements may not be implemented consistently or recognised by APP

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114 Many other recommendations made in the 2008 privacy report were implemented following the enactment of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

115 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.

116 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [70.104].

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

118 The NSWCID referred to the *Health Records and Information Privacy Act 2002* (NSW) as a good model for dealing with 'incapacity issues': Ibid.

119 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 No 108 (2008) Recs 3–4, 3–5.

entities. Some form of legislative underpinning may be more effective in establishing recognition of supporters.

6.128 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.

6.129 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.

6.130 While there was some support for the Discussion Paper proposals,[120] the OAIC did not consider amendments to the *Privacy Act* are needed. In this context, the OAIC advised that it does not generally support amendments to the *Privacy Act* unless there is evidence that the difficulty encountered is as a result of the current legislative framework. It was suggested that 'non-legislative measures, such as improved guidance, should be favoured' and, if this approach were found to be insufficient,

> careful consideration would need to be given to the regulatory impact of any amendments to ensure that they do not introduce additional complexities for individuals and APP entities, and meet the objectives of the *Privacy Act* set out in s 2A.[121]

6.131 The *Privacy Act* does not prevent supported decision-making where the individual has provided consent to the arrangement. Where the assistance requires the supporter to have access to the personal information of the individual, the individual can provide consent for the APP entity to disclose the information to the supporter.[122] The OAIC considered that a consistent application of the Commonwealth supported decision-making model can be achieved through the development of specific and targeted guidance for APP entities.[123]

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120 National Mental Health Consumer & Carer Forum, *Submission 100*.

121 Office of the Australian Information Commissioner, *Submission 132*.

122 There are a number of other exceptions in the APPs, which permit the use and disclosure of an individual's personal information to a representative, including where the use or disclosure is required or authorised by law; where a permitted health situation exists and information is disclosed to a responsible person for an individual; and in certain situations where there is a serious threat to the life, health or safety of any individual, or to public health or safety: See *Privacy Act 1988* (Cth) ss 16A, 16B(5).

123 Office of the Australian Information Commissioner, *Submission 132*.

6.132 In the Discussion Paper, the ALRC proposed that the *Privacy Act* should permit APP entities to establish a supporters and representatives scheme, but stated that this should not be mandatory.[124]

6.133 APP entities need to retain the flexibility to develop practices and procedures consistent with their broader operations. Agencies and organisations are 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 needs to consider the extent to which it is able to recognise and act upon decisions made by a supporter.

6.134 Applying the Commonwealth decision-making model in the *Privacy Act* would differ from other contexts, in that provisions would apply potentially to an individual's relationships with the full range of APP entities—Commonwealth government agencies and private sector organisations—and have to be administered by them, rather than by a single agency, such as the NDIA or Centrelink.

6.135 The ALRC concludes that it is not necessary to amend the *Privacy Act* itself to encourage the recognition of supported decision-making in privacy regulation. To begin with, there is no case for allowing all APP entities to create mechanisms for appointing representatives, although they should have processes for recognising substitute decision-makers appointed under state or territory law.

6.136 As suggested by the OAIC, the preferable approach may be to encourage supported decision-making through guidelines describing the role of supporters and explaining how APP entities should recognise the role of supporters in assisting people to exercise their rights under the *Privacy Act*.

Banking services

6.137 Banking is another area of Commonwealth legislative responsibility,[125] in relation to which the application of the decision-making model might be considered. 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.[126]

6.138 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.

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124 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 6–4, [6.109].

125 See, eg, *Banking Act 1959* (Cth); *Australian Prudential Regulation Authority Act 1998* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth).

126 *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).

6.139 An issue in relation to banking is the refusal of some banks to allow persons 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.[127] 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.[128]

6.140 The ABA's Code of Banking Practice recognises the needs of older persons and customers with a disability to have access to transaction services and commits banks to taking reasonable measures to enhance their access to those services.[129] In addition, there are a number of industry standards and guidelines to assist banking accessibility. Individual banks have various customer service commitments, including Disability Action Plans and other service charters as well as policies, practices, business rules and product and service solutions to assist certain customers.[130]

6.141 The ABA issues other non-binding industry guidelines that are relevant to the ability of persons with disability to engage with the banking industry and to make decisions in that context.[131] In particular, the ABA has issued guidelines on responding to requests from a power of attorney or court-appointed administrator. These 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.[132]

6.142 The ABA guidelines note that it 'is not the role of bank staff (or a bank) to determine a customer's capacity'.[133] They outline the roles of administrators and guardians, how to recognise their authority, and highlight differences in the role, authority and responsibilities of guardians and administrators between jurisdictions.[134]

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127 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) 190.

128 Australian Bankers' Association, *Financial Abuse Prevention* (12 November 2013).

129 Australian Bankers' Association, *Code of Banking Practice* (2013) [7].

130 Australian Bankers' Association, *Submission 128*.

131 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.

132 Australian Bankers' Association Industry Guideline, *Responding to Requests from a Power of Attorney or Court-Appointed Administrator*, June 2013, 1.

133 Ibid 2.

134 Ibid 4–5, 7.

Encouraging supported decision making

Recommendation 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, consistent with other legal duties.

6.143 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 prefer 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.[135]

6.144 In the ALRC's view, people who need decision-making support should not necessarily have to access banking services only through an administrator or the holder of a power of attorney.

6.145 Submissions referred to difficulties faced by persons 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 persons 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 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

135 Ibid 6.

> concern about capacity and others cite an obligation to protect vulnerable people. When facing this problem some families decide to seek an administration order.[136]

6.146 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'.[137]

6.147 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]'.[138]

6.148 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.

6.149 The nomination of a supporter does not involve the limitations and protective formalities of, for example, a power of attorney.[139] 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.[140]

6.150 Nevertheless, there 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.

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136 Pave the Way, *Submission 09*.

137 Equal Opportunity Commission of South Australia, *Submission 28*. (Referring to *Jackson v Homestart Finance* [2013] SAEOT 13).

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

139 Eg, in relation to an appointment by written instrument, independent witnesses and so on.

140 Relevant legal obligations of banks include privacy laws, responsible lending obligations, duties of confidentiality towards customers, contractual obligations to act on the instructions of their customers or others formally appointed to act on behalf of the customer (attorneys or court-appointed administrators). Other legal obligations which restrict banks from dealing with others not formally appointed include identification requirements associated with anti-money laundering and counter-terrorist financing and obligations to protect customers from fraud, identity theft, financial abuse, and other potential security risks: Australian Bankers' Association, *Submission 128*.

6.151 The ALRC recommends 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.[141]

6.152 The new guidance should reflect the National Decision-Making Principles, including the Support Guidelines. 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.

6.153 The proposal in the Discussion Paper attracted some support from stakeholders.[142] The OPA (SA and Vic) supported the proposal and highlighted the importance of legally recognised supported decision-making arrangements in helping people 'to better and more easily deal with financial institutions, and other third parties'. This was said to be particularly important to 'obtaining and communicating often complex information which may be an otherwise difficult undertaking for a person with a cognitive impairment'.[143]

6.154 However, AGAC noted the 'very practical' risk of undue influence in banking transactions, if banks recognise supporters who do not have some formal status. AGAC considered that 'banks are highly unlikely to expose themselves to a contingent liability that would at least prima facie be so evident'.[144]

6.155 The ABA submitted that industry guidelines are not necessary to encourage banks to recognise supported decision making because banks have already 'implemented policies, practices, and business rules as well as provided products, services and tools as solutions to assist customers with special needs'.[145] Banks may, for example, provide facilities for co-signing, allowing designated others to conduct banking along with the account holder.

6.156 The ABA expressed concern about 'supported decision making or co-decision making arrangements that do not establish clear boundaries for all parties' and about customers entering arrangements with others, especially where customers breach their contract with the bank (for example, by disclosing PINs) or give up their consumer rights and protections.

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141 Australian Bankers' Association, *Code of Banking Practice* (2013) [7].
142 Advocacy for Inclusion, *Submission 126*; Offices of the Public Advocate (SA and Vic), *Submission 95*.
143 Offices of the Public Advocate (SA and Vic), *Submission 95*.
144 AGAC, *Submission 91*.
145 Australian Bankers' Association, *Submission 128*.

> The ABA believes that supported decision making or co-decision making may expose individuals to liability and legal risks, rather than provide them with greater financial independence and autonomy, decision making freedom and flexibility. Additionally, it is inappropriate for banks and other service providers to be expected to identify or determine the capacity of their customers. Banks are not in a position (or qualified) to establish (or question) whether a customer has capacity or not.[146]

6.157 On the other hand, the ABA confirmed that some banks have introduced 'product and service solutions to assist customers have supported decision making without exposing these customers, or their banks, to liability and legal risks'.[147] While some 'alternative and third party arrangements may present certain liability and legal risks' banks have taken these risks in order to assist their customers.[148]

6.158 These arrangements are consistent with the outcomes envisaged by the ALRC's recommendation for ABA guidelines encouraging supported decision-making. These state that banks should recognise supporters and respond to their requests, 'where possible and consistent with other legal duties'.[149]

6.159 In the ALRC's view, an ABA guideline and associated commentary could encourage banks to explore options for further developing forms of supported decision-making in a flexible way—for example, through contractual means. This should not be a disjuncture with current approaches, given banks are said to have 'already embedded the values of the National Decision-Making Principles into the way in which they deal with their customers'.[150]

146 Ibid.
147 The ABA referred to these as 'instituted supported decision making arrangements': Ibid.
148 Ibid.
149 Ibid.
150 Ibid.

7. Access to Justice

Contents

Summary

7.1 This chapter discusses issues concerning decision-making ability that have implications for access to justice. Persons with disability may be involved in court processes in a number of different roles, including as parties and witnesses in criminal and civil proceedings.

7.2 In this chapter, the ALRC examines a range of Commonwealth laws and legal frameworks affecting people involved in court proceedings.[1] The issues discussed affect people as:

1 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.

- defendants in criminal proceedings—the concept of unfitness to stand trial;
- parties to civil proceedings—the appointment and role of litigation representatives;
- witnesses in criminal or civil proceedings—giving evidence as a witness, and consenting to the taking of forensic samples; and
- potential jurors—qualification for jury service.

7.3 In each of these areas there are existing tests of a person's capacity to exercise legal rights or to participate in legal processes. The ALRC recommends that these tests should be reformed consistently with the National Decision-Making Principles, based on art 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and other sources.[2]

7.4 Generally, the ALRC recommends that these tests be reformulated to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all. By providing models in Commonwealth laws, the ALRC also seeks to inform and provide a catalyst for reform of state and territory laws.

7.5 An important theme is the tension between laws that are intended to operate in a 'protective' manner—for example, in order to ensure a fair trial—and increasing demands for equal participation, in legal processes, of persons who require decision-making support.

Access to justice issues

7.6 A range of personal and systemic issues may affect the ability of persons with disabilities to participate fully in court processes. These include:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;[3]
- 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.[4]

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2 See Ch 3.

3 See, eg, Law Council of Australia, *Submission 142*. 'The Law Council considers that lack of 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, particularly people with disabilities'.

4 See, eg, 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.

7.7 Article 13 of the 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.

7.8 In its 2014 report, *Equal Before the Law: Towards Disability Justice Strategies*,[5] the Australian Human Rights Commission (AHRC) identified the barriers people with disabilities face in achieving equality in the criminal justice system. 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.
> - 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.[6]

7.9 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 rather than, for example, on how and by whom such support should be provided and funded.

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5 'Equal Before the Law: Towards Disability Justice Strategies' (Australian Human Rights Commission, 2014).

6 Ibid 7.

7.10 Legal reform is likely to have limited practical impact if people do not have access to the support necessary to enable them to participate in legal processes. Further, under the CRPD, Commonwealth, state and territory governments have an obligation to provide support to people with disability to assist them in decision-making.[7]

7.11 The significance of the availability of support was emphasised by stakeholders. The Offices of the Public Advocate (South Australia and Victoria) (OPA (SA and Vic)) submitted that the 'foremost concern' in relation to access to justice is 'the lack of support available for people with cognitive impairment currently accessing and interacting with the justice system'.[8]

7.12 National Disability Services (NDS) said that reform to encourage supported decision-making makes it 'imperative for the justice system to draw on disability expertise in decision support and adjustments' such as:

- interviewing techniques that address issues associated with recall of information or a propensity to be led by authorities;
- assistive technology and techniques that addresses communication barriers; and
- support to address circumstances where there are reduced social networks and fear of retribution if experiencing carer abuse.[9]

Eligibility to stand trial

7.13 In the ALRC's view, the current legal test for unfitness to stand trial needs to be reformed to avoid unfairness and maintain the integrity of criminal trials, while ensuring that people with disability are entitled to equal recognition before the law, and to participate fully in legal processes.

7.14 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 incapable of doing so could lead to an inaccurate verdict;
- 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

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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) art 12(3).

8 Offices of the Public Advocate (SA and Vic), *Submission 95*. 'For example, our experience is that accommodation for people with disabilities in court processes such as cross-examination is not being made'. The OPA (SA and Vic) considered a 'comprehensive Disability Justice Plan is required, that considers the needs of people with disability who are victims, witnesses and offenders, across civil and criminal law'.

9 National Disability Services, *Submission 92*.

- avoid unfairness—it would be unfair or inhumane to subject someone to the trial process who is unfit.[10]

7.15 Also, the Law Commission of England and Wales (Law Commission) has observed 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'.[11]

7.16 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.[12] If the issue is raised by the prosecution, and contested, then the issue must be proved beyond reasonable doubt.[13] In addition, some Australian jurisdictions have enacted express statutory presumptions of fitness.[14]

The test of unfitness

7.17 The presumption of fitness means that it is more correct to refer to a test of 'unfitness' to stand trial.[15] 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.[16]

7.18 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 to make an adequate defence.[17] 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;

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10 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.

11 '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.

12 *R v Podola* [1960] 1 QB 325. QAI 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*.

13 *R v Robertson* (1968) 3 All ER 557.

14 Eg, *Criminal Law Consolidation Act 1935* (SA) s 269I; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 7(1); *Crimes Act 1900* (ACT) s 312. The Commonwealth has not enacted such a statutory presumption: *Crimes Act 1914* (Cth) s 20B.

15 See, eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 53.

16 See, Thomson Reuters, *The Laws of Australia* [9.3.1960].

17 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].

- 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.[18]

7.19 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,[19] and too little emphasis on a person's decision-making ability. The rules on unfitness to stand trial are characterised as 'protective'[20]—ensuring that a person cannot be tried for a crime unless capable of defending themselves.

7.20 However, in practice, the rules can lead to adverse outcomes for individuals found unfit to stand trial, who may be subject to detention, for an uncertain period, in prison or in secure hospital facilities.[21] 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.

7.21 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'.[22]

> 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 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.[23]

7.22 In some cases, the defendant's interests may not be served in being found unfit to stand trial if the outcome is that they are 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.[24]

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18 *R v Presser* [1958] VR 45.

19 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.

20 Thomson Reuters, *The Laws of Australia* [9.3.1950].

21 Although most jurisdictions have legislated to divert such people away from the criminal justice system: See Ibid [9.3.2010]–[9.3.2030].

22 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.

23 Ibid.

24 Office of Public Prosecutions Victoria, Submission No 8 to Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990* (Vic), 2013.

> 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.[25]

7.23 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;[26]
- the test is difficult to apply to defendants with mental illness because the criteria were not designed for them;[27]
- 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.[28]

7.24 The Victorian Law Reform Commission (VLRC) has conducted a review of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) (CMI Act).[29] This review included consideration of the *Presser* test, which is incorporated in the CMI Act.[30]

7.25 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.[31]

7.26 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.[32]

7.27 Similar questions are being examined by the Law Commission.[33] In its 2010 Consultation Paper, 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

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25 Ibid. For such people, a higher threshold of unfitness to stand trial may therefore be advantageous.
26 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 27.
27 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.
28 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 28.
29 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report 28 (2014).
30 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 6.
31 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.
32 Ibid Questions 1–7.
33 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010); Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014). A final report is expected in 2015.

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':[34]

> 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.[35]

7.28 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.[36]

7.29 The Law Commission proposed a new test, under which a defendant would 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,
>
> (3) to use or weigh that information as part of decision making process, or
>
> (4) to communicate his or her decisions.[37]

7.30 In its 2014 Issues Paper, the Law Commission stated that there appeared to be 'considerable support from legal and clinical practitioners for a legal test which incorporates both effective participation and decision-making capacity'.[38] It asked a number of further questions—which serve to illustrate the complexity of law reform in this area—including whether:

- a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation;
- a 'participation test … with an additional decision-making capacity limb' would represent the most appropriate formulation for such a combined legal test;
- incorporating 'an exhaustive list of decisions for which the defendant requires capacity' would assist in maintaining the threshold for unfitness at a suitable level; and

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34 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Provisional Proposal 1.

35 Ibid Proposal 3.

36 Ibid Proposal 4.

37 Ibid 54. The Law Commission anticipated that if a person meets its proposed test, the person would also satisfy the requirements of the existing test, based on the criteria in *R v Pritchard* (1836) 173 ER 135. This is because the common law criteria set a higher threshold for unfitness to stand trial than a test based on decision-making ability: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 62.

38 Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014) 11.

- a 'diagnostic threshold' would be unlikely to assist in maintaining the threshold of unfitness at a suitable level.[39]

7.31 In contrast, the NSW Law Reform Commission (NSWLRC) recommended, in 2013, that the common law criteria for unfitness to stand trial[40] should not be fundamentally changed. In response to stakeholder concerns, it recommended that the standards simply be updated and incorporated into statute,[41] as in most Australian jurisdictions.[42]

7.32 However, 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.[43] 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'.[44]

7.33 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.[45]

7.34 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:

> 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.[46]

Assistance and support

7.35 Existing tests of unfitness to stand trial do not consider the possible role of assistance and support for defendants.

7.36 The Law Commission proposed that decision-making capacity should be assessed with a view to ascertaining whether a defendant could stand trial 'with the

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39 Ibid 12–14.
40 As represented by the *R v Presser* standards.
41 In the *Mental Health (Forensic Provisions) Act 1990* (NSW).
42 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.
43 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.
44 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.
45 Ibid xvi.
46 Ibid 26.

assistance of special measures and where any other reasonable adjustments have been made'.[47] 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.[48]

7.37 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'.[49]

7.38 In its Issues Paper, the Law Commission stated that the 'incorporation of special measures into the legal test received significant support from legal practitioners, clinicians and representative groups'.[50]

7.39 In this context, issues concerning the availability and resourcing of support were highlighted. The Law Commission asked whether it would be 'desirable and practicable for defendants to have a statutory entitlement to the support of a registered intermediary' for the proceedings, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial.[51]

7.40 The NSWLRC made a similar recommendation about the role of modifications to trial processes in assessing unfitness. 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.[52]

Reform of the test

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

(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;

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47 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Provisional Proposal 5.

48 Ibid.

49 Ibid 88.

50 Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014) 25.

51 Ibid 29.

52 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.

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

(d) communicate the decisions in some way.

7.41 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.[53]

7.42 This comes close to requiring that a person must be considered as lacking capacity on the basis of having an (intellectual) disability—and is therefore inconsistent with the approach taken by the CRPD and the National Decision-Making Principles. Rather, any test for eligibility 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—that is, a functional approach.

7.43 It is not practicable to completely do away with functional tests of ability that have consequences for participation in some legal processes. Even where a person has clearly expressed a will and preference to be subject to a criminal trial, the integrity of the trial (and, arguably, the criminal law itself) would be prejudiced if the person does not have the ability to understand and participate in a meaningful way.

7.44 In the Discussion Paper, the ALRC proposed a test similar to that originally suggested by the Law Commission. The Law Commission's formulation 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.[54]

7.45 Interestingly, similar conclusions about the primary importance of decision-making ability in this context 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[55] and the effective participation of defendants.[56]

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53 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 38.

54 *Mental Capacity Act 2005* (UK) s 3.

55 See, 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.

56 See, eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

7.46 The VLRC explained the way in which such a new test might operate in practice for people with disability:[57]

> 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.[58]

7.47 The general approach proposed by the ALRC received support from some stakeholders,[59] subject to reservations. The Law Council of Australia (Law Council), for example, agreed with the ALRC's proposed functional test, but considered that the term 'rationally' should be included to condition its elements. This was seen as necessary to cover the situation where, for example, a person is able to understand information and use it in a decision-making process, but the process itself is not rational. Arguably, some level of rationality is implicit in the ideas of understanding, using and weighing information. However, referring expressly to the concept of rationality may lead to a person's decision-making ability being assessed on its likely outcome, which would be inconsistent with the National Decision-Making Principles.

7.48 The Queensland Law Society submitted that the 'basic definition of capacity should remain, with any evidence of diagnosis and the impact on a person's understanding, memory and reasoning process to be used as evidence'.[60]

7.49 A formulation based on decision-making ability may operate too widely because it may have 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

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57 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.

58 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 60.

59 Law Council of Australia, *Submission 142*; NACLC and PWDA, *Submission 134*; KinCare Services, *Submission 112*; National Mental Health Consumer & Carer Forum, *Submission 100*; Offices of the Public Advocate (SA and Vic), *Submission 95*.

60 Qld Law Society, *Submission 103*.

example, because of stress, overwhelming tiredness or poor education or social background'.[61]

7.50 For this reason, some commentators have suggested that the test should include some threshold requirement that, for example, impaired decision-making ability is due to 'mental or physical illness, whether temporary or permanent',[62] or some clinically recognised condition.[63]

7.51 In the Discussion Paper, the ALRC asked what other elements should be included in any new test of eligibility to stand trial—including, whether there should be some threshold requirement that unfitness be due to some clinically-recognised mental impairment.[64]

7.52 Dr Fleur Beaupert, Dr Piers Gooding and Linda Steele submitted that, if legal tests are based on decision-making ability (which they opposed) there should be no threshold requirement. Such an approach would 'negatively impact on the realisation of legal capacity because it is not focused on the needs, wishes and views of the individual'. Rather, determinations of eligibility to stand trial

> will inevitably hinge on assessments carried out by clinicians such as psychologists, psychiatrists and neuropsychologists—similar to existing approaches to assessing a person's capacity and risk level for the purposes of mental health and guardianship laws.[65]

7.53 An obvious problem with a threshold based on any concept of mental impairment is that some people who are clearly unsuitable to stand trial would not be captured by the test—for example, a person with a physical illness may not be able to follow the course of a trial, but would not necessarily have a definable mental impairment—although there are processes to postpone trials on compassionate grounds.

7.54 In the Discussion Paper, the ALRC proposed that the new test of eligibility to stand trial be implemented through rules of court. However, because rules of court generally reflect, and are consistent with, the common law, legislation seems necessary to implement this change.

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61 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 61.

62 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.

63 Scottish Law Commission, *Insanity and Diminished Responsibility*, Discussion Paper No 122 (2003) 49.

64 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 7–1.

65 F Beaupert, P Gooding and L Steele, *Submission 123*. However, clinicians might play a role in assessing a person's support needs and providing support to people with disabilities provided the provision of support is not 'narrowly focused around medical-therapeutic interventions' and includes 'measures that address social, economic, cultural and systemic barriers to the exercise of legal capacity'. Other stakeholders also expressed concern about any undue emphasis on clinical reports Vicdeaf, *Submission 125*. KinCare submitted that unfitness should 'be determined through assessment of mental (cognitive) impairment': eg KinCare Services, *Submission 112*.

The role of support

7.55 The National Association of Community Legal Centres and People with Disability Australia (NACLC and PWDA) submitted that the focus of the test should be on the adequacy of the supports available to the individual to enable them to express their will and preference and, as a result, participate in the legal process.[66]

7.56 The wording of the ALRC's recommendation concerning the test for eligibility to stand trial, as set out above, now explicitly incorporates the concept of support. It is desirable, as much as possible, to 'shift the emphasis to an assessment of the supports that are available to a person, rather than an assessment of the person'[67]—but does not remove a threshold functional requirement.

7.57 This aspect of the recommendation reflects the National Decision-Making Principles in that any assessment of decision-making ability should be considered in the context of available support.

7.58 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.[68]

7.59 In practice, resources may be too limited to support a defendant who needs decision-making support through a criminal trial.

7.60 If the available support is taken into account in determining eligibility to stand trial, in some circumstances, this may be seen as working against equality before the law. That is, a person with support may be able to stand trial but another, with similar ability but without support, may not be tried.[69] The OPA (SA and Vic), while supporting the ALRC's proposal, anticipated that 'inequities will arise in relation to the quality of support provided and potentially inconsistent application' of determinations about decision-making ability. The Law Council also agreed with the proposal in principle, but expressed concerns that taking into account the 'support available to a person who would otherwise be determined unfit to stand trial may water down the test for unfitness' and the practical difficulties associated with avoiding undue influence.[70]

7.61 Stakeholders also recognised that, while a new test based on decision-making ability would be fairer and more principled than the existing 'status-based' test, it may

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66 NACLC and PWDA, *Submission 134*.

67 Ibid.

68 Victorian Institute of Forensic Mental Health, Submission No 19 to Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990* (Vic), 2013.

69 Of course, as discussed below, it may or may not be in the interests of the defendant to be found unfit to stand trial.

70 Law Council of Australia, *Submission 142*.

be even more difficult to apply in practice—for example, experts may need to advise on a defendant's decision-making ability in the light of the nature and complexity of the particular decisions the defendant is likely to face.

7.62 The ALRC recognises that the new test of eligibility to stand trial raises many issues that may need to be resolved before implementation, including in relation to the process for determining eligibility.

7.63 As discussed below, if the matter is being heard in a state or territory court, the issue would be determined in accordance with the procedures applicable under state or territory law.[71] The VLRC final report may provide leads for law reform in this area, as it considered how the process for determining unfitness to stand trial can be improved.[72] The Law Commission of England and Wales is also continuing to examine what evidential requirements might form part of assessing unfitness to stand trial, including in relation to expert medical advice.[73]

7.64 The recommended test would introduce into the *Crimes Act 1914* (Cth) a new test of when a person is not able to stand trial. The test is consistent with the National Decision-Making Principles and associated Guidelines. There seems no need to retain the language of 'fitness' or 'unfitness', which could be considered pejorative in the current context. The question is simply whether or not a person can be required, or is entitled, to stand trial for a criminal offence.

7.65 Other provisions of the *Crimes Act* dealing with unfitness to stand trial should also be reviewed for consistency with the new test of eligibility to stand trial. For example, s 20BB sets out procedures for dealing with persons who have been found unfit to be tried, but likely to become fit within 12 months. These provisions will also need amendment to ensure that eligibility to stand trial can be re-assessed if forms of support become available that may enable the person to meet the test.

Modelling in Commonwealth law

7.66 The ALRC recommends 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.[74]

7.67 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.[75]

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71 *Kesavarajah v R* (1994) 181 CLR 230.

72 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report 28 (2014).

73 Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014) 30–36.

74 *Crimes Act 1914* (Cth) ss 20B–20BI.

75 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).

7.68 The *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions.[76] The Act makes specific provision for the exercise of federal criminal jurisdiction by both state and territory courts.[77] 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.[78]

7.69 Essentially this means that, even if the *Crimes Act* were amended to introduce a new test of eligibility 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.[79]

7.70 The ALRC nevertheless considers that modelling a new approach to eligibility to stand trial in Commonwealth law will provide an opportunity to guide law reform at state and territory level and reflect a new approach to determining decision-making ability in criminal justice settings.

Limits on detention

Recommendation 7–2 State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for:

(a) limits on the period of detention that can be imposed; and

(b) regular periodic review of detention orders.

7.71 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.

7.72 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).[80] Many of these issues do not directly concern decision-making or were too specific to a particular jurisdiction to be considered in this Inquiry.[81]

7.73 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

76 *Judiciary Act 1903* (Cth) s 39(2).
77 Ibid s 68(2).
78 Ibid ss 68(1), 79.
79 *Kesavarajah v R* (1994) 181 CLR 230.
80 Queensland Advocacy Incorporated, *Submission 45*.
81 Eg, concerns that Queensland law makes no provision for unfitness to stand trial in relation to summary offences: Qld Law Society, *Submission 53*.

Fulton.[82] These concerns have led the AHRC to call for a national audit of people held in prison after being found unfit to stand trial.[83]

7.74 The Safeguards Guidelines recommended 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.

7.75 The consequences of a determination that a federal offender is unfit are set out in the *Crimes Act*.[84] 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.[85] 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.[86]

7.76 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.[87]

7.77 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.[88] Otherwise, the court must determine, after considering medical

82 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 because of his intellectual disability. Rosie Anne Fulton was held in Kalgoorlie prison for 21 months after being charged with crimes related to a motor vehicle and being found unfit to stand trial due to her cognitive impairment due to foetal alcohol syndrome. 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>. After public outcry, the WA and NT governments reached an agreement that saw Fulton released into community care in Alice Springs.

83 Australian Human Rights Commission, *Jailed without Conviction: Commissioners Call for Audit* <www.humanrights.gov.au>.

84 *Crimes Act 1914* (Cth) pt IB div 6.

85 *Australian Constitution* s 109.

86 *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*.

87 *Crimes Act 1914* (Cth) s 20B(1).

88 Ibid s 20BA(2).

reports, whether, on the balance of probabilities, the person will become fit to be tried within 12 months.[89]

7.78 The court may order a person to be detained in a hospital if they are likely to become fit to be tried within 12 months. 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.[90]

7.79 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.[91] 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.[92]

7.80 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.[93] 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.[94]

7.81 These provisions of the *Crimes Act* were inserted in 1989.[95] 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.

7.82 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;[96]
- 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';[97] and

89 Ibid s 20BA(4)–(5).
90 Ibid s 20BB(2).
91 Ibid s 20BC(2).
92 Ibid s 20BC(5).
93 Ibid s 20BD.
94 Ibid s 20BE.
95 *Crimes Legislation Amendment Act (No 2) 1989* (Cth).
96 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19.
97 *Criminal Code Act 1983* (NT) sch 1, s 43ZC.

- in Victoria, custodial supervision orders are for an indefinite period,[98] although the CMI Act also requires the court to set a 'nominal term' for the purposes of review.[99]

7.83 Data from Tasmania's Forensic Tribunal is said to illustrate that, for forensic patients placed on a mental health order for offences other than murder, the period of detention under an order is substantially longer than it would have been if they had been found guilty of the offence.[100]

7.84 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, by the Attorney-General.

7.85 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'.[101]

7.86 Regular periodic review of detention orders is also essential. For example, in Victoria, the CMI Act 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.[102]

7.87 Stakeholders said limits should be placed on the period of detention, within the criminal justice and corrective services systems, of people found unfit to stand trial.[103] The Illawarra Forum stated that, 'if a person is determined unfit to stand trial, they should not be incarcerated at all without due process'.[104]

7.88 Most jurisdictions do provide 'special hearings' as a means for determining the criminal responsibility of a person who has been found unfit to stand trial.[105] The Commonwealth *Crimes Act* provides that, where there has been a preliminary finding that a person is unfit to be tried,[106] the court must determine whether there has been established a prima facie case that the person committed the offence concerned.[107]

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98 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27.
99 Ibid s 28. The nominal terms are generally equivalent to the maximum term of imprisonment available for the offence.
100 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.
101 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 35.
102 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 431.
103 NACLC and PWDA, *Submission 134*; People with Disabilities WA and Centre for Human Rights Education, *Submission 133*; Illawarra Forum, *Submission 124*; Offices of the Public Advocate (SA and Vic), *Submission 95*.
104 Illawarra Forum, *Submission 124*.
105 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 15.
106 For a federal offence, on indictment.
107 *Crimes Act 1914* (Cth) s 20B.

Where the court determines that there is a prima facie case, the court must either dismiss the charge or finally determine the person's fitness within 12 months.[108]

7.89 People with Disabilities WA and the Centre for Human Rights Education expressed concern that 'significant numbers of Aboriginal people with cognitive impairment are indefinitely incarcerated in prisons in some Australian states, including WA'.[109] It was suggested that community based alternatives to detention should be considered as far as possible.[110]

7.90 In the Discussion Paper, the ALRC proposed that 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 and for regular periodic review of detention orders.[111] The Law Council suggested that the period of detention should be stated as not exceeding 'the period for which a court determines the individual would have been detained if convicted, bearing in mind all the circumstances which the court would have taken into account in sentencing the individual'.[112]

7.91 The ALRC agrees that limits on the period of detention should be set by reference to the period of imprisonment likely to have been imposed, if the person had been convicted of the offence charged. If they are 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.[113] The framework for detention and supervision orders should be flexible enough to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restriction of rights.

Conducting civil litigation

7.92 At common law, the capacity test for a person to participate in civil proceedings is the same as the test for a person to enter into legal transactions.[114] There is a presumption of capacity 'unless and until the contrary is proved'.[115]

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108 Ibid s 20BA.

109 PWDA/CHRE observed that the Declared Places (Mentally Impaired Accused) Bill 2013 (WA), which remains before the WA Parliament, provides for the establishment of 'declared places' other than prison where people found unfit to plead can be detained: People with Disabilities WA and Centre for Human Rights Education, *Submission 133*.

110 Ibid. As recommended in a 2014 report by the WA Office of the Inspector of Custodial Services: 'Mentally Impaired Accused on "Custody Orders": Not Guilty, but Incarcerated Indefinitely' (Government of Western Australia, Office of the Inspector of Custodial Services, 2014).

111 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 7–3.

112 Law Council of Australia, *Submission 142*.

113 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.

114 *Goddard Elliot v Fritsch* [2012] VSC 87, [555].

115 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [26].

7.93 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.[116]

7.94 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.[117]

7.95 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'.[118]

Litigation representatives

Recommendation 7–3 The *Federal Court of Australia Act 1976* (Cth), *Family Law Act 1975* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) should provide that a person needs a litigation representative if the person cannot be supported to:

(a) understand the information relevant to the decisions that they will have to make in conducting proceedings, including in giving instructions to their legal practitioner;

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

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

(d) communicate the decisions in some way.

7.96 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.[119] The ALRC chose 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 use of the term 'representative' elsewhere in this Report—notably, in relation to 'supporters' and 'representatives' in Chapter 4.

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116 *Goddard Elliot v Fritsch* [2012] VSC 87, [557].

117 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 52.

118 *Goddard Elliot v Fritsch* [2012] VSC 87, [558].

119 The term 'litigation guardian' is used in the rules of High Court and Federal Circuit Court, 'litigation representative' in the Federal Court and 'case guardian' in the Family Court.

7.97 In broad terms, a litigation representative acts in the place of the person and is responsible for the conduct of the proceedings.[120] The circumstances in which a litigation representative must be appointed are established at common law. The rules of federal courts make express provision for litigation representatives. Under these rules, a person may be assessed as needing a litigation representative if the person:

- is 'under disability' (High Court);[121]
- 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);[122]
- 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);[123]
- '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).[124]

7.98 The rules of federal courts make provision for the appointment, removal and conduct of litigation representatives. 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.

7.99 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.

7.100 The ALRC recommends that—as with the new test in relation to criminal proceedings—the law concerning the appointment of litigation representatives should be consistent with the National Decision-Making Principles and associated Guidelines.

7.101 Leaving aside the question of support, there is little difference between this recommendation and the position that applies at common law in determining whether a person has capacity to conduct civil litigation.[125]

7.102 However, the way in which some federal court rules are drafted appears inappropriate and does not fit with contemporary conceptualisations of capacity and

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120 The Law Council supported this 'harmonisation of terminology': Law Council of Australia, *Submission 142*.

121 *High Court Rules 2004* (Cth) r 20.08.

122 *Federal Court Rules 2011* (Cth) r 9.61, Dictionary.

123 *Family Law Rules 2004* (Cth) r 6.08, Dictionary.

124 *Federal Circuit Court Rules 2001* (Cth) r 11.08.

125 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.

disability. In particular, some rules seem to adopt elements of a 'status-based' approach that is inconsistent with the CRPD, and references to incapacity and disability should be removed. The rules should reflect a focus on a person's ability to conduct litigation in the particular proceedings, rather than whether they have a 'disability'.

7.103 The Support Guidelines recognise that ability should be assessed by reference to the decision to be made, and that ability may evolve or fluctuate over time. Consistently, orders appointing a litigation representative may be varied—for example, where the court has evidence that a person originally assessed as needing a representative due to mental illness is found to have recovered sufficiently to be able to give instructions.[126]

7.104 Some stakeholders expressed concern at the similar test proposed in the Discussion Paper. The Federal Court of Australia observed that 'greater participation in proceedings before the Court by litigants with impaired decision-making ability would impose an additional burden on the Court'. The Court stated that:

> This could quickly become unmanageable, particularly in an environment of increased participation of self-represented litigants generally, diminishing resources and increasing workload and complexity of litigation.[127]

7.105 The Law Council submitted that the proposed test focused 'too narrowly on the disabled person's direct engagement with the legal process, and does not address the capability or otherwise of the disabled person to instruct legal practitioners'.[128] It is implicit that the decisions a person 'will have to make in the course of the proceedings' would include decisions about how to instruct legal practitioners, the recommendation now expressly incorporates this element.

7.106 Other stakeholders supported reform along the lines proposed. Justice Connect and Seniors Rights Victoria (Justice Connect), for example, stated that they supported a 'move away from a status based approach to incapacity which is inconsistent with the CRPD towards a decision specific approach'. However, they counselled that it is important to retain an objective element in the test—that is, it should be necessary for there to be 'some sort of cognitive or mental impairment' because otherwise

> there is a very real risk that the appointment of a substitute decision maker will be made in circumstances where a person is perceived to be making risky or unwise decisions. It can be difficult to divorce the 'quality' of a decision from the process of making the decision, which can have the effect of denying an older person the dignity of risk. This is particularly relevant for older people who receive formal care. In our experience, service providers are often concerned about breaching their duty of care owed to the older person when the older person makes decisions that may be deemed unsafe or unwise.[129]

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126 Federal Circuit Court of Australia, *Submission 140*.

127 Federal Court of Australia, *Submission 138*.

128 Law Council of Australia, *Submission 142*. Noting that the test for assessing a person's need for a litigation representative, in the rules of the Family Court and the Federal Circuit Court, refers to a person's ability to 'conduct' the proceeding, and 'give adequate instruction for the conduct' of the proceeding.

129 Justice Connect and Seniors Rights Victoria, *Submission 120*.

7.107 The Law Institute of Victoria (LIV) considered that the requirement for evidence of cognitive impairment is an important safeguard, because evidence of a causal link between decision-making ability and some form of cognitive impairment is 'important to protect the right of individuals with capacity to make unwise or risky decisions'.[130] The ALRC is not convinced that such a threshold is desirable and is concerned that it would leave open a return to status-based approaches to decision-making ability.

7.108 The Federal Circuit Court of Australia suggested that an understanding of the 'possible consequences' of the proceedings should be included in the test [131] but, in the ALRC's view, this is encompassed adequately by the reference to using or weighing information 'as part of a decision-making process'.

The role of support

7.109 A more significant change than the new 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. The wording of the ALRC's recommendation concerning the test for eligibility to stand trial now explicitly incorporates the concept of support.

7.110 Existing law does 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 concept can be seen as a manifestation of the current common law approach of assessing capacity in the context of the particular transaction or proceedings.[132]

7.111 Implementation of this recommendation would more likely than not result in more people being involved in civil litigation without having a litigation representative formally appointed—assuming support is available.

7.112 The Law Council's Family Law Section advised that the requirement to consider available support is 'likely to result in more protracted and costly litigation for all parties, particularly in family law matters'. The Law Council expressed concern that 'limited court resourcing, chronic underfunding of legal aid and rising costs of litigation present serious practical barriers to the implementation' of the recommendation.[133]

7.113 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'.[134] From some perspectives this reform may be seen as making the resolution of some disputes less 'efficient'.

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130 Law Institute of Victoria, *Submission 129*.
131 Federal Circuit Court of Australia, *Submission 140*.
132 In the Discussion Paper, the ALRC proposed that the new test for the appointment of a litigation representative be implemented through rules of court. Again, however, because rules of court generally reflect and are consistent with the common law, legislation seems necessary to implement this change.
133 Law Council of Australia, *Submission 142*.
134 *Federal Court of Australia Act 1976* (Cth) s 37M.

7.114 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. For example, the Federal Circuit Court observed that, in courts where there is an emphasis on negotiation and the use of alternative dispute resolution,

> representatives of other parties may have difficulty in dealing with a person who is unable to understand the nature and possible consequences of the proceeding or any offer of compromise that might be had.[135]

7.115 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. In this context, there are parallels with the well-documented problems faced by unrepresented litigants in civil justice settings; and the challenges for courts in dealing with such litigants.[136]

7.116 In the ALRC's view, concerns about efficiency are outweighed by the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings. As discussed below, additional resources may be needed to enable supported decision-making to operate.

The role of litigation representatives

Recommendation 7–4 The *Federal Court of Australia Act 1976* (Cth), *Family Law Act 1975* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) should provide that litigation representatives must:

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

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

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

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

Recommendation 7–5 Federal courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

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135 Federal Circuit Court of Australia, *Submission 140*.

136 See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [5.148]–[5.157]; 'Access to Justice Arrangements' (Draft Report, Productivity Commission, 2014) ch 14.

7.117 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);[137]
- 'A person under a legal incapacity may start, or defend, a proceeding only by the person's litigation representative' (Federal Court);[138]
- 'A person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian' (Family Court);[139]
- '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).[140]

7.118 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 see that every proper and legitimate step for that person's representation is taken'[141]—which seems akin to a 'best interests' test.

7.119 At present, 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).

7.120 The Hon Chief Justice Diana Bryant AO of the Family Court of Australia 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*.[142]

7.121 Clearly, this is a departure from the preferred will and preferences approach to supported decision-making recommended 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'.[143]

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137 *High Court Rules 2004* (Cth) r 21.08.1.
138 *Federal Court Rules 2011* (Cth) r 9.61.
139 *Family Law Rules 2004* (Cth) r 11.09.
140 *Federal Circuit Court Rules 2001* (Cth) r 6.08.
141 *Read v Read* [1944] SASR 26, 28.
142 Quoting *Anton & Malitsa* [2009] FamCA 623, [2]: D Bryant, *Submission 22* (emphasis added).
143 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [25].

7.122 Case law also emphasises concerns about protecting the rights of the other parties in the litigation. It has been said that requiring a litigation representative to conduct litigation 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'.[144]

7.123 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.[145] To this end, legislation should provide that, in making decisions, litigation representatives have a duty to consider the will, preferences and rights of the person represented; and to promote their personal, social and financial wellbeing.

7.124 A number of stakeholders expressly supported the ALRC's proposal concerning the duties of litigation representatives.[146] NACLC and PWDA observed that the proposal would work to encourage supported decision-making and the shift from 'best interests' to 'will, preferences and rights' decision-making. The Law Council recognised that the duties promote the optimal participation of represented persons in litigation, but expressed concern that additional duties and responsibilities may act as a disincentive to potential litigation representatives.[147]

7.125 The Federal Circuit Court observed that, in the context of parenting matters, where the best interests of the child are the paramount consideration, 'it places a considerable burden on the litigation guardian should the wishes of the litigant be clearly contrary' to those best interests.[148]

7.126 The Law Council agreed that court practice notes explaining the duties of litigation representatives would be desirable, because there is 'a real likelihood of conflict of interest arising between a lay representative and the person they represent, particularly where they are related to the person they represent'.[149] In particular, in family law proceedings, the likelihood that a litigation representative is also a family member of the person represented means that possible conflicts of interest may arise.

7.127 The Federal Court expressed concern that the proposal may not give adequate weight to the important role litigation representatives have in 'protecting both other parties to the litigation and the process of the court'.[150] A practice note, as recommended above, could help address issues concerning litigation representatives' duties to the court.

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144 *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511, [31], [65].

145 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 recommendations with respect to the duties of case guardians representing children in Family Court proceedings.

146 NACLC and PWDA, *Submission 134*; Australian Research Network on Law and Ageing, *Submission 102*.

147 Law Council of Australia, *Submission 142*.

148 Federal Circuit Court of Australia, *Submission 140*.

149 Law Council of Australia, *Submission 142*.

150 Federal Court of Australia, *Submission 138*.

7.128 The LIV supported clarification of the scope of the role and duties of litigation representatives, noting the 'complexity arising from numerous court rules which establish different requirements and processes'.[151] At a roundtable hosted by the LIV, participants suggested that guidelines should be developed to assist litigation representatives, with a focus on:

- What the role of litigation guardian involves;
- The extent to which the litigation guardian should actively participate in the development of the represented person's case;
- Setting out activities which a litigation guardian may undertake, for example, obtaining reports to assist with the case or making contact with service providers;
- The ability of litigation guardians to challenge their lawyer in ways that any litigant may challenge their lawyer;
- The authority of a litigation guardian to change their lawyer;
- Whether the litigation guardian needs to act through a lawyer when the litigation guardian is a lawyer; and
- Whether settlement or consent orders need to be approved by the presiding Court.[152]

Appointing litigation representatives

7.129 In the ALRC's view, the availability of support (and supporters and representatives) is central to the aim of encouraging more supported decision-making. Litigation representatives play an important role in providing people with the support necessary to enable them to bring or defend legal proceedings, facilitating their access to the justice system on an equal basis with others.[153]

7.130 In practice, problems relating to the appointment and availability of litigation representatives may be of equal or greater significance than the applicable legal rules and duties which are the focus of the Inquiry. Submissions raised concerns about:

- the cost and availability of litigation representatives for people who are unable to instruct legal counsel;[154]
- the lack of funding to meet the legal costs of case guardians in Family Court proceedings;[155]

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151 Law Institute of Victoria, *Submission 129*. NACLC and PWDA also highlighted the need for courts to issue practice notes or other guidance material to explain the role and duties of litigation representatives, including clarifying the duties owed to any client and to the court and providing information on the activities a litigation representative might undertake, for example, contact with third parties and service providers: NACLC and PWDA, *Submission 134*.

152 Law Institute of Victoria, *Submission 129*.

153 NACLC and PWDA, *Submission 134*.

154 Office of the Public Advocate (Vic), *Submission 06*.

155 Law Council of Australia, *Submission 142*; D Bryant, *Submission 22*.

- the difficulties in securing the nomination by the Attorney-General of case guardians in Family Court proceedings where another suitable person is not available;[156] and
- the availability of legal representatives who are independent of guardians appointed by state tribunals.[157]

7.131 A related problem mentioned by a number of stakeholders is the potential legal costs implications for those acting as litigation representatives.[158] Exposure to costs orders may have a deterrent effect on the willingness of individuals and organisations to act as litigation representatives. NACLC and PWDA observed that while a litigation representative should be personally liable for the costs of litigation if they do not act within the scope of their powers, or conduct the litigation appropriately, it is not otherwise in the interests of justice for litigation representatives to bear personal liability in this way.[159]

7.132 Chief Justice Bryant submitted that, given funding and access are acknowledged to be of considerable importance in 'advancing autonomy and respect in decision-making by people with disabilities', it was 'unfortunate' that the opportunity to make recommendations with respect to the 'funding and appointment of case guardians was not seized' by the ALRC.[160]

7.133 The Federal Circuit Court stated that it is not equipped to incorporate the 'participatory model' of decision-making proposed by the ALRC; and 'significant resources' would need to be made available to overcome existing problems in the availability of litigation representatives.[161]

7.134 There are similar concerns about the adequacy of legal aid funding. The Federal Circuit Court stated that it was 'disappointing that little weight is given to the significant access to justice impediments currently being encountered by persons with impaired decision making ability when seeking to proceed in the courts'. These difficulties, it said, are 'compounded in the context of current limitations on the availability of legal aid with litigants who might otherwise have sufficient capacity to instruct a lawyer facing additional impediments'.[162]

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156 Law Council of Australia, *Submission 142*; D Bryant, *Submission 22*.

157 Queensland Advocacy Incorporated 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*.

158 Law Council of Australia, *Submission 142*; NACLC and PWDA, *Submission 134*; Qld Law Society, *Submission 103*. The Queensland Law Society referred to recommendations made by the Queensland Law Reform Commission, including that the *Uniform Civil Procedure Rules 1999* (Qld) be amended to the effect that a litigation guardian is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct: Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, 2010 rec 28–4.

159 NACLC and PWDA, *Submission 134*.

160 D Bryant, *Submission 22*.

161 Federal Circuit Court of Australia, *Submission 140*.

162 Ibid. See also Law Council of Australia, *Submission 142*.

7.135 In this context, legal aid funding guidelines could facilitate the provision of litigation representatives, where necessary. The OPA (SA and Vic) also suggested that courts should be under an obligation to seek support for litigants and that, if funding is available to provide litigation representatives, as it currently is by application for some matters, then it should also be extended to the provision of more informal support.[163]

7.136 Some stakeholders commented on the appointment mechanisms for litigation representatives. The LIV noted that, at present, litigation representatives are appointed under court rules for the relevant court in which proceedings take place. Suggestions have been made that, while courts should retain the ability to appoint litigation representatives, they should also have the ability to refer that decision to specialist bodies, such as the Victorian Civil and Administrative Tribunal.[164] Better liaison between courts and guardianship boards and tribunals might enable litigation representatives to be more readily available.

7.137 National Decision-Making Principle 2 (the Support Principle) provides that 'Persons who may require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives'.

7.138 Problems concerning the availability of appropriate support have been a recurring theme during the course of the Inquiry—and not just in the context of litigation representatives. While it was appropriate to draw attention to the valid and urgent concerns of leading stakeholders, it was not practicable to address these in any detail within the scope of an inquiry that required a primary focus on laws and legal frameworks.

Solicitors' duties

Recommendation 7–6 The Law Council of Australia should consider whether the Australian Solicitors' Conduct Rules and Commentary should be amended to provide for 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.

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163 Offices of the Public Advocate (SA and Vic), *Submission 95*.

164 Law Institute of Victoria, *Submission 129*. Justice Connect observed that the ability of Victorian courts, pursuant to s 66 of the *Guardianship and Administration Act 1986* (Vic) to refer the issue of whether a party before the court requires a guardian or administrator appointed means appointments are 'subject to appeal and regular review and can be tailored to the requirements of the litigation': Justice Connect and Seniors Rights Victoria, *Submission 120*.

7.139 In some circumstances, the barriers to obtaining support necessary to conduct litigation, including the appointment of a litigation representative, may include the duties solicitors owe to their clients.[165]

7.140 Solicitors have a duty to act in the best interests of their clients,[166] and to follow a client's lawful, proper and competent instructions.[167] 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.

7.141 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.[168] However, the duty of solicitors to the court and the administration of justice is paramount.[169] 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.[170]

7.142 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.[171]

7.143 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).[172]

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165 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) [7.96]. Citing Lauren Adamson, Mary-Anne El-Hage and Julianna Marshall, 'Incapacity and the Justice System in Victoria' (Discussion Paper, Public Interest Law Clearing House, 2013).

166 Law Council of Australia, *Australian Solicitors' Conduct Rules* (2011) r 4.1.1.

167 Ibid r 8.1.

168 Ibid r 9.

169 Ibid r 3.1.

170 *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'.

171 *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.

172 *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 171, 9.

7.144 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'.[173]

7.145 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.[174]

Solicitors' conduct rules

7.146 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 the ability to instruct. This would at least ensure that disclosure is not a ground for professional disciplinary action, but would not remove doubts about liability for breach of confidence or other liability under the general law.

7.147 One model is provided by the American Bar Association's (ABA) Model Rules for Professional Conduct. These rules 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.[175]

7.148 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'.[176] Other stakeholders also supported changes to solicitors' conduct rules along the lines proposed by the ALRC.[177]

7.149 Legal Aid NSW, for example, submitted 'amendments of this type could provide some much needed clarification and guidance to solicitors trying to assist clients who have some degree of diminished capacity'.

> The adoption of the proposed rule would provide guidance and encourage solicitors to explore a variety of options prior to making an application to have a substitute decision maker appointed. In the event that it was necessary for the solicitor to make

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173 Adamson, El-Hage and Marshall, above n 165, 3.

174 Ibid.

175 American Bar Association, *Model Rules of Professional Conduct*, r 1.14.

176 Qld Law Society, *Submission 53*. See also Andrew Taylor, 'Representing Clients with Diminished Capacity' *Law Society Journal (February 2010)* 56, 58.

177 Legal Aid NSW, *Submission 137*; Law Institute of Victoria, *Submission 129*; Vicdeaf, *Submission 125*. Vicdeaf supported the proposal providing that solicitors are obliged to first 'utilise all supports available to provide the client with access and the ability to be involved in decision making, providing instructions etc': Ibid.

> such an application, the proposed amendments to the Rule would make clear that such action is permissible and ethically responsible.[178]

7.150 The LIV advised that, at least in Victoria, while the courts have confirmed that, where proceedings are on foot, lawyers may have a duty to 'raise the issue of the client's capacity',[179] the position is not clear when proceedings have not yet commenced.[180] If a person's lawyer decides to make an application for the appointment of a substitute decision maker and the client objects, the lawyers may have no choice but to cease to act—leaving 'the client vulnerable and without a means of meaningfully engaging with the justice system'.[181]

7.151 The LIV suggested amending r 9.2 of the Australian Solicitors' Conduct Rules to include a further exception based on the ABA rules. That is, so that 'where the lawyer reasonably believes the client has diminished capacity and is at risk of substantial physical, financial or other harm and the lawyer discloses confidential client information for the purpose of taking reasonably necessary protective action':

> Phrased in this way, the amendment would not prescribe a set approach, but affords the solicitor the discretion to choose the most appropriate course of action in the circumstances. The commentary to the Rules should provide direction as to what protective action might be contemplated.[182]

7.152 The LIV also submitted that the commentary to r 9.2 should be amended to provide that: the new exception should only be used as a last resort where no member of the client's family is available or willing to act and alternatives have been explored; and in determining what protective action to take, the solicitor should be guided by the wishes and values of the client, the client's best interests, with the goals of least intrusion, maximizing client capacities and respecting the family and social connections.[183]

7.153 Other stakeholders questioned the necessity or desirability of amendments to the Australian Solicitors' Conduct Rules. The Law Council advised that, while its Professional Ethics Committee would give further consideration to this issue, 'at the present time the Law Council would not support weakening the lawyer's duty of client confidentiality to disabled clients'.[184] The National Mental Health Consumer and Carer Forum expressed concern that the proposed amendments may undermine the relationship between client and solicitor and encourage 'paternalistic second-guessing', which is not an 'appropriate basis for the professional relationship and is not best practice'.[185]

7.154 Similarly, the Australian Research Network on Law and Ageing considered that 'lawyers might too readily raise capacity issues without the requisite consideration of

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178 Legal Aid NSW, *Submission 137*.
179 Citing *Pistorino v Connell & Ors* [2012] VSC 438.
180 Law Institute of Victoria, *Submission 129*.
181 Ibid.
182 Ibid.
183 Ibid.
184 Law Council of Australia, *Submission 142*.
185 National Mental Health Consumer & Carer Forum, *Submission 100*.

the supports necessary for a person to exercise their decision making rights'.[186] The Illawarra Forum stated that a new rule 'could be open to interpretation and possible abuse and seems in conflict with the National Decision-Making Principles'.[187] NACLC and PWDA cautioned that, in the light of the importance and complexity of this issue, further consultation and consideration should occur prior to any ALRC recommendation.

7.155 The ALRC agrees that further, more detailed, consideration of this issue is required, especially given the reservations expressed by stakeholders. It would be appropriate for the Law Council to take the matter forward as part of ongoing review of the Australian Solicitors' Conduct Rules and associated commentary.

Witnesses

7.156 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.

7.157 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.[188]

7.158 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'.[189]

7.159 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 and magistrates'.[190] 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

186 Australian Research Network on Law and Ageing, *Submission 102*.
187 Illawarra Forum, *Submission 124*.
188 'Equality before the Law Bench Book' (Judicial Commission of New South Wales, 2006) [5.3.1].
189 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [190].
190 Ibid 78.

> perpetrator is aware that charges are less likely to be brought or prosecuted than if the victim were a person without disability.[191]

7.160 Similarly, NACLC and PWDA reported that, in 'the experience of our members and members' clients, allegations made by people with disability are not always investigated, or criminal charges pursued, in part due to perceptions of people with disability not being competent to give evidence as a witness to criminal proceedings, or not being considered to be a credible witness'.[192]

Competence

Recommendation 7–7 The *Evidence Act 1995* (Cth) should be amended to provide that a person is not 'competent to give evidence about a fact' if the person cannot be supported to:

(a) understand a question about the fact; or

(b) give an answer that can be understood to a question about the fact.

Recommendation 7–8 The *Evidence Act 1995* (Cth) should be amended to provide that a person who is 'competent to give evidence about a fact' is not competent to give sworn evidence if the person cannot understand that he or she is under an obligation to give truthful evidence, and cannot be supported to understand.

7.161 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.[193]

7.162 The AHRC has observed that people with disabilities frequently experience prejudicial assessments of their competency to give evidence as a witness to criminal proceedings.[194] This is despite research suggesting that, 'contrary to public perception, most people with intellectual disabilities are no different from the general population in

191 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'.

192 NACLC and PWDA, *Submission 134*. See also Queenslanders with Disability Network, *Submission 119*. QDN stated that a 'common theme from QDN members is the lack of weight given to their evidence or account of an event, starting at the police and finishing in the court'.

193 Thomson Reuters, *The Laws of Australia* [16.4.280].

194 'Equal Before the Law: Towards Disability Justice Strategies', above n 5, 21.

their ability to give reliable evidence' (as long as communication techniques are used that are appropriate for the particular person).[195]

7.163 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.[196] Section 13 of the *Evidence Act* provides:

> (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.
>
> Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

7.164 Section 13(1) provides a test of general competence. Section 13(3) provides a test of competence to give sworn evidence. 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.[197] The test for competence to give sworn evidence amounts to the capacity to understand the obligation to give truthful evidence.[198]

7.165 Under s 13(4), 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).[199] 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.[200]

7.166 The wording of s 13(1) 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 Explanatory Memorandum to the *Evidence Amendment Bill 2008* (Cth) states that, when 'considering whether incapacity can be overcome, the court should consider alternative communication methods or support depending on the needs of the

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195 'Equality before the Law Bench Book', above n 188, [5.3.1]. 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.

196 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).

197 *Evidence Act 1995* (Cth) s 13(3).

198 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) ch 7.

199 *Evidence Act 1995* (Cth) ss 13(4)–(5).

200 Ibid s 135.

individual witness', and the note makes a cross-reference to ss 30 and 31 of the Act (discussed below).

7.167 In the Discussion Paper, the ALRC proposed 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.[201]

7.168 This proposal received some support from stakeholders.[202] Others suggested that the proposal did not go far enough in reflecting the National Decision-Making Principles. Advocacy for Inclusion, for example, considered that in assessing competence,

> scrutiny should be upon whether the person is being adequately supported to understand the question, including whether the question was delivered in formats most appropriate to the person's understanding, rather than upon determining the person's capacity to understand.[203]

7.169 In contrast, the Attorney-General's Department submitted that, read as a whole, general competency must already be determined in the context of the available support or assistance. In the Department's view, s 13 of the *Evidence Act*, as currently drafted, is 'sufficiently broad' to address the ALRC's concerns.[204]

7.170 In the ALRC's view, the test of general competence and competence to give sworn evidence under the *Evidence Act* should more explicitly incorporate the concept of support. This would be consistent with the ALRC's recommendations in other access to justice contexts and with the National Decision-Making Principles.

7.171 However, without some obligation being placed on courts to provide support, and the resources to enable this, reform may have little practical effect. Even at present, it is not entirely clear whether the people with disability are being determined to be not competent to give evidence, or sworn evidence, because of legal rules of evidence or because 'administrative systems are unable to deliver, by reason of lack of knowledge, poor resources or attitudinal barriers, services to people with disabilities'.[205]

Assistance in giving evidence

Recommendation 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.

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201 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 7–8.

202 Illawarra Forum, *Submission 124*; Queenslanders with Disability Network, *Submission 119*.

203 Advocacy for Inclusion, *Submission 126*. See also NACLC/PWDA—'the focus of any test should be on the adequacy of supports available to the individual to support them to give sworn evidence': NACLC and PWDA, *Submission 134*.

204 Australian Government Attorney-General's Department, *Submission 113*.

205 'Equal Before the Law: Towards Disability Justice Strategies', above n 5, 24.

Recommendation 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.

7.172 Stakeholders expressed concerns about the extent to which existing laws and legal frameworks facilitate support for witnesses. The Office of the Public Advocate (Qld) submitted that the Australian and Queensland 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'.[206] 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.[207]

7.173 Sections 30 and 31 of the *Evidence Act* provide examples of the assistance that may currently be provided 'to enable witnesses to overcome disabilities'.[208] Section 30 provides that a witness may give evidence about a fact through an interpreter and s 31 relates to 'deaf and mute witnesses'. 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.

7.174 Deaf Australia expressed concerns about the dated language[209] 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.[210]

7.175 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, including ss 30–31, 'highlight that it is not easy for people with disability to have the process modified to increase their participation'.[211]

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206 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*.

207 Office of the Public Advocate (Vic), *Submission 06*.

208 *Evidence Act 1995* (Cth) s 13 (note).

209 The word 'mute' refers to inability to speak. The current appropriate term is 'speech impaired': Deaf Australia, *Submission 37*.

210 Ibid. See also AFDS, *Submission 47*.

211 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.

7.176 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. Courts should be empowered to give directions with regard to this.

7.177 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.[212] These include provisions allowing vulnerable persons to choose someone to accompany them while giving evidence in a proceeding.[213] In relation to adults, the right applies only to 'vulnerable adult complainants'[214] 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'.[215]

7.178 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.

7.179 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'.[216]

7.180 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'.[217] 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 an impairment or a disability, or for the purpose of providing the vulnerable person with other support'.[218]

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212 *Crimes Act 1914* (Cth) pt IAD.
213 Ibid s 15YO.
214 A vulnerable adult complainant is a person who is a victim of slavery or human trafficking: Ibid s 15YAA.
215 Ibid s 15YAB(1).
216 *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.
217 Ibid s 306ZK(2).
218 Ibid s 306ZK(3).

7.181 The ALRC recommends that the *Crimes Act* 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. Again, courts should be empowered to give directions with regard to the provision of support.

7.182 Proposals to provide more support for witnesses with disability met with approval.[219] The Illawarra Forum, for example, submitted that such changes would allow people with disability to fully participate in giving evidence 'in a manner that best suits the individual', allow a support person to assist and 'acknowledge the ability of a person with disability in being able to provide accurate and valuable evidence'.[220]

7.183 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 to influence 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.

7.184 The ALRC acknowledges that the recommendation 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.[221]

7.185 In its 2013 report on the justice system and people with intellectual disability, the Parliament of Victoria's Law Reform Committee[222] highlighted the witness intermediary scheme in the United Kingdom, established under the *Youth Justice and Criminal Evidence Act 1999* (UK). 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.[223]

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219 Advocacy for Inclusion, *Submission 126*; Illawarra Forum, *Submission 124*; National Disability Services, *Submission 92*.

220 Illawarra Forum, *Submission 124*.

221 Government of South Australia Attorney-General's Department, 'Draft Disability Justice Plan 2014–2016' (2014) Priority Actions 2.1–2.2.

222 Law Reform Committee, Parliament of Victoria, *Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*, Final Report (2013).

223 Ibid 283. Intermediaries may include speech and language therapists, clinical psychologists, mental health professionals and special needs education professionals.

Guidance for judicial officers

Recommendation 7–11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may support persons with disability in giving evidence.

7.186 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.[224]

7.187 The *Crimes Act* also contains protective provisions that, among other things, may disallow inappropriate or aggressive cross-examination of vulnerable and special witnesses;[225] allow for the use of alternative arrangements for giving evidence, such as closed-circuit television[226] and the exclusion of members of the public from the courtroom;[227] and ensure vulnerable persons are not compelled to give further evidence unless it is necessary in the interests of justice.[228]

7.188 Legislative provisions are, however, only part of the solution to facilitating the participation of persons with disability in the justice system. Flexibility should be encouraged in Commonwealth court and tribunal proceedings to adapt procedures:

> 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.[229]

7.189 The law may be flexible enough to allow support 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.[230]

7.190 Greater awareness of the measures that courts and judicial officers may take to support witnesses who need support giving evidence may be desirable. One model is the *Equality before the Law Bench Book* developed by the Judicial Commission of NSW.[231] This publication contains a section on people with disability and, among other things, discusses the implications of different types of disability for people involved in

224 *Evidence Act 1995* (Cth) ss 41, 29(2).
225 *Crimes Act 1914* (Cth) s 15YE.
226 Ibid ss 15YI, 15YL.
227 Ibid s 15YP.
228 Ibid s 15YNC.
229 Legal Aid Victoria, *Submission 65*.
230 'Equal Before the Law: Towards Disability Justice Strategies', above n 5, 23.
231 'Equality before the Law Bench Book', above n 188.

court proceedings, examples of the barriers for people with disabilities in relation to court proceedings, and making adjustments for people with disability.[232]

7.191 The Equality before the Law 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.

7.192 The ALRC recommends that federal courts develop bench books to provide judicial officers with guidance about how courts may support people with disability in giving evidence. This will mainly apply to civil matters because, as discussed earlier in relation to eligibility to stand trial, most federal offenders are tried in state and territory courts.

7.193 The Federal Court acknowledged that bench books can assist to ensure that the judiciary, lawyers and all other relevant agencies and organisations are aware of existing communication facilities and techniques.[233] NACLC and PWDA strongly supported the further development of guidance for judicial officers about how courts may support people with disability in giving evidence, in consultation with people with disability and their representatives.[234]

Forensic procedures

7.194 Barriers to obtaining consent for the taking of DNA and other forensic samples under Commonwealth, state and territory forensic procedures legislation,[235] may prejudice the investigation and prosecution of crimes against persons with disability.

7.195 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 persons with disability are victims of sexual assault.

7.196 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.

7.197 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.

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232 Ibid s 5.
233 Federal Court of Australia, *Submission 138*.
234 NACLC and PWDA, *Submission 134*. See also Queenslanders with Disability Network, *Submission 119*.
235 Eg, *Crimes Act 1914* (Cth) pt ID; *Police Powers and Responsibilities Act 2000* (Qld) ch 17; *Forensic Procedures Act 2000* (Tas).

7.198 At a Commonwealth level, forensic procedures are regulated by pt ID of the *Crimes Act*. Under the *Crimes Act*, a magistrate may order the carrying out of a forensic procedure on an 'incapable person'[236] if the consent of a guardian cannot 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.[237] 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 the incapable person; and 'so far as they can be ascertained, any wishes' of the incapable person with respect to the forensic procedure.[238]

7.199 Procedures in other jurisdictions may require investigators to obtain an emergency order from the state or territory guardianship tribunal, resulting in significant delay.

7.200 The existing Commonwealth provisions may help to address problems with the timeliness of obtaining consent, by allowing a state or territory 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;[239] or
- guardianship legislation dealing with consent to medical treatment to include reference to the taking of forensic samples.

7.201 In the Discussion Paper, the ALRC asked whether Commonwealth, state and territory laws should 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.[240]

7.202 In response, some stakeholders expressed concern that avoiding delay might be used as a rationale for not making full efforts to obtain consent, for example, by determining how a person communicates and providing the support they require to do so.[241]

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236 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.

237 Ibid s 23XWU(1).

238 Ibid s 23XWU(2).

239 That is, consent may be given for a person incapable of doing so, by a 'person responsible'—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).

240 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 7–3.

241 Vicdeaf, *Submission 125*; KinCare Services, *Submission 112*.

7.203 In the absence of any firm indication that Commonwealth forensic procedures legislation is responsible for undue delay in obtaining forensic samples, the ALRC makes no recommendation for reform.

Jury service

7.204 Trial by jury is an important element of the justice system in Australia. Juries are made up of citizens randomly chosen from the electoral roll.[242] 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.

7.205 An essential characteristic of juries, as an institution, is that they be representative of the wider community.[243] 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.[244] There are longstanding concerns that, in practice, persons 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 the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.[245]

7.206 For example, in May 2014, the Supreme Court of Queensland ruled that a woman with a hearing impairment, who can lip-read but needed an Auslan interpreter, was 'incapable of effectively performing the functions of a juror and therefore ineligible for jury service'.[246]

7.207 State and territory legislation generally refers to disability as a ground for disqualification from serving as a juror, or implies that persons with disability may be disqualified on the grounds that they are not capable of performing the duties of a juror.

7.208 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

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242 In Ch 9, the ALRC recommends that the 'unsound mind' provisions of the *Commonwealth Electoral Act 1918* (Cth), which relate to disqualification for enrolment and voting on the basis that a person is of 'unsound mind', be repealed.

243 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.

244 See Ibid 9–10.

245 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [223].

246 *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113. Earlier in 2014, another hearing impaired woman, Gaye Lyons, lost a discrimination case against the Queensland Government over being excluded from jury service at Ipswich District Court in 2012: *Lyons v State of Queensland (No 2)* [2014] QCAT 731.

(QLRC).[247] In South Australia, the Attorney-General has proposed 'further research and investigation on identifying and overcoming barriers to jury duty for people with disability'.[248]

7.209 Inquiries have recommended various legislative changes to facilitate jury service by persons 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.[249]
- 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).[250]
- The QLRC recommended that the *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 person incapable of effectively performing the functions of a juror is ineligible for jury service.[251]

7.210 More recently, Disability Rights Now has recommended to the United Nations that, in Australia, 'all people with disability be made eligible for jury service'[252] 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.[253]

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247 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).

248 'Draft Disability Justice Plan 2014-2016', above n 221, Priority Action 1.5.

249 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(a)–(c). At the time of writing, these recommendations had not been implemented.

250 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Report No 99 (2010) rec 56.1. This recommendation was implemented: see *Juries Act 1957* (WA) s 5.

251 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.

252 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [223].

253 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).

7.211 Submissions have highlighted this issue as being of continuing concern,[254] and expressed support for earlier law reform commission recommendations for change.[255] 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.[256]

Juries in the Federal Court

7.212 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.

7.213 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.

7.214 This position changed, however, with the criminalisation of 'serious cartel conduct' in 2009,[257] 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.[258]

7.215 The Federal Court also has the power, in civil proceedings to direct trial of issues with a jury.[259] Because the ordinary mode of trial is by judge alone,[260] this would only occur in an exceptional case and, in any event, state or territory law relating to the qualification of jurors would generally apply in Federal Court civil proceedings.[261]

7.216 Even though juries remain 'extremely rare' in Federal Court proceedings,[262] the ALRC recommends that reform of jury qualification provisions be modelled in Commonwealth law through amendments to the *Federal Court of Australia Act*.

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254 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*.

255 Supporting NSWLRC recommendations: Public Interest Advocacy Centre, *Submission 41*. Supporting consideration of QLRC recommendations: Qld Law Society, *Submission 53*.

256 Disability Discrimination Legal Service, *Submission 55*.

257 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.

258 *Federal Court of Australia Act 1976* (Cth) pt III, div 1A, subdiv D.

259 Ibid s 40.

260 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).

261 *Federal Court of Australia Act 1976* (Cth) s 41(1).

262 Federal Court of Australia, *Submission 138*.

Qualification to serve on a jury

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

(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; or

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

7.217 Under the *Federal Court of Australia Act*, the Sheriff must remove a person's name from the jury list[263] 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.[264]

7.218 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'.[265] In coming to a conclusion about a person's ability to perform the duties of a juror, the Act requires that the Sheriff must have regard to the *Disability Discrimination Act 1992* (Cth).[266]

7.219 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.

7.220 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'.[267] The Disability Discrimination Legal Service observed that, while 'this is

263 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.
264 Ibid s 23DO.
265 Ibid ss 23DQ, 23DR.
266 Ibid s 23DQ (Note). See, in particular, *Disability Discrimination Act 1992* (Cth) s 29 (Administration of Commonwealth laws and programs).
267 *Juries Act 2000* (Vic) sch 2, cl 3(a),(f).

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.[268]

7.221 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'.[269] 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.[270] 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.[271]

7.222 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'.

7.223 The ALRC recognises there is likely to be 'some difficulty establishing a more specific objective standard' for determining juror qualification.[272] 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-making ability. Clearly, there should be no presumption that any particular physical or mental disability should be a disqualifying factor.

7.224 In particular, people who require communication devices or communication supporters to 'expressively communicate' may be subject to assumptions about their ability to serve on juries.[273] 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.[274]

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268 Disability Discrimination Legal Service, *Submission 55*.
269 *Jury Act 1977* (NSW) s 6(b), sch 2.
270 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.
271 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.
272 Law Council of Australia, *Submission 83*.
273 Disability Discrimination Legal Service, *Submission 55*.
274 Ibid.

7.225 At present, the fact that a person may be supported in performing the duties of a juror does not seem able to be taken into account in determining whether a person is eligible to serve.

7.226 The ALRC recommends that the *Federal Court of Australia Act* should explicitly incorporate the concept of support into the test for serving as a juror. The test is consistent with the National Decision-Making Principles and associated Guidelines. The ALRC's proposal for reform of the test for qualifying to serve as a juror[275] received support from a number of stakeholders.[276]

7.227 Again, the recommendation may be criticised on the basis that, unless support is actually available, there will be no change in jury selection practices. Nor does the recommendation 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

Recommendation 7–13 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.

7.228 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.

7.229 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.[277] 'Interpreter' in this context was intended to extend to sign languages, such as Auslan, and other communication support, and 'stenographer' to include a person providing 'computer-aided real time transcription'.[278]

7.230 The ALRC's recommendation 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.

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275 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 7–12.

276 NACLC and PWDA, *Submission 134*; Vicdeaf, *Submission 125*; Queenslanders with Disability Network, *Submission 119*.

277 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(d)–(e).

278 Ibid 17–18.

7.231 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.[279] 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.[280]

7.232 The practicality of allowing deaf people to serve as jurors with the assistance of Auslan interpreters in the court and during deliberations continues to be investigated by researchers, most recently at the University of NSW.[281]

7.233 NACLC and PWDA expressed strong support for the ALRC proposal to introduce communication assistants. This suggestion, they said, 'recognises the centrality of supports in ensuring that people with disability who require such support are able to serve as a juror'.[282] Vicdeaf observed that it should also be the court's responsibility to ensure supports are provided so that the person can communicate their decisions to the other members of the jury and to the court.[283]

Jury secrecy

Recommendation 7–14 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that communication assistants, allowed by the trial judge to assist a juror, should:

(a) swear an oath or affirm to faithfully communicate the proceedings or jury deliberations; and

(b) be permitted in the jury room during deliberations without breaching jury secrecy principles, providing they are subject to and comply with requirements for the secrecy of jury deliberations.

279 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.

280 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.

281 Ignorantia Juris, *Deaf Jurors in Mock Trial Experiment* <http://ignorantiajuris.com>.

282 NACLC and PWDA, *Submission 134*.

283 Vicdeaf, *Submission 125*.

Recommendation 7–15 The *Federal Court of Australia Act 1976* (Cth) should provide for offences, in similar terms to those 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.

7.234 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.[284]

7.235 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. The rule is a convention or rule of conduct rather than a rule of law,[285] and it is reinforced by statutory provisions that make it an offence to disclose or solicit information about jury deliberations.[286]

7.236 In 2014, Douglas J in the Queensland Supreme Court noted that even if 'deafness as a disability' can be overcome by the use of interpreters to assist jurors, further potential difficulties arise in respect of deliberations by the jury during and after the hearing:

> Communication or discussion between jurors has been emphasised as an integral part of the jury system because of their collective duty to pool their experience and wisdom in coming to a verdict … In the absence of legislative provision, it is clear that the jury is bound to deliberate in private[287]

7.237 Douglas J observed that it was not clear under the *Jury Act 1995* (Qld) that a judge is able to give leave to permit the presence of an interpreter in the jury room during the jurors' deliberations—and there is no explicit power to require such an interpreter to swear an oath or to make an affirmation to maintain the secrecy of the jury's deliberations.[288] He held that,

> while it may be possible to assist this individual to participate in the trial itself, by the use of an Auslan interpreter, and, for example, written jury directions, it would not be appropriate to permit such an interpreter to perform a similar role in the jury room as

284 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*.

285 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).

286 Eg, *Federal Court of Australia Act 1976* (Cth) ss 58AK, 58AL.

287 *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113, [3].

288 Ibid [4]–[5].

> a '13th juror' in the absence of specific legislative provision, including the power to require the interpreter to swear or affirm to keep the jury's deliberations secret.[289]

7.238 In the ALRC's view, concerns about maintaining the secrecy of the jury room and allowing a communication assistant can be addressed, and this suggestion was supported by stakeholders.[290]

7.239 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 recommendations above adapt this model, in the context of the *Federal Court of Australia Act*.

289 Ibid [6].

290 NACLC and PWDA, *Submission 134*; Illawarra Forum, *Submission 124*; Public Interest Advocacy Centre, *Submission 41*.

8. Restrictive Practices

Contents

Summary

8.1 The term 'restrictive practices' refers to the use of interventions that have the effect of restricting the rights or freedom of movement of a person in order to protect them. Examples include lap belts, hand mitts, removing mobility aids such as walking frames and sedation of a person to control their behaviour.[1] Serious concerns have been expressed about inappropriate and under-regulated use of restrictive practices in a range of settings in Australia.

8.2 Current regulation of restrictive practices occurs mainly at a state and territory level. However, the Commonwealth, state and territory disability ministers endorsed the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (National Framework) in March 2014 to forge a consistent national approach.[2]

8.3 The National Framework is intended to reduce the use of restrictive practices, including by informing the development of the National Disability Insurance Scheme quality assurance and safeguards system (NDIS system).[3] In developing the NDIS system, the ALRC recommends that the Australian Government and the Council of

1 Department of Health, *Decision-Making Tool: Supporting a Restraint Free Environment in Residential Aged Care* <www.health.gov.au>; Department of Health, *Decision-Making Tool: Supporting a Restraint Free Environment in Community Aged Care* <www.health.gov.au>.

2 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014).

3 Ibid.

Australian Governments (COAG) should take the National Decision-Making Principles into account to regulate restrictive practices in the context of the NDIS.[4]

8.4 The ALRC also recommends that the Australian Government and COAG adopt a similar, national approach to the regulation of restrictive practices in other relevant sectors such as aged care and health care.

The use of restrictive practices in Australia

8.5 Restrictive practices involve the use of interventions by carers and service providers that have the effect of limiting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm. These include restraint (chemical, mechanical, social or physical) and seclusion.[5]

8.6 Persons with disability who display 'challenging behaviour' or 'behaviours of concern' may be subjected to restrictive practices or medical intervention in a variety of contexts, including: supported accommodation and group homes; residential aged care facilities; rehabilitation centres; mental health facilities; hospitals; prisons; and schools.[6]

8.7 The limited available data from the Victorian Office of the Senior Practitioner accords with the international research that an estimated 10–15% of persons with disability will show 'behaviours of concern' and between 44–80% of them will be administered a form of chemical restraint in response to the behaviour.[7]

8.8 The Office of the Senior Practitioner found chemical restraint to be the most commonly used form of restraint.[8] Chemical restraint is reportedly widely used on people with dementia. The Department of Health and Ageing told the Senate Inquiry

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4 See Ch 3.

5 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). For comment, 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, 2009) [2.48]–[2.51]. See also 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*.

6 See, eg, Justice Connect and Seniors Rights Victoria, *Submission 120*; PWDA and Disability Rights Research Collaboration, *Submission 111*; 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*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 318.

7 Eric Emerson, *Challenging Behaviour: Analysis and Intervention in People with Severe Intellectual Disabilities* (Cambridge University Press, 2001); Kathy Lowe et al, 'The Management and Treatment of Challenging Behaviours' (2005) 10 *Tizard Learning Disability Review* 34, cited in 'Chemical Restraint: What Every Disability Support Worker Needs to Know' (Office of the Senior Practitioner, Victoria, August 2008) 1. Victorian figures on behaviour support plans cited in 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) 12.

8 'Chemical Restraint: What Every Disability Support Worker Needs to Know', above n 7.

into dementia that the use of drugs in dementia is higher than would be expected on clinical grounds alone:

> In February 2013 [the drug utilisation subcommittee] found that there is a high and inappropriate utilisation of antipsychotics in the elderly, especially in the case of two drugs: quetiapine and olanzapine, which are prescribed at a rate inconsistent with the age-specific prevalence of bipolar disease.[9]

8.9 Between 50–60% of people presenting challenging behavior in the United Kingdom are subjected to physical restraint;[10] those with multiple impairments and complex support needs may experience much higher levels of restrictive practices.

8.10 Surveillance may, in some circumstances, amount to a restrictive practice. The Office of the Public Advocate (Qld) reported that, in a census survey of 861 disability accommodation sites in 2013, 13% of them used some form of electronic monitoring of their residents. The majority of the residents subject to audio or visual surveillance had an intellectual disability and the reasons for surveillance included monitoring of the residents' health, the desire to safeguard residents from accidental harm, and the residents' challenging behaviours and self-harming behaviours.[11]

Improper use of restrictive practices

8.11 While restrictive practices are used in circumstances to protect from harm the person with disability or others around them, 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'.[12]

8.12 Many stakeholders raised systemic issues across various sectors which result in inappropriate or overuse of restrictive practices.[13] A key explanation for the use of restrictive practices may be the lack of resources for positive behaviour management and multi-disciplinary interventions to 'challenging behaviours'. Such behaviours may be better understood as a 'legitimate response to difficult environments and situations' or 'adaptive behaviours to maladaptive environments'.[14]

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9 Commonwealth, *Committee Hansard*, Senate, 17 July 2013, 40–41 (Ms Adriana Platona).

10 Eric Emerson, 'The Prevalence of Use of Reactive Management Strategies in Community-Based Services in the UK' in David Allen (ed), *Ethical Approaches to Physical Interventions: Responding to Challenging Behaviour in People with Intellectual Disabilities* (BILD, 2003).

11 Office of the Public Advocate (Qld), *Submission 110*. See, attachment to the submission, 'Inquiry into the Use of Electronic Monitoring at Disability Accommodation Sites in Queensland' May 2014.

12 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [241].

13 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).

14 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*.

8.13 As the Chief Executive Officer (CEO) of Alzheimer's Australia explained to the Senate Inquiry into dementia,[15] it is important to look beyond behaviours to understand the reasons for them:

> I think the secret to dementia care is actually very simple, and that is to look at the cause of a person's symptoms and not to respond to the symptoms themselves. If somebody is violent, they are not being violent because they are a nasty person. They are being violent because they are frustrated. They feel no purpose in life ... They do not know where they are. They feel disoriented. They may feel very depressed. They may be suffering psychosis. They may be losing their words. They may not be able to communicate. You put all those things together and think of how you would react and then you can start to translate it into your own behaviours.[16]

8.14 There is also evidence that what constitutes a restrictive practice is contested, which may result in inadvertent and misguided use of restrictive practices. A representative of the Royal Australian College of General Practitioners told the Senate Inquiry into dementia:

> Many facilities have a locked dementia unit so people cannot actually get out, where there might be a busy road or something like that. For the night people may be put in a low bed that is a little bit difficult to get out of so that they cannot wander easily. It is not actually a restraint as such but it does provide a physical barrier to wandering. So there are some things like that that do not feel anything like being tied up but that do minimise behaviour that might cause that resident some harm.[17]

8.15 In contrast, Caxton Legal Centre described a similar scenario in a dementia unit as a clear instance of restrictive practices, submitting a case involving 'Mrs H', a woman in her mid-70s and of a culturally and linguistically diverse background, who called the centre to complain that she had been misdiagnosed with Alzheimer's disease and had spent 10 months in 'prison'.[18]

8.16 High level definitions in the National Framework have set out the agreed understanding of restrictive practices and clarify that a restraint need not be physical, mechanical or chemical, but can also be psychosocial and involve the use of 'power-control' strategies.[19] A case study submitted by Justice Connect illustrated this point:

> An older man was frustrated with a rehabilitation facility that would not allow him to return home in circumstances where his children did not support his desire to do so. The man's capacity was not impaired, but the facility was concerned about their duty of care. The man was told that if he attempted to leave the facility, the police would be called.[20]

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15 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).

16 Commonwealth, *Committee Hansard*, Senate, 17 July 2013, 31 (Mr Glenn Rees).

17 Commonwealth, *Committee Hansard*, Senate, 16 December 2013, 36 (Professor Constance Dimity Pond); see also evidence by the General Manager of Residential Care, HammondCare: Commonwealth, *Committee Hansard*, Senate, 17 July 2013, 17 (Ms Angela Raguz).

18 Caxton Legal Centre, *Submission 67*.

19 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014).

20 Justice Connect and Seniors Rights Victoria, *Submission 120*.

Australia's international obligations

8.17 Australia, as a State Party, has obligations under the *United Nations Convention on the Rights of Persons with Disabilities*[21] (CRPD) and the *United Nations Convention against Torture*.[22]

8.18 The Australian Civil Society Response, as part of Australia's appearance before the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) in 2013, expressed concern that persons with disabilities, especially cognitive impairment and psychosocial disability, are 'routinely subjected to unregulated and under-regulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion'.[23]

8.19 Following this report, the UNCRPD recommended that Australia

> 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.[24]

8.20 Article 12 of the CRPD protects the right of persons with disabilities to have equal recognition before the law. Articles 14, 15 and 16 provide their right to liberty and security of person, freedom from torture or cruel, inhuman or degrading treatment or punishment and freedom from exploitation, violence and abuse.

8.21 Stakeholders suggested that some forms of restrictive practices could even amount to torture.[25] Australia is a party to the United Nations Convention against Torture[26] and also a signatory to the Optional Protocol on the Convention against Torture (OPCAT).[27] However, Australia has not yet ratified the OPCAT which requires States to establish a national system of inspections of all places of detention to ensure compliance with the Convention against Torture.[28]

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

22 *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).

23 Disability Rights Now, 'Australian Civil Society Parallel Report Group Response to the List of Issues, CRPD 10th Session Dialogue with Australia, Geneva' (September 2013) 13.

24 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its 10th Session (2–13 September 2013)' (United Nations, 4 October 2013) [35]–[36].

25 See PWDA and Disability Rights Research Collaboration, *Submission 111*; Queensland Advocacy Incorporated, *Submission 45*; Mental Health Coordinating Council, *Submission 07*.

26 *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).

27 *Optional Protocol to United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008).

28 Australian Human Rights Commission, *Optional Protocol to the Convention against Torture (OPCAT)* <www.humanrights.gov.au>.

8.22 A national approach to restrictive practices that includes monitoring of detention and other deprivations of liberty could assist in meeting Australia's obligations under OPCAT, if it were to ratify the agreement.

8.23 The Offices of the Public Advocate (South Australia and Victoria) (OPA (SA and Vic)) noted the omission of detention as a restrictive practice from the National Framework.[29] Stakeholders emphasised that disability accommodation with locked doors—where people cannot leave unless they are escorted—should be considered places of detention.[30] Arguably, detention constitutes a criminal offence or otherwise fits within the high level definition of 'seclusion' in the National Framework as the sole confinement of a person with disability in a room or physical space at any hour of the day or night where voluntary exit is prevented, implied, or not facilitated.[31]

8.24 The ALRC considers that a national approach should clarify the circumstances under which detention would be a crime or restrictive practice. The ALRC commends the existing Victorian[32] and South Australian[33] models, which prevent restrictions on people's liberty or freedom of movement, as useful in informing a national approach to restrictive practices that explicitly addresses detention in schools, residential treatment facilities and correctional institutions.

8.25 The People with Disability Australia and Disability Rights Research Collaboration proposed that 'a national dialogue' with people with disability and their representatives be held to consider all issues relating to the 'use of and protection from restrictive practices'.[34] Such a dialogue would include examination of the relationship between restrictive practices and torture, Australian's international obligations under OPCAT and the utilisation of evidence of restrictive practices administered on children with disability that may be produced in the Royal Commission into Institutional Responses to Child Sexual Abuse.[35] Noting the dearth of empirical studies of the views of people with disability and family carers, the joint submission contended that a nationally consistent framework on restrictive practices must be shaped by their lived experiences.[36]

A patchwork of existing laws and policies

8.26 Stakeholders expressed significant concerns about the unregulated use of restrictive practices[37] and were supportive of the ALRC's proposal for national reform.[38]

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29 Offices of the Public Advocate (SA and Vic), *Submission 95*.
30 See, eg, PWDA and Disability Rights Research Collaboration, *Submission 111*.
31 See, French, Dardel and Price-Kelly, above n 5, 64–65; 97–98.
32 *Disability Act 2006* (Vic) pt 8.
33 See policies of Disability Services and OPA (SA); *Guardianship and Administration Act 1993* (SA).
34 PWDA and Disability Rights Research Collaboration, *Submission 111*.
35 Ibid.
36 Ibid.
37 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*.

8.27 Regulation of restrictive practices occurs at a state and territory level under disability services and mental health legislation, and under a range of policy directives, statements and guidance materials. There is substantial discrepancy in the regulation of restrictive practices across jurisdictions, and the numerous frameworks 'conspire to make the legal framework in this area exceedingly complex'.[39]

8.28 Robust regulation that applies specifically to restrictive practices occurs in Victoria, Queensland and Tasmania through disability services legislation.[40] The approach in other jurisdictions includes policy-based frameworks, voluntary codes of practice, and regulation as an aspect of guardianship .[41]

8.29 In the context of the mental health system, Victoria and Queensland have detailed provisions relating to restrictive practices, combined with minimum standard guidelines[42] and a policy statement.[43] Legislative provisions are less prescriptive in other jurisdictions.[44] In NSW, the use of restrictive practices is regulated by a lengthy policy directive.[45] Mental health legislation is an area of ongoing review and reform, with implications for the regulation of restrictive practices.[46]

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38 National Association of Community Legal Centres, *Submission 127*; Advocacy for Inclusion, *Submission 126*; National Mental Health Consumer & Carer Forum, *Submission 100*; Office of the Public Advocate (SA and Vic), *Submission 95*; 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*.

39 Michael Williams, John Chesterman and Richard Laufer, 'Consent vs Scrutiny: Restrictive Liberties in Post-Bournewood Victoria' (2014) 21 *Journal of Law and Medicine* 1.

40 *Disability Act 2006* (Vic); *Disability Services (Restrictive Practices) and Other Legislation Amendment Act 2014* (Qld); *Disability Services Act 2011* (Tas).

41 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.

42 *Mental Health Act 1986* (Vic) ss 81–82; Victorian Chief Psychiatrist's Guideline, *Seclusion in Approved Mental Health Services* (2011).

43 *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).

44 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).

45 NSW Health, *Aggression, Seclusion & Restraint in Mental Health Facilities in NSW*, Policy Directive (June 2012).

46 In Tasmania, the *Mental Health Act 2013* (Tas) which regulates restrictive practices, commenced on 17 February 2014; and the new *Mental Health Act 2014* (Vic) commenced on 1 July 2014. There are also several reviews of mental health legislation in a number of jurisdictions: in ACT, the second exposure draft of the *Mental Health (Treatment and Care) Act 1994* (ACT) was drafted in 2013; in 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; in 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; in Queensland, submissions to a review focusing on areas for improvements to the *Mental Health Act 2000* (Qld) closed in August 2013; in NSW, a report was tabled in Parliament in May 2013: 'Review of the NSW Mental

8.30 Since March 2014, there is also a national agenda for consistency and standardisation in the regulation of restrictive practices in the form of the National Framework. The National Framework represents a united 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'.[47]

8.31 The National Framework is intended to work within existing legislative arrangements to establish minimum standards in relation to the regulation of restrictive practices. It embodies the agreement by all jurisdictions that, by 2018, all disability service providers with NDIS funding will implement six core strategies to reduce the use of restrictive practices.[48] The COAG Disability Reform Council indicated that these core strategies will guide governments in the development of national quality and safeguards system for the NDIS.[49] Until such a system is developed, state and territory quality assurance and safeguards frameworks will apply.[50]

8.32 The NDIS system will be underpinned by the revised National Standards for Disability Services.[51] It is expected that, from 2018, this national system will govern the use of restrictive practices affecting NDIS participants to ensure their access to disability services is in accordance with human rights principles.

8.33 There are also relevant guidelines at a national level including those issued by the Royal Australian and New Zealand College of Psychiatrists,[52] the Australian Psychological Association,[53] Alzheimer's Australia[54] and the Australian Government Department of Health with respect to aged care.[55]

8.34 The complex web of state, territory and national laws, policies, codes and guidelines has been much criticised. The OPA (SA and Vic) described the existing

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Health Act 2007: Report for NSW Parliament, Summary of Consultation Feedback and Advice' (NSW Ministry of Health, May 2013). See also Ch 10.

47 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014) 2.

48 The six core strategies are: person-centred focus; leadership towards organisational change; use of data to inform practice; workforce development; use of restraint and seclusion reduction tools; and debriefing and practice review. See further Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014).

49 COAG Disability Reform Council, *Meeting Communiqué*, 21 March 2014.

50 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.

51 National Disability Insurance Scheme, *Quality and Best Practice Framework* <www.ndis.gov.au>. The revised National Standards for Disability Services were endorsed by all governments on 18 December 2013. The six standards are: Rights; Participation and Inclusion; Individual Outcomes; Feedback and Complaints; Service Access; and Service Management.

52 Royal Australian and New Zealand College of Psychiatrists, *Statements and Guidelines* <www.ranzcp.org>.

53 'Evidence-Based Guidelines to Reduce the Need for Restrictive Practices in the Disability Sector' (Australian Psychological Society, 2011).

54 Alzheimer's Australia, *Quality Dementia Care Papers* <www.fightdementia.org.au>.

55 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).

regulatory efforts as being 'piecemeal' across the country and insufficient 'to protect and promote the rights of people who are subject to restrictive interventions'.[56]

8.35 However, recent initiatives at a national level—the National Framework; the development of a national quality and safeguards system for the NDIS; the National Seclusion and Restraint Project[57] and an Australian Research Council Linkage Project[58]—provide a timely opportunity to inform and ground a uniform approach to regulating restrictive practices that applies in a broader range of settings than just the disability sector.

A national approach to regulation

Recommendation 8–1 The Australian Government and the Council of Australian Governments should take the National Decision-Making Principles into account in developing the national quality and safeguards system, which will regulate restrictive practices in the context of the National Disability Insurance Scheme.

The National Framework and the NDIS

8.36 The ALRC recommends the development of the NDIS system take into account the National Decision-Making Principles. Among other things, this would mean that provisions regulating restrictive practices would: encourage supported decision-making before the use of such practices; provide for the appointment of representative decision-makers only as a last resort; and require that the will, preferences and rights of persons direct decisions about any use of restrictive practices.[59]

8.37 The ALRC recognises the complexity of incorporating supported decision-making into regulation of restrictive practices, but considers that art 12 of the CRPD should help inform any future national approach to restrictive practices—in particular, by ensuring that decisions about restrictive practices are based on the 'will, preferences and rights' of the person subjected to them.

8.38 The National Framework is an important platform for reform and embodies the commitment of all jurisdictions to collaborate and evaluate progress against a set of principles and strategies. The National Framework is based on the human rights encapsulated in the CRPD, a person-centred focus and international research on best practice.

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56 Offices of the Public Advocate (SA and Vic), *Submission 95*.

57 National Mental Health Commission, *National Seclusion and Restraint Project* <www.mentalhealthcommission.gov.au>.

58 Associate Professor Renata Kokanovic of Monash University is leading an ARC Linkage Project for 2013–2016 investigating options for supported decision-making to enhance recovery of people with severe mental health problems.

59 See Ch 3.

8.39 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.[60]

8.40 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.[61]

8.41 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'.[62]

8.42 However, the National Framework has been criticised for omitting reference to art 12 of the CRPD and, in particular, the obligation on Australia to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[63]

8.43 The National Decision-Making Principles are a vehicle for the Australian Government and COAG to give effect to the right of persons with disability to have equal recognition before the law captured in art 12 of the CRPD. The National Decision-Making Principles make prominent the need to respect the will, preferences and rights of persons with disability in making decisions affecting their lives.

The National Decision-Making Principles

8.44 Taking the National Decision-Making Principles into account in the context of restrictive practices would mean that, as far as possible, decisions about restrictive practices should ultimately be those of the person potentially subject to them.

8.45 The National Decision-Making Principles can be interpreted as being consistent with best practice alternatives to restrictive practices, which consider the causes of behaviour and plan for positive behaviour support.[64] For example, a person may require support to make decisions about the use of restrictive practices under a behaviour support plan.

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60 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014) 7.

61 Ibid.

62 Ibid 10.

63 *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(3); Offices of the Public Advocate (SA and Vic), *Submission 95*.

64 See, Paul Ramcharan et al, 'Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers' (Research Report, Victorian Officer of the Senior Practitioner, May 2009).

8.46 The story of 'Vincent' demonstrates the importance of providing for supported decision-making and complaint mechanisms:

> Vincent is 32 and lives in a major city. He has an intellectual disability with complex behaviour. He has lived in supported accommodation since he was a teenager. His parents, Maria and Carl, are increasingly frail and visit him as often as they can. One visit, they become concerned about the amount of medication used for Vincent. They raise their concerns with the support worker who says that the behaviour management recommended is too hard as there aren't enough workers on the evening shifts ... Maria and Carl begin to worry that making a complaint may make matters worse for Vincent, but the manager explains that the formal process helps the service understand issues and make improvements. They call Hannah (an independent advocate) for advice. At their request, Hannah joins them for a meeting with the service. The staff say that Vincent has become increasingly violent and they are concerned about their safety and the safety of other residents.[65]

8.47 The management of Vincent's behaviour of concern requires a considered, multi-pronged response:

> The family and the service agree that they need to update Vincent's behaviour support plan, to support him earlier. The service agrees that workers need extra training on behaviour management, to avoid the use of medication. The service reviews its use of restrictive practices and organises training to improve behaviour support planning and implementation, and working with families to plan and review behaviour support.[66]

8.48 An NDIS system that is informed by the National Decision-Making Principles may enhance the prospects for Vincent to directly express his will and preferences, through having the right to communication support from anyone of his choice—parents, carers, fellow residents or independent advocates.

8.49 Supported decision-making could also help reduce and avoid the use of restrictive practices for persons with disability. Research has found that many persons with disability feel unsafe in the situations and environments they are faced with.[67] Many find it challenging to maintain their privacy and safety where staff numbers are low or where there is no active engagement.[68] They may rightly feel angry when services are not delivered but often feel powerless in disability and mental health facilities. Therefore, they may communicate their views about their environments and situations through their challenging behaviours.[69]

8.50 If the NDIS system is consistent with the National Decision-Making Principles, a family member or carer of an NDIS participant with intellectual disability could help to communicate to the disability service provider, for instance, the reasons behind any 'behaviours of concern'—such as, discomfort in an environment, boredom with an

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65 Department of Social Services, *National Standards for Disability Services Stories* (January 2014) <http://www.dss.gov.au>.

66 Ibid.

67 Ramcharan et al, 'Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers', above n 64.

68 PWDA and Disability Rights Research Collaboration, *Submission 111*.

69 Ibid.

activity or strong aversions to certain food. Adjusting the environmental factors or stimuli may eliminate or moderate the need for any restraints or seclusion to be used.

Communication of will and preferences

8.51 Communication is crucial to a supported decision-making model.[70] Loretta Woolston identified the lack of specialised communication support as a decisive issue for people with complex communications needs in relation to restrictive practices:

> complex communications consumers of Disability Restrictive Practices (RP), seclusion, containment and chemical restraint have little to no systemic communication systems to assist and support them to participate in their health, legal and complaint systems decision making. They are discriminated against by the omission or lack of professional interpreter and translating services as currently provided by the Australian, states and territories governments to aboriginal, deaf or linguistically challenged persons.[71]

8.52 Silence from or acquiescence by persons with disability is taken as consent when this behaviour may in fact be the effect of disempowerment, institutionalisation and social isolation. Jo Watson's research on the communication of people with severe and profound disability demonstrates that it is possible to discern their wishes and preferences through the investment of time and effort.[72]

8.53 Support should also be available for people who do not have family or friends who can assist them in communicating their will and preferences. In some decision-making, the 'representative' of the person—a state guardian, administrator or a Commonwealth representative should be directed by the person's will, preferences and rights in making decisions for them.

8.54 Advance care directives may help determine a person's will and preferences. The OPA (SA and Vic) submitted that having support measures in place would be useful in the care management of people with disability.

> A person with a mental illness who has a Ulysses agreement may be calmer because of an effective pre-planned strategy to deal with distress when unwell; and a person with an intellectual disability who can plan and control their life and has necessary supports will be less likely to be in the types of situation that lead to restrictive practices, such as overcrowding and boredom.[73]

8.55 The OPA (SA and Vic) expressed some concerns about how supported decision-making in relation to consent to the use of restrictive practices will be applied under state and territory mental health law or disability legislation.[74] The ALRC recommends review of these state and territory laws.[75] The principal aims of such a review would be

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70 See Ch 3.

71 L Woolston, *Submission 89*; Loretta Woolston, Submission No 303 to the Senate Committee on Community Affairs, *Inquiry into the Prevalence of Different Types of Speech, Language and Communication Disorders and Speech Pathology Services in Australia*, 2014.

72 Scope, *Submission 88*.

73 Offices of the Public Advocate (SA and Vic), *Submission 95*; John Brayley, 'Your Right to Know: Consumer and Carer Participation and Involuntary Mental Health Care', *MIFSA News*, April–May 2011.

74 Offices of the Public Advocate (SA and Vic), *Submission 95*.

75 See Ch 10.

to encourage supported decision-making, and to shift from a best interests test to one directed by a person's will, preferences and rights.[76]

8.56 In the ALRC's view, a distinction should be maintained between lawful substitute consent to the use of the restrictive practice by a guardian or other authorised person and the support provided by a family member or carer to the person with disability in determining their will and preferences.

8.57 It is expected that, in a majority of cases, supporters will help discern a person's will and preferences concerned with restrictive practices. However, the NDIS system and any other national approaches must also make provision for situations where a person does not have informal support or it is otherwise impossible to determine their will and preferences. The ALRC recommends that in these cases, the human rights relevant to the situation apply in making decisions regarding restrictive practices.[77]

8.58 The ALRC disputes the assertion that if a person can be supported to give consent to a restrictive practice, then they may not be in need of restraint or seclusion.[78] The 'level of insight' into one's behaviour,[79] often understood as mental capacity, is not determinative of a person's capacity to consent to or refuse decisions about their bodily integrity, liberty, freedom, wills and preferences. This is because a person with an intellectual, cognitive or psychosocial disability may clearly express their will and preferences directly themselves at the time of the proposed use of the restrictive practice, have done so previously or through communication support, without needing to meet a certain level of mental capacity. The National Decision-Making Principles embody this stance.

8.59 PWDA and the Disability Rights Research Collaboration expressed concern that the initiatives to regulate, rather than eliminate, restrictive practices legitimise potentially serious breaches of human rights.[80] They cautioned that 'a perverse outcome' may result if a national framework enabled people with disability to consent to very serious breaches of their fundamental rights.[81]

8.60 The ALRC agrees that 'reforms to the legal framework regarding legal capacity should be aiming to reduce and limit the potential for these further rights violations to occur'.[82] A national approach to regulating restrictive practices is the first phase in a longer-term, iterative process towards the elimination of any rights violations against persons with disability. A stepped model is needed, along with rights education and resources devoted to guidance and training of persons with disability, their supporters and representatives.

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76 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); French, Dardel and Price-Kelly, above n 5; Michael Williams, John Chesterman and Richard Laufer, above n 39.

77 See Ch 3.

78 NSW Government, *Submission 135*.

79 Ibid.

80 PWDA and Disability Rights Research Collaboration, *Submission 111*.

81 Ibid.

82 Ibid.

8.61 Many stakeholders emphasised the importance of safeguards in the use of restrictive practices.[83] PIAC proposed 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.[84]

8.62 Taking the National Decision-Making Principles and the Safeguards Guidelines into account in the regulation of restrictive practices would mean that any representative decision-making would be in a form least restrictive of the person's human rights; appealable; and subject to regular, independent and impartial monitoring and review.

A national approach in other sectors

Recommendation 8–2 The Australian Government and the Council of Australian Governments should develop a national approach to the regulation of restrictive practices in sectors other than disability services, such as aged care and health care.

8.63 The National Framework currently applies only to the disability services sector. The ALRC acknowledges the ongoing work of the Disability Reform Council,[85] but recommends that the Australian Government and the COAG also develop a national approach to restrictive practices across other relevant sectors.

8.64 Stakeholders were very supportive of the ALRC's proposal for a national or nationally-consistent approach to restrictive practices.[86] The National Mental Health Consumer and Carer Forum and the Mental Health Council of Australia (NMHCCF and MHCA), for example, 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.[87]

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83 NACLC and PWDA, *Submission 134*; Illawarra Forum, *Submission 124*; National Association of Community Legal Centres and Others, *Submission 78*.

84 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.

85 The Disability Policy Group is developing a national framework for quality and safeguards and is expected to report to the Disability Reform Council and the COAG by early 2015: NSW Government, *Submission 135*.

86 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 8–1.

87 NMHCCF and MHCA, *Submission 81*.

8.65 The Disability Discrimination Legal Service (DDLS) recommended that a national framework or approach 'be binding on organisations that receive federal funding, via inclusion in service agreements'.[88] The OPA (Vic) suggested the creation of a National Senior Practitioner (mirroring the role of Victoria's Senior Practitioner) to monitor and audit the use of restrictive practices in aged care facilities.[89]

8.66 The OPA (SA and Vic) identified the challenge of reducing and eliminating the use of restrictive practices in Australia is exacerbated by 'the lack of uniform legislative controls and reporting requirements and the absence of equivalent key players across all jurisdictions'.[90] The solution may lie in 'clear, uniform legislative controls and reporting requirements' for the use of restrictive interventions in all government funded and supported accommodation services, modelled on provisions of the *Disability Act 2006* (Vic).[91] The OPA (SA and Vic) called for coverage of both federal and state funded and supported accommodation, including aged care facilities, schools and prisons.[92]

8.67 Stakeholders stressed the need for a national approach beyond the disability services sector and the NDIS.[93] Disability Rights Now recommended that, due to 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'.[94]

8.68 The ALRC recommends the regulation of restrictive practices cover the use of restrictive practices in a range of settings.[95] This is particularly important given that persons with disability may experience restrictive practices in a variety of contexts, including: supported accommodation and group homes; residential aged care facilities; mental health facilities; hospitals; prisons; and schools.[96] Harmonising laws and reducing red-tape related to restrictive practices in all relevant sectors, and not just disability services, may result in cost benefits for service providers around Australia.[97]

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88 Disability Discrimination Legal Service, *Submission 55* attachment 1. See also National Association of Community Legal Centres, *Submission 127*; Offices of the Public Advocate (SA and Vic), *Submission 95*; National Association of Community Legal Centres and Others, *Submission 78*; Carers Queensland Inc, *Submission 14*.

89 Office of the Public Advocate (Vic), *Submission 06*.

90 Offices of the Public Advocate (SA and Vic), *Submission 95*.

91 Claire Spivakovsky, 'Restrictive Interventions in Victoria's Disability Sector: Issues for Discussion and Reform' (Office of the Public Advocate, Victoria, August 2012); *Disability Act 2006* (Vic) pt 7.

92 Offices of the Public Advocate (SA and Vic), *Submission 95*.

93 See, eg, National Association of Community Legal Centres, *Submission 127*.

94 Disability Rights Now, above n 23, 14.

95 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*.

96 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*.

97 See, KinCare Services, *Submission 112*.

8.69 Concerns about restrictive practices in aged care were highlighted by several stakeholders, as well as the Senate inquiry into dementia.[98] The Senate inquiry recommended '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'.[99] Similarly, the Office of the Public Advocate (Vic) highlighted concerns 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'.[100]

8.70 Justice Connect and Senior Rights Victoria supported national regulation in aged care 'due to the failure of current laws to provide a comprehensive framework' for decisions affecting people with 'disabilities solely related to ageing'.[101]

8.71 The OPA (SA and Vic) submitted there is an 'alarming lack of Commonwealth oversight' over the high use of restrictive interventions, particularly chemical restraints, on residents of aged care facilities. They urged the ALRC to

> carefully consider how the Commonwealth decision-making model can both provide for supported decision-making arrangements, and establish protective mechanisms in relation to the use of restrictive practices in aged care facilities.[102]

8.72 There are two comprehensive guidelines issued by the Department of Health in relation to supporting restraint-free practices in residential aged care and community aged care.[103] However, stakeholders expressed strong support for binding national regulation rather than just guidelines.

8.73 The use of restrictive practices on people with mental illness in a variety of situations is recognised by the National Seclusion and Restraint Project. The Project extends beyond hospitals and health facilities to include community, custodial and ambulatory settings.[104] The national study seeks to capture best practice in reducing or eliminating seclusion and restraint around Australia and it may help produce an evidence base upon which a national approach could be developed.[105]

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98 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.

99 Ibid.

100 Office of the Public Advocate (Vic), *Submission 06;* Office of the Public Advocate (Qld), *Submission 05*.

101 Offices of the Public Advocate (SA and Vic), *Submission 95*.

102 Office of the Public Advocate (SA and Vic), *Submission 95*. See also Office of the Public Advocate (SA), *Submission 17*.

103 Department of Health, *Decision-Making Tool: Supporting a Restraint Free Environment in Residential Aged Care*, above n 1; Department of Health, *Decision-Making Tool: Supporting a Restraint Free Environment in Community Aged Care*, above n 1.

104 National Mental Health Commission, *National Seclusion and Restraint Project*, above n 57.

105 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,

8.74 Smoke-free hospitals may be environmental restraints on people with mental illness, particularly involuntary patients, if no exemption for them applies.[106] The NMHCCF asserted that any service that imposes smoking bans on consumers at a time when they are acutely unwell are 'engaging in cruel and inhumane treatment and demonstrating a complete indifference to the distress of this consumer group'.[107] Furthermore, non-compliance with anti-smoking policies by patients appears to trigger the use of restrictive practices and rates of seclusion.[108]

Other issues

8.75 The ALRC does not recommend specific mechanisms for enforcing regulation of restrictive practices, recognising the many options for reform and the expertise held by Australian Government departments and agencies, COAG and others in this area.

8.76 However, it is worth noting that stakeholders expressed various views on the form a national approach should take.[109] Many of them submitted that some binding form of regulation is preferred or necessary. For example, the DDLS submitted that it would be 'insufficient' to simply have a framework and hope that the relevant organisations will abide by its 'guidelines'.[110]

8.77 The NMHCCF warned against 'the illusion of compliance' in applying a national framework to service agreements that are not enforced.[111] People with Disabilities WA and the Centre for Human Rights Education preferred regulation over voluntary codes, like that in Western Australia,[112] because voluntary codes provide useful guidance but cannot guarantee implementation by all service providers.[113]

8.78 Legal Aid Queensland favoured a legislative scheme which imposed a positive duty on carer organisations to provide all practical help to support an adult with impaired capacity with respect to decisions about restrictive practices.[114] This is because, without such an obligation, there has only been a 'minority of cases' where

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Project Information <www.socialequity.unimelb.edu.au>. See also, the ARC Linkage Project on options for supported decision-making to enhance recovery of people with severe mental health problems.

106 National Mental Health Consumer & Carer Forum, *Submission 100*. An estimated 32% of people with a mental illness smoke tobacco compared to 18% of the general population: Sane Australia, *Smoking and Mental Illness: Factsheet 16* (2014) <www.sane.org>.

107 'Advocacy Brief: Smoking and Mental Health' (National Mental Health Consumer and Carer Forum, February 2014).

108 National Mental Health Consumer & Carer Forum, *Submission 100*; 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).

109 People with Disabilities WA and Centre for Human Rights Education, *Submission 133*; National Association of Community Legal Centres, *Submission 127*; PWDA and Disability Rights Research Collaboration, *Submission 111*; Offices of the Public Advocate (SA and Vic), *Submission 95*; Mental Health Coordinating Council, *Submission 94*; Disability Discrimination Legal Service, *Submission 55*.

110 Disability Discrimination Legal Service, *Submission 55* attachment 1.

111 National Mental Health Consumer & Carer Forum, *Submission 100*.

112 'Voluntary Code of Practice for the Elimination of Restrictive Practices' (Disability Services Commission of Western Australia, September 2012).

113 People with Disabilities WA and Centre for Human Rights Education, *Submission 133*.

114 Citing the *Mental Capacity Act 2005* (UK) s 1(3): Legal Aid Qld, *Submission 141*.

their lawyers have successfully advocated for funded carers to consider the proposed use of restrictive practices and develop supported decision-making for the adult.[115]

8.79 The OPA (SA and Vic) supported a comprehensive approach that addresses current gaps across sectors and jurisdictions which incorporates legislation and national guidelines, codes of practice or policy directives, as well as education, training and guidance.[116] Other submissions called for laws to incorporate key principles[117] or to mandate training that will complement the use of strategies to reduce restrictive practices such as positive support behaviour plans.[118]

8.80 Monitoring the use of restrictive practices is an essential element of any regulatory framework. The Australian Government and COAG's commitment to implement a data monitoring system, that integrates existing arrangements by 2018 under the National Framework, may form the basis for the design of a national mechanism for enforcement in relation to restrictive practices in Australia. Stakeholders suggested some 'touchstones' for monitoring the use of restrictive practices may relate to the veracity of the data, specifically, the accuracy in staff recognition of restrictive practices and in recording instances following clear data collection principles.[119]

115 Legal Aid Qld, *Submission 141*.
116 Offices of the Public Advocate (SA and Vic), *Submission 95*.
117 For example, 10 Principles are identified in the National Safety Priorities in Mental Health: a National Plan to Reduce Harm: Mental Health Coordinating Council, *Submission 94*.
118 For example, Nonviolent Crisis Intervention Training: L Woolston, *Submission 89*.
119 National Mental Health Consumer & Carer Forum, *Submission 100*.

9. Electoral Matters

Contents

Summary

9.1 Australia is obliged, under the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), to guarantee that persons 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 The ALRC recommends that the 'unsound mind' provisions of the *Commonwealth Electoral Act 1918* (Cth) (the *Electoral Act*), which relate to disqualification for enrolment and voting, be repealed. The removal of the unsound mind provisions is consistent with the recommendation by the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) 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'.[2]

9.3 The ALRC recommends a new exemption to compulsory voting based on a functional test consistent with the National Decision-Making Principles. A person without decision-making ability in relation to voting should be exempt from the penalties arising from failure to vote. The Australian Electoral Commission (AEC)

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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 Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25; *Universal Declaration of Human Rights 1948* art 21.

2 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its 10th Session (2–13 September 2013)' (United Nations, 4 October 2013).

should provide guidance material, consistent with the National Decision-Making Principles, to assist Divisional Returning Officers (DROs) to determine whether or not a person with disability had a valid and sufficient reason for not voting at an election. A person should be able to claim an exemption, or an exemption should be granted by a DRO.

9.4 Where a person with disability requires assistance to vote, they should be supported by all available means. The ALRC recommends that current provisions of the *Electoral Act* concerning permissible support be broadened, and that the AEC provide its officers with guidance and training to improve support in enrolment and voting for persons with disability. As the right to a secret vote is fundamental to the right to vote, but may be compromised by some forms of support, the AEC should also investigate methods of maintaining the secrecy of voting.

Repeal of the 'unsound mind' provisions

Recommendation 9–1 The *Commonwealth Electoral Act 1918* (Cth) should be amended to repeal:

(a) s 93(8)(a), which 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; and

(b) s 118(4), which relates to objections to enrolment on the basis that a person is of 'unsound mind'.

Recommendation 9–2 State and territory governments should repeal 'unsound mind' provisions in their electoral legislation and make other changes consistent with those recommended by the ALRC with respect to the *Commonwealth Electoral Act 1918* (Cth).

9.5 Under the *Electoral Act*, persons of 'unsound mind' are not entitled to have their names on the electoral roll or to vote in elections, and may be removed from electoral roll following objection. The ALRC recommends that these provisions be repealed.

9.6 Section 93(8)(a) and pt IX of the *Electoral Act* provide for a person's entitlement to enrolment, their right to vote and objections to enrolment. 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'.

9.7 There are several steps involved in removing a person from the electoral roll:

- a written objection must be lodged by an enrolled elector;[3]
- the objection must be supported by a medical certificate;[4]
- the AEC must give the individual an opportunity to respond to the written objection;[5] and
- the Electoral Commissioner determines the objection after making necessary inquiries.[6]

9.8 In 2012, the AEC submitted evidence to the Joint Standing Committee on Electoral Matters that 28,603 people were removed from the electoral roll on the basis of the unsound mind provision from 2008–2012.[7] People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHR Centre) criticised provisions of this type, which 'all too often' seek to remove or limit a person's legal agency to exercise their rights:

> 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.[8]

9.9 The policy objective of the provision is protective, to allow some persons with disability to be excused from the compulsory duty to vote. The Australian Government has stated that 'these arrangements and review rights ensure that the rights of people with disability are not encroached' and that the provisions are 'considered to be consistent with Article 29 of the Convention [CRPD]'.[9] Most democratic countries have some capacity-related qualification for voting.[10]

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3 *Commonwealth Electoral Act 1918* (Cth) ss 114–116.

4 Ibid s 118(4).

5 Ibid ss 116–118.

6 Ibid s 118. There are also avenues to challenge a decision to remove a person's name from the electoral roll. These include internal review and review by the Administrative Appeals Tribunal under the *Commonwealth Electoral Act 1918* (Cth) pt X; *Disability Discrimination Act 1992* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth); and by the Commonwealth Ombudsman.

7 Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral and Referendum (Improving Electoral Procedure) Bill 2012 (Cth)' (August 2012) [2.66].

8 PWDA, ACDL and AHR Centre, *Submission 66*.

9 Australian Treaty National Interest Analysis, *United Nations Convention on the Rights of Persons with Disabilities* [2008] ATNIA 18 [11].

10 In 2001, only four (Canada, Ireland, Italy and Sweden) out of 63 democratic countries had no restrictions on voting by adults with mental incapacities. In 2010, the European Union Agency for Fundamental Rights found 13 of 27 European Union member states had denied voting rights to adults under measures for an intellectual disability or a mental health problem: cited in The University of Cambridge—Cambridge Intellectual and Developmental Disabilities Research Group, *Submission to the Committee on the Rights of Persons with Disabilities on the Participation of Persons with Disabilities in Political and Public Life*, 15 October 2011.

9.10 In *Roach v Electoral Commission*, the High Court found s 93(8)(a) of the *Electoral Act* to be constitutionally valid and stated that:

> 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.[11]

9.11 The Joint Standing Committee on Electoral Matters reviewed the unsound mind provision in s 93(8)(a) and concluded that, given Australia's system of compulsory enrolment and voting, it provides a useful mechanism 'to protect the integrity of elections and assist those who might otherwise have to deal repeatedly with the AEC as to why they are not complying with their enrolment and voting obligations'.[12]

9.12 Stakeholders pointed to recent commentary on art 29 of the CRPD, indicating that a person's capacity should not affect their right to vote. In particular, in April 2014, the UNCRPD stated that, in order to realise the legal capacities of persons to participate in public and political life:

> a person's decision-making ability cannot be a justification for any exclusion of persons with disability from exercising their political rights, including the right to vote, the right to stand for election and to serve as a member of a jury.[13]

9.13 The Human Rights Law Centre suggested that this statement is a consolidation of the movement 'away from a medical and protectionist view of disability towards a social and rights based approach in which people with disability have a right to enjoy equal legal capacity'.[14]

9.14 This move towards a social theory of disability is illustrated by a 2013 decision of the UNCRPD. In *Zsolt Bujdosó v Hungary*, the UNCRPD held discriminatory and invalid a Hungarian law which sought to comply with the CRPD by assessing the capacity to vote of individuals with intellectual disabilities who were previously automatically disenfranchised as subjects of guardianship. In doing so, the UNCRPD reiterated that:

> Article 29 does not provide for any reasonable restriction or exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention.[15]

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11 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [88] (Gummow, Kirby and Crennan JJ).

12 Joint Standing Committee on Electoral Matters, above n 7, [2.93].

13 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [44].

14 Human Rights Law Centre, *Submission 139*.

15 Committee on the Rights of Persons with Disabilities, *Views: Communication No 4/2011*, 10th Sess, UN Doc CRPD/C/10/D/4/2011 (2-13 September 2013) (*'Zsolt Bujdosó, Jánosné Ildikó Márkus, Viktória Márton, Sándor Mészáros, Gergely Polk and János Szabó v Hungary'*) [9.4].

Entitlement to enrol and vote

9.15 Section 93(8)(a) of the *Electoral Act* has attracted criticism.[16] 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'.[17] Other stakeholders considered the provision to be ambiguous.[18]

9.16 Stakeholders supported removing the unsound mind provision on the basis that it is not consistent with Australia's international law obligations.[19] For example, the National Association of Community Legal Centres (NACLC) argued that the 'most appropriate approach, and one consistent with international law, is to repeal s 93(8)(a) in its entirety and remove any restriction on eligibility for enrolment connected to capability'.[20]

9.17 The ALRC concludes the unsound mind provision in s 93(8)(a) of the *Electoral Act* should be repealed. The phrase 'unsound mind' is considered 'derogatory, judgemental and stigmatising'.[21] As discussed in Chapter 2, words and terms should not be used that tend to lower the dignity of people with disabilities. Arguably, repeal would also be consistent with Australia's obligations under art 8 of the CRPD.[22]

9.18 In upholding universal suffrage for persons with disability, the ALRC recognises concerns about maintaining the integrity of the electoral system, especially in the context of compulsory voting. That is, there may be concern about the 'harm that may be caused by votes cast by persons who are not able to understand the nature and significance of voting'.[23] However, in practice, no test is conducted when a person seeks to enrol or vote.

> In practice the provision is 'used' when a person raises a concern with the AEC about another person, initiating a formal process which may result in the removal of the second person from the electoral roll. These concerns are generally raised by persons close to the elector in question, and motivated by what they see as the best interests of

16 See, eg, Human Rights Law Centre, *Submission 139*; PWDA, ACDL and AHR Centre, *Submission 66*; Public Interest Advocacy Centre, *Submission 41*; Physical Disability Council of NSW, *Submission 32*. See also People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

17 Human Rights Law Centre, *Submission 139*.

18 Ibid; Public Interest Advocacy Centre, *Submission 41*; Physical Disability Council of NSW, *Submission 32*. See also People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

19 Human Rights Law Centre, *Submission 139*; PWDA, ACDL and AHR Centre, *Submission 136*.

20 National Association of Community Legal Centres, *Submission 127*.

21 Human Rights Law Centre, *Submission 139*.

22 Article 8 contains a duty to undertake to adopt immediate, efficient and appropriate measures to combat stereotypes and prejudice in relation to persons 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.

23 Australian Government, *Electoral Reform Green Paper—Strengthening Australia's Democracy* (2009) 42.

> the person concerned, for example protecting them from having to respond to repeated penalty notices for failure to vote at successive elections.[24]

9.19 There is no evidence that reform to remove the unsound mind provisions would cause any new problems with regard to the integrity of the electoral system, undue influence or fraud. If the concern is protecting persons with disability from having to respond to penalty notices, there are solutions that do not involve removing the person from the electoral roll.[25]

No new threshold test

9.20 Stakeholders were uniformly against adopting any new 'capacity test' of the kind proposed by the ALRC in the Discussion Paper.[26] The Human Rights Law Centre argued that the proposed threshold was both too high and made false assumptions about the decision-making ability required to vote:

> Many people with dementia, for example, may have impaired decision-making ability regarding day to day decisions, but nonetheless maintain long-held firm views on which person or parties should be in government.[27]

9.21 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',[28] but are still entitled to vote.[29] This perspective was echoed by the Human Rights Law Centre:

> Regardless of disability, not all voters cast their vote by understanding, retaining and weighing information relevant to an election (as required by the ALRC's proposed decision-making test). Requiring individuals with impaired decision-making ability to vote in this way imposes a burden upon people with a disability that is not imposed upon the general population.[30]

9.22 Trevor Ryan favoured repeal of s 93(8)(a), but argued that the ALRC should 'focus instead on strengthened regulation of voter fraud and coercion, and greater flexibility in the enforcement of compulsory voting':

> While the proposed amendments (including the criteria, the machinery, and the persons involved in assessing capacity) adopt some of the more progressive elements of the modern, de-medicalised adult guardianship regime, this seems to be premised upon (and entrenches) a problematic conflation of the civil guardianship system and the exercise of political rights.[31]

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24 Ibid.

25 Compare the denial of legal capacity to married women prior to the 19th century. Married women were denied testamentary power in relation to real property because it was regarded they might be overborne by their husbands: Henry Swinburne, *A Brief Treatise of Testaments and Last Wills* (John Windet, 1590). The woman's capacity was denied, rather than the husband's power checked.

26 Human Rights Law Centre, *Submission 139*; Advocacy for Inclusion, *Submission 126*; National Mental Health Consumer & Carer Forum, *Submission 100*; Trevor Ryan, *Submission 99*.

27 Human Rights Law Centre, *Submission 139*.

28 Public Interest Advocacy Centre, *Submission 41*.

29 See also, People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

30 Human Rights Law Centre, *Submission 139*.

31 Trevor Ryan, *Submission 99*.

9.23 The Australian Government Electoral Reform Green Paper acknowledged there are some concerns about the provision, but considered it as necessary to protect the integrity of the electoral system. It 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.[32]

9.24 There has been some parliamentary consideration of the unsound mind provision.[33] The Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth) presented amendments which would have removed the term 'unsound mind' and broadened the range of qualified persons to provide a statement (and not a medical certificate by a doctor) about the elector's capacity to understand the nature and significance of voting. However, the Australian Government accepted the recommendation of the Joint Standing Committee on Electoral Matters, which 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'.[34]

Removal from the electoral roll

9.25 A person may only be removed from the electoral roll based on an objection supported by a certificate from a medical practitioner.[35] The medical certificate must state 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.[36]

9.26 The ALRC recommends that this provision of the *Electoral Act* should also be repealed. However, while there should be no new threshold test for enrolment or voting, there should be a new exemption from compulsory voting for those who lack decision-making ability relating to voting.

9.27 State and territory governments should consider repealing comparable provisions in their electoral legislation,[37] consistently with recommendations relating to the review of state and territory laws.[38]

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32 Australian Government, *Electoral Reform Green Paper—Strengthening Australia's Democracy* (2009) 42.

33 At a state level, in relation to an equivalent provision, the Victorian Electoral Matters Committee encouraged 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].

34 Joint Standing Committee on Electoral Matters, above n 7.

35 *Commonwealth Electoral Act 1918* (Cth) s 118(4).

36 Ibid.

37 See, eg, unsound mind provisions contained in the following legislation: *Parliamentary Electorates and Elections Act 1912* (NSW) s 25(a); *Electoral Act 1907* (WA) s 18(1)(a); *Electoral Act 1985* (SA) s 29(1)(iv).

38 See Ch 10.

Valid and sufficient reason for failure to vote

Recommendation 9–3 Section 245 of the *Commonwealth Electoral Act 1918* (Cth) on compulsory voting should be amended to provide that it is a 'valid and sufficient reason' for not voting if a person cannot:

(a) understand information relevant to voting at the particular election;

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

(c) use or weigh that information as part of the process of voting; or

(d) communicate their vote in some way.

Recommendation 9–4 The Australian Electoral Commission should provide Divisional Returning Officers with guidance and training, consistent with the National Decision-Making Principles, to help them determine if a person with disability has a valid and sufficient reason for failing to vote.

A new functional exemption

9.28 Section 245 of the *Electoral Act* provides voting is compulsory. Section 245(4) provides that a DRO is not required to send or deliver a penalty notice if satisfied that the elector: is dead, was overseas, was ineligible to vote or 'had a valid and sufficient reason for failing to vote'. Electors with a valid and sufficient reason for not voting do not have to pay a fine.

9.29 The ALRC recommends amendment of the *Electoral Act* to specify that it is a valid and sufficient reason for not voting, if the person cannot understand, retain and weigh information relevant to voting, or communicate their vote in some way. The wording of the recommendation is intended to be consistent with other instances in which the ALRC has recommended that some form of functional test of ability needs to be retained.[39]

9.30 Exemption from compulsory voting would ensure there is a mechanism so that people who lack decision-making ability relating to voting are not unfairly penalised. Some form of functional test is needed to determine whether someone has a 'valid and sufficient reason' not to vote because, otherwise, persons with disability who are on the electoral roll may be fined for not voting when they are not able to understand what it means to vote.[40]

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39 See, eg, in relation to eligibility to stand trial: Ch 7.

40 Stakeholders also noted exemptions may need to apply where persons with disability 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: see, eg, Public Interest Advocacy Centre, *Submission 41*; People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

9.31 Some stakeholders said disability should be included as a specific criterion excusing failure to vote. In particular, PIAC endorsed a submission by the PWDA and the NSW Disability Discrimination Legal Centre (DDLC) on the Electoral Reform Green Paper 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.[41] The ALRC has not examined in any detail whether exemptions along these lines would be desirable, but observes that such status-based approaches may not accord with the CRPD.

9.32 The recommended exemption would cover situations where a person's intended support failed them, or where support was not able to facilitate an expression of the person's will and preference with respect to voting.[42] A person should not necessarily be removed from the electoral roll in these circumstances, and the potential to vote in future elections should not be removed.[43]

9.33 Persons with disability should not be required to provide a medical certificate when seeking an exemption from laws requiring them to vote. At present, an exemption may be given by a DRO for any valid and sufficient reason, and no particular form of proof is required. To require a medical certificate in order to claim the exemption would place too great a burden on individuals or their families.[44] Further, the AEC needs flexibility to decide that, having accepted that a person has a valid and sufficient reason not to vote in one election, subsequent failures to vote will also not be penalised—where the reason for not voting is likely to be ongoing. However, the person should remain on the electoral roll and be entitled to vote, if they can be supported to do so.

Guidance for Divisional Returning Officers

9.34 Under the *Electoral Act*, the DRO for each electorate has discretion to determine what constitutes a valid and sufficient reason for not voting.[45] 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.[46]

9.35 Administrative guidelines developed by the AEC, in consultation with its Disability Advisory Committee,[47] may provide additional guidance to DROs in relation

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41 Public Interest Advocacy Centre, *Submission 41*; People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009 rec 9. See also Human Rights Law Centre, *Submission 139*.

42 PWDA, ACDL and AHR Centre, *Submission 136*.

43 Ibid 136.

44 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) [2.86].

45 *Commonwealth Electoral Act 1918* (Cth) s 245(4)(d).

46 Australian Electoral Commission, *Electoral Backgrounder: Compulsory Voting* (April 2010) [30].

47 Australian Electoral Commission, *Submission 10*.

to the potential impact of disability on electors' ability to vote. In the Electoral Backgrounder on Compulsory Voting, the AEC cites some practical examples given by the High Court of valid and sufficient reasons not to vote, including 'competitive claims of public duty', and:

> Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognised by law in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster, such as a fire.[48]

9.36 The ALRC recommends the AEC provide DROs with appropriate guidance and training, consistent with the National Decision-Making Principles, to help them determine if a person with disability has a valid and sufficient reason for failing to vote.

Support in voting

Recommendation 9–5 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 chosen by the voter to assist them with voting.

Recommendation 9–6 The Australian Electoral Commission should provide its officers with guidance and training, consistent with the National Decision-Making Principles, to improve support in enrolment and voting for persons who require support to vote.

Recommendation 9–7 The Australian Electoral Commission should investigate methods of maintaining the secrecy of votes of persons who require support to vote.

9.37 The ALRC recommends that the *Electoral Act* be amended to allow for broad support in voting. 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 persons with disability assistance in voting by a person of their choice.[49]

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48 *Judd v McKeon* (1926) 38 CLR 380 cited in Australian Electoral Commission, *Electoral Backgrounder: Compulsory Voting* (April 2010).

49 *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.

9.38 Section 234(1) of the *Electoral Act* currently provides:

> 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.

9.39 In order to ensure consistency with the ALRC's overall approach to support, and compliance with the CRPD, the ALRC recommends that the provision be amended. Specifically, the section should adopt more appropriate language and be broadened to offer assistance to more people who may require support in exercising their right to vote.[50] Australia needs to 'adopt concrete measures to support people with disabilities to exercise their right to vote on an equal basis with others'.[51]

9.40 Advocacy for Inclusion argued that a person should be entitled to vote if they can make their views known via any means of communication, and that they should be provided with 'appropriate social and technological supports'.[52] It was suggested that, where there is an objection to a person voting, an independent body should verify whether or not the person's voting preference can be ascertained.[53] Advocacy for Inclusion suggested people with disability should have the option of accessing support from an electoral officer to cast their vote, subject to safeguards and monitoring.[54]

9.41 NACLC stated that AEC officers should be provided with 'appropriate education, training and guidance material' to assist them to decide whether a person requires assistance.[55]

9.42 Guidance material could cover assistance in marking and depositing the ballot paper at the polling booth, but also support in relation to enrolment and declaration votes.[56] 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.

9.43 The AEC and various state and territory electoral commissions have introduced a range of measures to increase electoral accessibility.[57] A self-advocacy group in South Australia reported positive experiences of assistance at the 2013 federal election:

> Most of us had a very good experience voting. Our support workers helped us to get to a polling booth and ask the volunteers working at the booth to help us make our vote so our support workers didn't influence our vote.[58]

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50 See *Electoral Act 1992* (Qld) ss 108–109 for the provision of help to enable electors to vote at polling booths and hospitals.
51 Human Rights Law Centre, *Submission 139*.
52 Advocacy for Inclusion, *Submission 126*.
53 Ibid.
54 Ibid.
55 National Association of Community Legal Centres, *Submission 127*.
56 Declaration votes allow an elector to fulfil their obligations by voting before election day or in a different division from the division in which they are enrolled on election day: Australian Electoral Commission, *Electoral Backgrounder: Compulsory Voting* (April 2010).
57 See, eg Australian Electoral Commission, *Submission 10*.
58 Minda Inc Self Advocacy Group-Express Yourself, *Submission 93*.

9.44 One critical issue with respect to voting is 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'.[59] Case studies submitted on the Electoral Reform Green Paper illustrated the limitations of the current system:

> One of our (DDLC) clients stated that her closest accessible polling booth was 45 minutes away by electric wheelchair and would cost around $20 to $50 if she caught a taxi. Consequently, our client decided to vote at her closest polling booth, which was ten minutes away by electric wheelchair. However, as the polling booth was not accessible, she was forced to vote outside. She did not have sufficient privacy and felt very undignified. Furthermore, our client was unable to place the ballot in the ballot box herself as the ballot box was outside the building and therefore had to rely on electoral officials to do it for her.
>
> One of our (PWDA) clients stated that at his local polling booth there was no easy English information available. The polling booth official was unable to communicate the steps required to fill out the ballot paper. Fortunately he had visited the booth with his father, and his father provided instructions. Our client did feel pressured to vote for a particular candidate, as he was aware that his father had voted for that party all of his life.[60]

9.45 A number of stakeholders suggested support mechanisms that would allow persons with disability to vote independently and in secret. Mechanisms might include the use of logos or symbols; templates; assisted voting; electronically assisted voting (EAV); and outreach models.[61] One man who used EAV during 2007 federal election described it as an 'empowering experience'—being the first time in his life that he was able to vote independently.[62]

9.46 The AEC is well-placed to examine options for secret voting for persons with disability, including by reviewing national and international best practice in technological advances.[63] The ALRC recommends that the AEC should investigate methods of maintaining the secrecy of votes for people who require support in voting.

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59 Public Interest Advocacy Centre, *Submission 41*.

60 People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009.

61 Public Interest Advocacy Centre, *Submission 41*.

62 People with Disability Australia and the NSW Disability Discrimination Law Centre, Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, 2009 90.

63 The AEC's roles include research and analysis to improve electoral participation, support the delivery of electoral services and contribute to electoral policy reform in Australia: Australian Electoral Commission, *Research* <www.aec.gov.au>. The Commissioner's Advisory Board for Electoral Research includes experts in the Australian electoral system. The AEC is a member of the Electoral Council of Australia, the Electoral Education Network, the Commonwealth Network of National Election Management Bodies and other international networks.

10. Review of State and Territory Legislation

Contents

Summary

10.1 This chapter discusses the implications of the ALRC's recommendation for review of state and territory laws and legal frameworks that have an impact on the exercise of legal capacity. The Terms of Reference for the Inquiry focused on Commonwealth laws and legal frameworks, but also asked 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)[1] because many important areas of decision-making are governed by state and territory law—including in relation to guardianship and administration, consent to medical treatment, mental health and disability services.

10.3 The key elements of the ALRC's approach include the National Decision-Making Principles and the Commonwealth supporter and representative scheme ('Commonwealth decision-making model'), which reflects them.

10.4 The ALRC recommends that state and territory governments 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

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).

the Commonwealth decision-making model. This chapter explains some of the implications of this recommendation and how the ALRC's recommendations might be applied in specific areas of state and territory law.

Review of state and territory legislation

Recommendation 10–1 State and territory governments should review laws and legal frameworks concerning individual decision-making 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 and legal frameworks with respect to guardianship and administration; 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 a substantial number of people who need decision-making support.[2]

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

2 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?* <www.statetrustees.com.au>.

regulation of, and prescription of, the way states and territories administer disability funding'.[3]

10.7 As discussed in Chapter 3, the National Decision-Making Principles and associated Guidelines are intended to be consistent with art 12 of the CRPD. By reviewing guardianship and other laws in the light of these principles, states and territories will advance compliance with the CRPD.

10.8 This is important as, under international law, parties to treaties undertake to ensure that the terms of the treaty are performed 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,[4] and an obligation required expressly by art 4(5) of the CRPD.[5] 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.[6]

10.9 The intention of Recommendation 10–1 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 to supported decision-making.

10.10 The process envisaged by the ALRC 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 capacity 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

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3 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26, 33.

4 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) art 27.

5 '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).

6 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, 2009) 14–15.

- 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.

10.11 To some extent, states and territories have already commenced this process—in particular, 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;[7] 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.[8]

10.12 The Victorian Government has been actively reviewing laws dealing with decision-making by people who need decision-making support. The *Powers of Attorney Act 2014* (Vic) aims to simplify and consolidate certain aspects of Victoria's power of attorney laws, to create the role of a 'supportive attorney' and to improve the protections for vulnerable people.[9] A supportive attorney is a new legal mechanism, which recognises that some people with impaired decision-making ability do not need a guardian or administrator. The ability to appoint a supportive attorney will acknowledge family and other relationships of support, while ensuring that the person retains their right to make decisions.[10]

10.13 Stakeholders endorsed the idea that the role of this Report should include influencing reform of state and territory laws.[11] Some suggested, however, that review based on the ALRC's recommendations would not go far enough towards desired results.[12] Pave the Way described the ideal outcome as a 'a cohesive national approach' to the implementation of art 12 of the CRPD, and a national regime of supported decision-making that no longer permits 'substitute' or 'best interest' decision-making.[13]

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7 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) xi.

8 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) i, rec 4–1.

9 Explanatory Memorandum, Powers of Attorney Bill 2014 (Vic).

10 Ibid. The Act implements a number of the VLRC's recommendations: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012).

11 National Association of Community Legal Centres, *Submission 127*; Illawarra Forum, *Submission 124*; National Mental Health Consumer & Carer Forum, *Submission 100*; AGAC, *Submission 91*; Pave the Way, *Submission 90*.

12 F Beaupert, P Gooding and L Steele, *Submission 123*; Pave the Way, *Submission 90*.

13 Pave the Way, *Submission 90*.

10.14 Dr Fleur Beaupert, Dr Piers Gooding and Linda Steele advocated for the repeal of all 'discriminatory mental health legislation, guardianship legislation, and any other substituted decision-making regimes' and stated:

> When restrictions are placed on the right to exercise legal capacity and the right to refuse medical treatment on an equal basis with others, the basis for supported decision-making as a remedy for disability-based discrimination is compromised. Hence, even if provisions for 'supported decision-making' and other measures to support the exercise of legal capacity were installed into current mental health and guardianship laws, the violation of core obligations of the CRPD would remain.[14]

10.15 In relation to the process of reform, the Australian Guardianship and Administration Council (AGAC) observed that the 'move to harmonisation of legislation will take some time to achieve and the complexity of this process cannot be underestimated'.[15]

10.16 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'.[16] Justice Connect and Seniors Rights Victoria suggested that there should be a nationally consistent approach to implementing decision-making principles and that states and territories retain responsibility for the implementation of supported decision-making under the oversight of a federal monitoring body.[17]

10.17 A 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 AGAC.

Application of the National Decision-Making Principles

10.18 The following material discusses, in general terms, how the National Decision-Making Principles and associated Guidelines may be used to guide review and amendment of state and territory laws, in the particular areas of:

- guardianship and administration;
- consent to medical treatment;
- mental health; and
- disability services.

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14 F Beaupert, P Gooding and L Steele, *Submission 123*.
15 AGAC, *Submission 91*.
16 Law Council of Australia, *Submission 83*.
17 Justice Connect and Seniors Rights Victoria, *Submission 120*.

Guardianship and administration

10.19 As discussed in Chapter 2, one of the key debates of central importance to the Inquiry concerned the extent to which art 12 of the CRPD permits 'substitute' or 'fully supported' decision-making.

10.20 A major element 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. However, regardless of the lack of consensus, 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'.[18]

10.21 Some room for fully supported decision-making should remain. This conclusion is, in part, dictated by the reality that some people will always need decisions made for them. 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'.[19] 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.[20]

10.22 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;[21]
- subject to accessible mechanisms for review; and
- consistent with decision-making that respects the will, preferences and rights of the individual.

10.23 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

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18 Office of the Public Advocate Systems Advocacy (Qld), 'Autonomy and Decision-Making Support in Australia: A Targeted Overview of Guardianship Legislation' (February 2014).

19 AGAC, *Submission 51*. See Ch 2.

20 Caxton Legal Centre, *Submission 67*. See also NSW Council for Intellectual Disability, *Submission 131*; Justice Connect and Seniors Rights Victoria, *Submission 120*.

21 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*.

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.[22] 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.[23] In the Australian Capital Territory and Queensland, guardians are obliged to act in a way that least interferes with a person's right to make a decision,[24] or to give effect to a person's wishes, so far as they can be determined.[25] 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.[26]

10.24 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.[27]

10.25 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 made 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.

10.26 Appointments would be made by the VCAT and the range of decisions for which the person needs support could, in principle, 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.

10.27 Stakeholders in this Inquiry called for continuing review of Australian guardianship laws,[28] as has the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD).[29] AGAC stated that the principles of supported decision-making articulated in the Discussion Paper could be 'incorporated into any review of state-based guardianship and administration regimes'.[30]

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22 *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.

23 *Guardianship and Administration Act 2000* (Qld) s 4; *Guardianship and Administration Act 1995* (Tas) s 6.

24 Ibid ss 5–7, sch 1.

25 *Guardianship and Management of Property Act 1991* (ACT) ss 4, 5A. See Ch 2.

26 *Guardianship and Administration Act 1993* (SA) s 5.

27 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) chs 8–9.

28 See, eg, National Association of Community Legal Centres, *Submission 127*; F Beaupert, P Gooding and L Steele, *Submission 123*; Justice Connect and Seniors Rights Victoria, *Submission 120*; AGAC, *Submission 91*; National Seniors Australia, *Submission 57*.

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

30 AGAC, *Submission 91*.

10.28 In addition to highlighting the desirability of reviewing state and territory laws to ensure consistency with the National Decision-Making Principles and the Commonwealth decision-making model, the ALRC's recommendation outlines a number of particular considerations that should inform such reviews. These are briefly discussed below, with particular reference to guardianship laws.

Interaction with Commonwealth supporter and representative schemes

10.29 As discussed in Chapter 4, the ALRC recommends 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.[31]

10.30 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.

10.31 Chapter 4 highlights some of the issues involved but they will vary depending on what approach is taken in Commonwealth laws.

10.32 For example, the ALRC envisages that before a representative is appointed for someone, the Commonwealth agency would have to be satisfied that the person actually needs a representative, and that an appointment is not being used as a substitute for appropriate decision-making support.

10.33 While there should be a presumption that an existing state or territory appointee should be appointed where a representative is needed under a Commonwealth law, sometimes there may be both a Commonwealth representative and a state or territory appointed decision-maker. If they have power to make decisions in the same area, interaction problems may occur (or be avoided by consultation and cooperation) but ultimately where a decision is being made for the purposes of the Commonwealth legislation, the Commonwealth representative is responsible.

10.34 If an existing state or territory appointee is also appointed under Commonwealth law, other issues may arise, particularly if the appointee's duties under state or territory legislation conflict significantly with those under Commonwealth law. Legislative change may be required to allow state or territory appointees to be appointed under orders that better align with duties and responsibilities under Commonwealth legislation—for example, so that they can make both lifestyle and financial decisions as representatives under the NDIS.

Consistency

10.35 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:

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31 See Chs 5 and 6.

> 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.[32]

10.36 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.

10.37 Stakeholders supported a nationally consistent approach.[33] 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.[34]

10.38 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'.[35] 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'.[36]

Cross-jurisdictional recognition

10.39 A related issue is the need to maximise cross-jurisdictional recognition of appointments and other decision-making arrangements. Stakeholders emphasised this need—especially as people commonly travel between jurisdictions or live in towns which straddle jurisdictional boundaries.[37] 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.[38]

10.40 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,

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32 B Arnold and W Bonython, *Submission 38*.
33 See, eg, National Seniors Australia, *Submission 57*; National Disability Services, *Submission 49*; Office of the Public Advocate (SA), *Submission 17*.
34 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*.
35 QDN, *Submission 59*.
36 Ibid.
37 See, eg, Office of the Public Advocate (SA), *Submission 17*.
38 QDN, *Submission 59*.

particularly if they lose capacity outside the jurisdiction the appointment was made in, or if they hold assets in multiple jurisdictions'.[39]

10.41 There are some provisions permitting cross-jurisdictional recognition. However, these arrangements are not comprehensive and should be improved. For instance, while the Victorian legislation makes provision for the recognition of interstate guardianship and administration orders,[40] Queensland has no corresponding law.

Data collection

10.42 Stakeholders raised concerns about difficulties associated with obtaining consistent data in relation to the appointment of substitute decision-makers. They emphasised the need for improved data collection to facilitate comparisons across jurisdictions and inform policy development.[41] Arnold and Bonython observed that,

> 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.[42]

10.43 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.

Consent to medical treatment

10.44 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. 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'.[43]

10.45 As part of their duty of care, health professionals must obtain 'informed consent' by providing 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.[44]

10.46 The common law recognises that there are circumstances where an individual may not be capable of giving informed consent, for example, due to requiring decision-making support with respect to medical treatment. However, except in the case of children—where the High Court has recognised the courts' *parens patriae* jurisdiction

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39 B Arnold and W Bonython, *Submission 38*.
40 *Guardianship and Administration Act 1986* (Vic) pt 6A.
41 See, eg, B Arnold and W Bonython, *Submission 38*; Office of the Public Advocate (SA), *Submission 17*.
42 B Arnold and W Bonython, *Submission 38*.
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 17.
44 *Rogers v Whitaker* (1992) 175 CLR 479.

in authorising treatment[45]—it does not provide significant guidance on supported decision-making in health care settings.

10.47 State and territory guardianship and mental health laws provide detailed rules for substitute decision-making concerning the medical treatment of adults who are deemed incapable of giving consent.[46]

10.48 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.

10.49 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 (for example, by a court) to make health decisions for an adult who is not capable of giving consent.[47]

10.50 Currently, 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.[48]

Supported decision-making in health care

10.51 Stakeholders expressed opposition to existing substitute decision-making mechanisms in health care and favoured supported decision-making.[49] NSW Council of Social Service (NCOSS) stated that 'quality of life decisions should be made by the affected person'. [50] The Illawarra Forum submitted that 'every effort should be made to support people to make informed decisions and choices', including in relation to healthcare.[51]

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45 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

46 Eg, *Guardianship and Management of Property Act 1991* (ACT) ss 32B, 32D; *Mental Health Act 2009* (SA) ss 56, 57.

47 At the time of writing, in the Northern Territory, there was no provision for consent to medical treatment without an appointment being made. South Australia has legislation specific to consent to medical treatment, which provides for medical powers of attorney: *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

48 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.

49 See, eg, NCOSS, *Submission 26*; The Illawarra Forum, *Submission 19*; Office of the Public Advocate (SA), *Submission 17*.

50 NCOSS, *Submission 26*.

51 The Illawarra Forum, *Submission 19*.

10.52 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.[52] The Carers Alliance asserted the primacy of the family who know of a person's beliefs and values in supporting people with disability to exercise capacity.[53] On the other hand, Family Planning NSW considered that encouraging supporters who are not family members but health care workers may help overcome a lack of understanding about what constitutes informed consent in reproductive and sexual health and any discomfort between family members to discuss such matters.

> 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.[54]

10.53 Under the Commonwealth decision-making model, the person requiring support chooses who their supporter should be when making medical decisions, such as a family member, friend, carer, health care worker or a group of these people. If a representative is appointed for the person under the model, the representative may make decisions about medical treatment for the person in accordance with that person's will, preferences and rights.

10.54 A number of stakeholders expressed concerns about the current laws on sterilisation procedures. Women with Disabilities Australia submitted the 'best interest' approach to the sterilisation of women and girls has been used in a discriminatory way and that a lack of education and accessible services can prevent women from making choices regarding their fertility and conception.[55] Organisation Intersex International Australia argued that, in the absence of a national policy framework, 'intersex-related medical interventions must be subject to legal scrutiny within a human rights framework'.[56]

10.55 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.[57] Several other stakeholders supported legislative prohibition of sterilisation without informed consent.[58]

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52 See, eg, Office of the Public Advocate (Qld), *Submission 05*.

53 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*.

54 Family Planning NSW, *Submission 04*.

55 WWDA, *Submission 58*.

56 Organisation Intersex International Australia Limited, *Submission 97*.

57 Children with Disability Australia, *Submission 68*.

58 Law Council of Australia, *Submission 83*; Women's Legal Services NSW, *Submission 76*; ADACAS, *Submission 29*.

Review of the law

10.56 The law on decision-making in health care is complex. Inconsistency in language, and different tests of decision-making ability and processes across the jurisdictions may cause difficulties for health service providers and consumers.

10.57 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', as well as differentiating between 'significant' and 'routine' medical procedures.[59] 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.[60]

10.58 In 2011, AHMAC developed a national policy framework for advance care directives to address challenges posed by divergent laws affecting consent to medical treatment.[61] The ALRC received submissions noting the desirability of nationally consistent and enforceable laws on advance care directives.[62]

10.59 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).[63] This would place a focus on the ability of people to understand information relevant to a health care decision; retain that information; use or weigh that information as part of a decision-making process; or communicate the decision.[64]

10.60 The ALRC recommends that state and territory governments review legislation relating to informed consent to medical treatment, including in relation to advanced care directives,[65] with a view to reform that is consistent with the National Decision-Making Principles and the Commonwealth decision-making model.

10.61 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.

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59 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 12, 199–219, ch 13.

60 '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.

61 Australian Health Ministers' Advisory Council, *National Framework for Advance Health Care Directives*, September 2011.

62 Law Council of Australia, *Submission 83*; ADACAS, *Submission 29*; Mental Health Coordinating Council, *Submission 07*.

63 NMHCCF and MHCA, *Submission 81*.

64 See *Mental Capacity Act 2005* (UK) s 3.

65 See Best Practice Standards in Australian Health Ministers' Advisory Council, *National Framework for Advance Health Care Directives*, September 2011.

10.62 Any new approach to consent to medical treatment 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[66] and the national codes of conduct for health practitioners.[67]

Mental health

10.63 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.[68]

10.64 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.[69] There are active mental health reviews and legislative initiatives in other jurisdictions.[70]

10.65 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 decisions and who have a view about the preferred treatment or wish to forgo certain treatments.[71]

10.66 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'.[72]

10.67 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

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66 '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).

67 The codes of conduct for the 14 national boards of health practitioners are available at Australian Health Practitioner Regulation Agency, *National Boards* <www.ahpra.gov.au>.

68 See, eg, *Mental Health and Related Services Act* (NT) s 14; *Mental Health Act 2007* (NSW) s 14.

69 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.

70 See, eg, ACT Second Exposure Draft Bill to amend the *Mental Health (Treatment and Care) Act 1994* (ACT); 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).

71 Mental Health Coordinating Council, *Submission 07*.

72 Ibid.

approved facility, its controlling authority must give the person a statement of their rights.[73] In Victoria, a statement of rights must be explained to people being assessed or receiving treatment in relation to their mental illness.[74]

10.68 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.[75] 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.[76] A person can only nominate another person in writing and the nomination must be witnessed.[77] 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.[78]

10.69 A similar model for supported decision-making in mental health services is contained in the Mental Health Bill 2013 (WA) (the WA Bill).[79] 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.[80] In addition, the WA Bill would give effect to the carers' charter provided for in the *Carers Recognition Act 2004* (WA).[81]

10.70 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 mental health workers.[82] A nominated person is entitled to 'uncensored' communication with the person with mental illness, and to receive information related to that person's treatment and care.[83]

10.71 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.[84] 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

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73 *Mental Health Act 2013* (Tas) ss 62, 129, sch 1.
74 From 1 July 2014: *Mental Health Act 2014* (Vic) ss 12, 13.
75 Ibid pt 3.
76 Ibid s 23.
77 Ibid s 24.
78 Ibid ss 25–27.
79 The Mental Health Bill 2013 (WA) was adopted by the WA Legislative Assembly in April 2014 and at the time of writing was expected to progress to the Legislative Council for review. If enacted, it will replace the *Mental Health Act 1996* (WA).
80 Mental Health Bill 2013 (WA) sch 1.
81 Ibid cl 319(2)(g), 332(3)(e).
82 Ibid cl 263.
83 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).
84 Mental Health Bill 2013 (WA) cl 264(5)–(6).

consideration of the options that are reasonably available for the patient and the provision of support to the patient.[85]

10.72 The ALRC recommends 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.

10.73 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.[86] This project propelled review of mental health laws in every state and territory in Australia in the late 1990s.[87]

Disability services

10.74 States and territories legislate for the provision of supports and services to persons with disability.[88] The role of disability services legislation in regulating restrictive practices is discussed in Chapter 8, where the ALRC recommends the development of a national approach to restrictive practices in disability services.

10.75 As a national quality and safeguards system for the NDIS is being developed by COAG,[89] the ALRC considers it desirable for state and territory governments to review their disability services 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 compliance with the CRPD, as well as preparing for the implementation of the NDIS.

10.76 The *Disability Inclusion Act 2014* (NSW) is an example of legislation which moves towards more complete recognition of the right of persons with disability to make decisions that affect their lives and to have those decisions respected.[90] The Act includes an objective to 'enable people with disability to exercise choice and control in the pursuit of their goals'[91] and a general principle that 'people with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support'.[92]

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85 Ibid cl 266(1)(b).

86 The University of Newcastle, 'Model Mental Health Legislation' (Australian Health Ministers' Advisory Council, 1994).

87 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).

88 *Disability Act 2006* (Vic); *Disability Inclusion Act 2014* (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).

89 COAG Disability Reform Council, *Meeting Communiqué*, 21 March 2014.

90 *Disability Inclusion Act 2014* (NSW).

91 Ibid s 3(c).

92 Ibid s 4(5).

11. Other Issues

Contents

Summary

11.1 This chapter discusses a number of issues that are relevant to other Commonwealth laws and legal frameworks that have an impact on the exercise of legal capacity. These relate to:

- the common law relating to incapacity to contract;
- consumer protection laws;
- consent to marriage;
- the nomination of superannuation beneficiaries;
- acting in the role of a board member and in other corporate roles; and
- holding public office.

11.2 The ALRC recommends amendments to the *Marriage Act 1961* (Cth) and associated guidelines for marriage celebrants, and some provisions of the *Corporations Act 2001* (Cth), to better reflect the National Decision-Making Principles. It also recommends that the Australian Government should review and replace provisions in Commonwealth legislation that require the termination of statutory appointments by reason of a person's 'unsound mind' or 'mental incapacity'.

11.3 The ALRC received submissions on a number of other areas which are not a focus of the Inquiry. While the ALRC does not make recommendations in these areas, some of the key concerns are outlined.

Incapacity and contract law

11.4 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]

11.5 Generally, if a person with a legal disability attempts 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.

11.6 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]

11.7 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]

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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 Thomson Reuters, *The Laws of Australia*, Contract Law 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 The ACL is contained in sch 2 of the *Competition and Consumer Act 2010* (Cth): sch 2, s 20 'Unconscionable conduct within the meaning of the unwritten law'.

11.8 Effectively, the common law recognises a presumption of capacity—legal agency—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.

11.9 For example, introducing any new functional test of decision-making ability (as recommended 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.

11.10 Arguably, abolishing the common law relating to contractual incapacity in its entirety 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]

11.11 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

11.12 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).

11.13 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]

11.14 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*.

11.15 The *National Consumer Credit Protection Act 2009* (Cth) contains provisions on responsible lending conduct.[10] These essentially require credit providers to assess the capacity of all consumers—not only consumers with disabilities—and assist them to understand consumer credit and financial products being offered.

11.16 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]

11.17 For example, the National Association of Community Legal Centres (NACLC) 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'.[12] This may involve, for example, through asking a 'mandatory list of questions to ensure that a consumer has understood the contract'.[13]

11.18 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'.[14]

11.19 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.

11.20 In the Discussion Paper, the ALRC asked whether provisions similar to the responsible lending provisions of the *National Consumer Credit Protection Act* should apply to other consumer contracts.[15] 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?

11.21 Some stakeholders considered that such obligations should underlie consumer contracts,[16] but recognised concerns about the practical implications of law reform in this direction. KinCare Services, for example, stated that while it supported the notion that 'all interactions with people with disability should take place under conditions where the customer's decision-making capability is assured', this could be costly and would increase market regulation. It suggested that the aims of the *United Nations*

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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 Ibid.
14 Public Interest Advocacy Centre, *Submission 41*.
15 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 11–1.
16 Illawarra Forum, *Submission 124*; KinCare Services, *Submission 112*.

Convention on the Rights of Persons with Disabilities (CRPD)[17] may be pursued more effectively through 'the development of recommended standard contract clauses or improved availability of accessible communication tools'.[18]

11.22 The Queenslanders with Disability Network (QDN) observed that the 'potential for some people with disability to sign a contract that is unsuitable for their needs is high' and welcomed 'any attempt to protect consumers from financial commitments that they may not fully understand'.[19] However, it expressed concern that reform in this area will 'lead to an overly conservative approach in the offering of services to people with disability'.[20]

11.23 NACLC submitted that, rather than any broader reform,

> The introduction of very targeted and basic suitability requirements only in certain high-risk consumer contracts may be a preferable approach. This could, for example, apply to contracts such as purchasing a car without finance, high value phone contracts, and other high value consumer contracts and require a basic consideration of affordability and suitability.[21]

11.24 Similarly, Legal Aid NSW considered that there is a need for reform in relation to 'financial products, particularly insurance, as well as reforms that target particular product types and business models such as life insurance, funeral insurance and door to door and telephone sales'.[22]

11.25 The ALRC considers that it would not be appropriate to make any recommendations in consumer protection law without further consideration of the possible ramifications for persons with disability who do not have decision-making vulnerabilities.

Marriage

11.26 Article 23 of the CRPD recognises the right of persons with disabilities to marry and found a family. The focus of this Inquiry is on the Commonwealth legal framework for marriage, namely the *Marriage Act 1961* (Cth) and the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* (the Guidelines), to ensure that persons with disability are 'not unnecessarily prevented from entering a marriage'.[23]

11.27 Stakeholders supported the ALRC's proposal for amendment to the threshold under the *Marriage Act* for 'real consent' to marriage,[24] to provide that, instead of a

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17 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).
18 KinCare Services, *Submission 112*.
19 Queenslanders with Disability Network, *Submission 119*.
20 Ibid. See also Vicdeaf, *Submission 125*.
21 National Association of Community Legal Centres, *Submission 127*.
22 Legal Aid NSW, *Submission 137*.
23 National Mental Health Consumer & Carer Forum, *Submission 100*.
24 *Marriage Act 1961* (Cth) s 23B(1)(d)(iii).

reference to mental incapacity, the consent of either of the parties may be void where that party did not have decision-making ability with respect to the marriage.[25]

11.28 The Victorian Deaf Society raised concerns about difficulties facing the people who would assess a person's decision-making ability with respect to marriage and of discerning 'real consent' as 'there are people who don't get the concept of marriage but do enjoy the time they spend together'.[26]

11.29 To assist in the role of marriage celebrants to determine real consent, the ALRC recommends that existing guidelines for marriage celebrants also be amended.

Real consent to marriage

Recommendation 11–1 Sections 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth) should be amended to remove the references to 'being mentally incapable' and instead provide that 'real consent' is not given if 'a party did not understand the nature and effect of the marriage ceremony'.

11.30 The *Marriage Act 1961* (Cth) provides that a marriage will be void in a number of circumstances. Specifically, ss 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act* states 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'.[27]

11.31 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.[28] It is an offence for a celebrant to solemnise a marriage where they have reason to believe that one of the parties does not meet this standard.[29]

11.32 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'.[30] Similarly, the Illawarra Forum submitted that the 'terminology must be reviewed to reflect a clear distinction between intellectual

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25 National Mental Health Consumer & Carer Forum, *Submission 100*; Family Planning NSW, *Submission 109*; Illawarra Forum, *Submission 124*.

26 Vicdeaf, *Submission 125*.

27 *Marriage Act 1961* (Cth) s 23(1)(iii) applies to marriages solemnised on or after 20 June 1977 and before the commencement of s 13 of the *Marriage Amendment Act 1985* (Cth) and s 23B(1)(d)(iii) applies to marriages solemnised after the commencement of s 13 of the *Marriage Amendment Act*.

28 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.

29 Ibid s 100.

30 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012).

disability and mental capacity ... people with disability should be assessed on their mental capacity as opposed to their disability'.[31]

11.33 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.[32]

11.34 Sections 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act* reveal a tension between the need to protect persons with disability from exploitation or forced marriage, while ensuring that any person with disability who is able to understand and consent to marriage should be entitled to marry freely.

11.35 This formulation of the test was first introduced in the *Matrimonial Causes Act 1959* (Cth).[33] There have only been three reported decisions with respect to this test.[34] In 2014, Foster J in *Oliver and Oliver* 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.[35]

11.36 Foster J also stated that 'the relevant point of time in proving mental incapacity is the time of the marriage ceremony'.[36]

11.37 This interpretation of the provision reflects the ALRC's approach to decision-making ability 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,[37] the ALRC recommends amendment of ss 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act* to void a marriage if 'a party did not understand the nature and effect of the marriage ceremony'.

11.38 The ALRC does not, however, make recommendations 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 because of concerns about such provisions

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31 The Illawarra Forum, *Submission 19*.

32 B Arnold and W Bonython, *Submission 38*.

33 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].

34 *Brown and Brown* (1982) 92 FLC 232; *AK and NC* (2003) 93 FamCA 178; *Oliver and Oliver* [2014] FamCA 57.

35 *Oliver and Oliver* [2014] FamCA 57, [255].

36 Ibid [201].

37 Section 23B(1)(d)(iii) is similarly worded to s 93(8)(b) 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'. See further, Ch 9.

unintentionally resulting in a higher threshold for real consent to marry for persons with disability.[38]

Guardians and consent

11.39 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.[39]

11.40 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'.[40] 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'.[41] The ALRC suggests this may be an issue that could be considered in the course of review of state and territory guardianship legislation.[42]

Guidelines on the Marriage Act

Recommendation 11–2 The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* should be amended to reflect the removal of the reference to 'mental incapacity' in the *Marriage Act 1961* (Cth) and to provide further guidance on determining whether or not a person can 'understand the nature and effect of the marriage ceremony'.

11.41 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.[43] There are a number of guidelines for celebrants[44] and celebrants must undergo performance reviews by the Registrar of Marriage Celebrants.[45]

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38 The *Marriage Act 1961* (Cth) currently only requires 'a very simple or general understanding ... of the marriage ceremony and what it involves': Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014 pt 8.6.

39 See, eg, The Illawarra Forum, *Submission 19*; Family Planning NSW, *Submission 04*.

40 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) 152.

41 Family Planning NSW, *Submission 04*. See also The Illawarra Forum, *Submission 19*.

42 See Ch 10.

43 *Marriage Act 1961* (Cth) s 39G.

44 Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014; 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. The *Guidelines on the Marriage Act 1961* were updated in July 2014 to reflect changes brought about through the *Marriage Amendment (Celebrant Administration and Fees) Act 2014* (Cth), the *Marriage (Celebrant Registration Charge) Act 2014* (Cth) and the *Marriage Amendment (Fees and Charges) Regulation 2014* (Cth).

45 *Marriage Act 1961* (Cth) s 39(H).

11.42 As outlined above, it is an offence for a celebrant to solemnise a marriage where they have reason to believe there is 'a legal impediment'.[46] The Guidelines state that, if a celebrant believes the 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'.[47]

11.43 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.[48] The Guidelines state:

> in cases where there is doubt about whether a party has the 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.[49]

11.44 The Guidelines also provide a list of questions to assist celebrants to identify situations where consent issues may arise.[50] However, stakeholders considered the existing guidance to be inadequate. The Physical Disability Council of NSW submitted that a celebrant who may not have any knowledge of disability should not be authorised to make a judgement about a person's capacity to consent to marriage.[51]

11.45 Further, the Physical Disability Council of NSW highlighted that the Guidelines do not 'consider communication needs and augmented communication used by people with disability'.[52] The Council recommended amendment to clauses of the Guidelines which relate to obtaining a translator or interpreter[53] 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'.[54]

11.46 The revised 2014 Guidelines provide for ceremonies conducted in a sign language such as Auslan[55] and for vows to be exchanged in a sign language.[56] The ALRC acknowledges this positive development and encourages provision of additional

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46 Ibid s 100.
47 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 pt 8.6.
48 Ibid.
49 Ibid.
50 Ibid.
51 Physical Disability Council of NSW, *Submission 32*. See also The Illawarra Forum, *Submission 19*.
52 Physical Disability Council of NSW, *Submission 32*.
53 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 pt 5.9.
54 *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).
55 Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014 pt 5.9.
56 Ibid pt 5.7.

guidance for marriage celebrants in relation to determining real consent, including ensuring different communication needs are met.[57]

Other concerns

11.47 In Australia, persons with disability may experience discrimination or difficulties in exercising their rights to marry and to form intimate relationships. In particular, the Disability Rights Now report asserted that 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.[58]

11.48 The 'subject of sexuality and intimate relationships are [a] generally silent, ignored and invisible aspect of the lives of people with disability'.[59] Some stakeholders emphasised that many persons with disability may be denied the right to engage in intimate relationships. Stakeholders outlined a range of difficulties including: legislative barriers under state and territory law;[60] attitudes of family, carers and service providers;[61] risk management processes and policies;[62] limited access to information;[63] difficulty accessing sex workers;[64] and the need for education and awareness raising in relation to persons with disability and sexual and reproductive health.[65]

11.49 While important, many of these issues arise at a state or territory level. The key to addressing them extends beyond the limits of law or legal frameworks and into other levers for attitudinal and cultural change.[66] The ALRC does not make

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57 The NSW Capacity Toolkit is another useful model: New South Wales Attorney General's Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

58 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*.

59 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).

60 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*.

61 See, eg, Queenslanders with Disability Network, *Submission 59*; B Arnold and 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.

62 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) 158.

63 Vicdeaf, *Submission 56*.

64 Queenslanders with Disability Network, *Submission 59*; Touching Base, *Submission 40*; Physical Disability Council of NSW, *Submission 32*.

65 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).

66 See, eg, B Arnold and W Bonython, *Submission 38*.

recommendations in relation to these issues but notes that they may be considered in the review of state and territory legislation.[67]

Superannuation

11.50 Many decision-making issues in relation to superannuation concern the operation and powers of state and territory appointed decision-makers, including under powers of attorney. The focus of this chapter is confined to decision-making issues that may require amendment to Commonwealth legislation and legal frameworks.

11.51 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.[68] The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Commissioner of Taxation supervise superannuation funds.[69] Individual superannuation funds are also administered by their trust deeds and in accordance with governing rules.

11.52 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 death benefit nomination of a beneficiary. 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
- contain a declaration signed and dated by the witness stating that the notice was signed by the member.[70]

11.53 A member can nominate a legal personal representative, or a dependant or dependants as their beneficiary.[71] Nominations are generally only binding for three years, but can be renewed.[72] On or after the member's death, the trustee of the fund

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67 See Ch 10.

68 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).

69 Ibid.

70 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. There is also provision for a non-binding death benefit nomination: although not binding on the trustee of the superannuation fund, 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.

71 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.

72 *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.

must then provide the member's benefits to the person or people mentioned in the notice.[73]

11.54 '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'.[74]

11.55 One area of contention identified in the ALRC's Discussion Paper was 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.[75]

11.56 As a matter of law, there does not appear to be any restriction in the SIS Act or SIS Regulations themselves that would prevent a person acting under a power of attorney from completing and signing a binding death benefit nomination. The issue arose for consideration by the Superannuation Complaints Tribunal in 2007. In *Determination D07–08\030*, the sister of the member of the relevant superannuation fund (the Deceased Member) was also his legal personal representative. She also held an enduring power of attorney on behalf of the Deceased Member. Exercising the power of attorney, the sister had made a binding death benefit nomination on behalf of the Deceased Member as follows: 25% to herself and 37.5% each to the member's daughter and son. The Trustee of the fund advised the sister that it had decided to accept the validity of the nomination and pay 37.5% each to the member's daughter and son, and 25% to the sister *as the legal personal representative*. By his will, the Deceased Member left one quarter of his estate to his sister and the remaining three quarters to his son and daughter in equal shares. The sister lodged a complaint with the Tribunal that the decision of the trustee to pay 25% of the death benefit to her as the legal personal representative, and not directly to her, was unfair or unreasonable.

11.57 The Superannuation Complaints Tribunal stated that, in principle, the enduring power of attorney would have permitted the sister to complete and sign the binding death nomination, but the nomination would 'only have been valid if the person nominated to receive the benefit was an individual who was either a dependant, or the Legal Personal Representative acting in that capacity, rather than as an individual'.[76] The trustee decided that she was not a 'dependant' and therefore ineligible under the scheme, hence the only capacity in which she could receive a benefit was as the legal personal representative of her brother.

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73 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.

74 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1).

75 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Questions 11–1, 11–2.

76 *Determination No D07-08\30* (Unreported, Superannuation Complaints Tribunal, 3 September 2007) [34].

11.58 The Tribunal said that it was unclear on what basis the sister named herself in the nomination and the trustee should have clarified this 'before accepting the nomination'.[77] Further, the nomination was ambiguous because there were in fact two legal personal representatives appointed in the will. The Tribunal pointed to the power in the trust deed of the fund to refuse to accept or give effect to a binding nomination, if it is not sufficiently clear to allow the trustee to pay it according to the nomination.[78]

11.59 The Tribunal decided that the trustee should not have accepted the nomination and that the trustee's decision should be set aside. Instead, the Tribunal determined that 100% of the death benefit should be distributed to the Deceased Member's estate. As the Tribunal did not decide the matter on the basis of the binding nomination, its comments are not of direct application.

11.60 As a matter of current practice the Law Council of Australia (Law Council) pointed to the different practices of funds:

> 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.[79]

11.61 The Law Council suggested that superannuation funds would adopt a more consistent approach if there was greater clarity in legislative provisions governing superannuation death benefits.[80]

11.62 This policy issue is a difficult one, given the difference between a nomination, as a lifetime act, and its effect, which is will-like in nature—as it affects property after the death of the person who holds the superannuation interest.[81] In this context, in the Discussion Paper, the ALRC asked whether a person holding authority under an instrument such as an enduring power of attorney should be *restricted* from nominating a beneficiary on behalf of the person for whom they were acting—assuming that such action was not prevented by the power of attorney itself.[82]

11.63 The Law Council agreed that the main issue around binding death benefit nominations is that there is currently no clear policy position on whether a nomination should be considered similar to a will or simply an instruction in relation to a person's assets. The Council also agreed with the ALRC's analysis that nominations are will-like in nature and they should be treated in policy terms 'similarly to wills'.[83]

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77 Ibid [35]. Other issues were argued by the son and daughter, including that to exercise the power of attorney in favour of herself was a breach of fiduciary duty by the sister: [21].

78 Ibid [37].

79 Law Council of Australia, *Submission 83*.

80 Ibid.

81 See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [3.10]–[3.12].

82 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 11–3.

83 Law Council of Australia, *Submission 142*.

11.64 Until recently, a will could *only* be made by the testator themselves, and not, for example, an enduring guardian. 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.[84] 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 require decision-making assistance, discussed in Chapter 2. The standard to be applied by the courts reflects the time the relevant state or territory legislation was introduced.[85] For example, the courts have to ask variously 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'.[86]

11.65 While a limitation on the power of an enduring guardian is a matter that goes beyond the Terms of Reference for the Inquiry, the ALRC concludes that, as a policy matter, the role of an enduring guardian is one focused on the lifetime needs of the person. It is not appropriate for an enduring guardian to make a binding death benefit nomination, which is like a will in effect. The Law Council submitted that the SIS Act and SIS Regulations could be amended to make this clear so that a nomination 'generally cannot be made on behalf of a member by a person exercising powers under an EPA'.[87]

Board membership and other corporate roles

Recommendation 11–3 Sections 201F(2), 915B and 1292(7)(b) of the *Corporations Act 2001* (Cth) should be amended to remove references to 'mental incapacity', 'being incapable, because of mental infirmity' and 'mental or physical incapacity'. Instead, the provisions should state that a person is not eligible to act in the roles of director, auditor or liquidator, or a financial services licence holder, if they cannot be supported to:

(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;

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84 *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.

85 See the discussion in Croucher and Vines, above n 82, [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.

86 Croucher and Vines, above n 82, [6.11].

87 Law Council of Australia, *Submission 142*. The Law Council's submission was supported by National Mental Health Consumer & Carer Forum, *Submission 100*.

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

(d) communicate the decisions in some way.

11.66 Stakeholders expressed concern about under-representation of persons 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.[88]

11.67 The Mental Health Coordinating Council submitted that the language of laws should change to 'eradicate any stigmatising and discriminating practice towards people with a mental health condition'—including in relation to some provisions concerning board membership.[89]

11.68 For example, the *Associations Incorporation Act 2009* (NSW) applies model rules to the constitutions of associations, if appropriate provision is not otherwise made.[90] 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'.[91] 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*'.[92]

11.69 Such a broad provision is 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.[93] 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.[94] In this Inquiry the ALRC recommends a move away from such a status-based approach.

11.70 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

88 See eg, J Meagher *Submission 79*; Hobsons Bay City Council, *Submission 44*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; The Illawarra Forum, *Submission 19*; Mental Health Coordinating Council, *Submission 07*.

89 Mental Health Coordinating Council, *Submission 07*.

90 *Associations Incorporation Act 2009* (NSW) s 25.

91 *Associations Incorporation Regulation 2010* (NSW) sch 1, cl 18(2)(f).

92 *Interpretation Act 1987* (NSW) s 21.

93 See Ch 3.

94 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*.

mental incapacity', the person's personal representative or trustee may appoint another person as director.[95]

- ***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'.[96]
- ***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'.[97]

11.71 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.

11.72 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.

11.73 Some stakeholders, while supporting a move in this direction, pointed out some of its implications.[98] The National Mental Health Consumer and Carer Forum observed that the legal process around the appointment and removal of directors or board members needs 'to take account of the protection of the interests of the governed and an underlying goal of enhancing diverse representation of boards'.[99] Ian Watts raised a number of questions about the possible obligations of the company to provide support, and the duties and obligations of any supporter.[100]

Holding public office

Recommendation 11–4 The Australian Government should review and replace provisions in Commonwealth legislation that require the termination of statutory appointments by reason of a person's 'unsound mind' or 'mental incapacity'.

95 *Corporations Act 2001* (Cth) s 201F(2).
96 Ibid s 1292(7)(b).
97 Ibid s 915B.
98 I Watts, *Submission 114*; National Mental Health Consumer & Carer Forum, *Submission 100*.
99 National Mental Health Consumer & Carer Forum, *Submission 100*.
100 I Watts, *Submission 114*.

11.74 Persons with disability are significantly under-represented in public office.[101] The main barrier to holding public office for persons with disability may be the negative assumptions about their ability. The Law Council 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.[102]

11.75 There are a considerable number of other provisions in Commonwealth legislation concerning public office holders that refer to the concept of 'unsound mind' or 'mental incapacity'. In most cases, these provide that the appointment of a person who becomes of unsound mind or acquires a mental incapacity may be terminated.[103] For example:

- *Australian Law Reform Commission Act 1996* (Cth) ss 17, 18—members of the ALRC;
- *Australian Securities and Investments Commission Act 2001* (Cth) s 207—Chairperson or Deputy Chairperson of ASIC;
- *Gene Technology Act 2000* (Cth) s 119—Gene Technology Regulator;
- *Inspector-General of Taxation Act 2003* (Cth) s 35—Inspector-General of Taxation;
- *National Blood Authority Act 2003* (Cth) s 35—General Manager of the National Blood Authority; and
- *Veterans' Entitlements Act 1986* (Cth) s 164—members of the Veterans' Review Board.

11.76 The ALRC suggests that these provisions be replaced over time with functional tests similar to those recommended by the ALRC in other contexts, including in relation to board membership, above. That is, an appointment should be able to be terminated if the person cannot be supported to: understand the information relevant to the decisions that they will have to make in performing the role; retain that information to the extent necessary to make those decisions; use or weigh that information as part of the process of making decisions; or communicate the decisions in some way.

Members of Parliament

11.77 The qualifications of members of the House of Representatives and Senators are set out in the *Australian Constitution*.[104] They include eligibility as an elector under the *Commonwealth Electoral Act 1918* (Cth).[105] As discussed in Chapter 9, the ALRC

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101 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.

102 Law Council of Australia, *Submission 83*.

103 Most of these provisions include the words 'proved misbehaviour or physical or mental incapacity'.

104 *Australian Constitution* ss 16, 34.

105 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).

recommends removing the 'unsound mind' provision contained in the *Commonwealth Electoral Act*.[106]

Judicial officers

11.78 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'.[107] 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.

11.79 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[108] to deal with complaints about judicial officers, including establishing a conduct committee.

11.80 The ALRC does not recommend any change to these laws because they appear to provide for an impartial and considered approach to the assessment of decision-making ability in their relevant contexts. At the time of writing, these 2012 laws had 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.

Other issues

Employment

11.81 There are many concerns about the employment of persons with disability in Australia, including those arising from lower levels of labour force participation and higher unemployment, compared to others;[109] and the lowest employment participation rate for persons with disability among OECD countries.[110]

11.82 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;

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106 *Commonwealth Electoral Act 1918* (Cth) s 93(8)(b).
107 *Australian Constitution* s 72.
108 The heads of jurisdiction are the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate.
109 See, eg, Australian Bureau of Statistics, 'Australian Social Trends' (Cat No 4102.0).
110 Organisation for Economic Co–Operation and Development, '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 persons with disability in the Commonwealth public service.[111]

11.83 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 make recommendations in these areas.

Anti-discrimination

11.84 The nature and operation of Commonwealth anti-discrimination legislation raises a range of significant issues for persons with disability. These issues relate to factors which may limit the ability of persons with disability to access the anti-discrimination complaints system, including:

- the individualised nature of the system;
- issues of standing;
- failure to cover intersectional discrimination;
- costs associated with proceeding past the conciliation stage of complaints;
- reliance on, and the operation of, exceptions in legislation;
- coverage of laws;
- positive duties;
- remedies and enforcement; and
- the role, powers and resourcing of the Australian Human Rights Commission.[112]

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111 See, eg, People with Disabilities WA and Centre for Human Rights Education, *Submission 133*; 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*.

112 See, eg, Law Council of Australia, *Submission 83*; National Association of Community Legal Centres and Others, *Submission 78*; 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 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*.

11.85 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,[113] the ALRC does not make recommendations in this area in this Report.

Insurance

11.86 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), and for submissions on other issues relating to insurance. The key concerns expressed by stakeholders with respect to persons with disability and insurance related 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 *Disability Discrimination Act*.[114]

11.87 Conversely, some stakeholders submitted that 'laws and legal frameworks concerning insurance do not reduce the equal recognition of people with disability' and that it is unnecessary to examine the operation of the underwriting process or the exemption under the *Disability Discrimination Act*.[115]

11.88 Again, some of the issues highlighted by stakeholders do not relate directly to concepts of legal capacity or decision-making ability, and the ALRC does not make recommendations in these areas. This approach was endorsed by the Insurance Council of Australia, which expressed its willingness to discuss with disability organisations ways of improving access to general insurance for those with a disability.[116]

11.89 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*,[117] may also be applicable in the context of disability, including in relation to:

- the need for clear and simple information about available insurance products;

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113 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.

114 See, eg, Anti-Discrimination Commissioner (Tasmania), *Submission 71*; Mental Health Council of Australia, *Submission 52*; Physical Disability Council of NSW, *Submission 32*.

115 Insurance Council of Australia, *Submission 08*. See also Financial Services Council, *Submission 35*.

116 Insurance Council of Australia, *Submission 105*.

117 Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013).

- the desirability of an agreement between the Australian Government and insurers requiring the publication of data upon which insurance offerings based on disability rely;
- review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to disability 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 persons with disability.

Parenthood and family law

11.90 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 this Report. For example, issues concerning the appointment of case and litigation representatives and protecting vulnerable witnesses arise in family law proceedings and are discussed in Chapter 7. Similarly, issues relating to sterilisation are discussed in Chapter 10.

11.91 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.[118] However, as outlined in Chapter 1, the focus of the ALRC's work is on Commonwealth laws and legal frameworks, and the examination of the operation of state and territory child protection systems extends beyond the Terms of Reference for this Inquiry.

11.92 Some stakeholders also raised issues relating to the effect that a parent having disability may have on parenting proceedings in the Family Court.[119] However, the Hon Chief Justice Diana Bryant AO of the Court 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.[120]

11.93 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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118 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).

119 See, eg, Office of the Public Advocate (Vic), above n 119. See also ADACAS, *Submission 29*; The Illawarra Forum, *Submission 19*.

120 D Bryant, *Submission 22*.

Consultations

Name	Location
Administrative Appeals Tribunal	Sydney
Advocacy for Inclusion	Sydney
Amparo Advocacy Inc	Brisbane
Association of Relatives and Friends of the Mentally Ill (ARAFMI) NSW	Sydney
Christian Astourian, Chair of the Federation of Ethnic Communities' Council of Australia (FECCA) Disability Advisory Council	Melbourne
Australian Bankers' Association	Sydney
Australian Federation of Disability Organisations (AFDO)	Sydney
Australian Government, Attorney-General's Department	Canberra
Australian Government, Attorney-General's Department	Sydney
Australian Government, Australian Electoral Commission	Canberra
Australian Government, Department of Employment	Canberra
Australian Government, Department of Finance	Canberra
Australian Government, Department of Health	Sydney
Australian Government, Department of Human Services	Canberra
Australian Government, Department of the Prime Minister and Cabinet	Canberra
Australian Government, Department of Social Services	Canberra
Australian Government, Department of Social Services	Sydney

Name	**Location**
Australian Government, The Treasury	Canberra
Australian Guardianship and Administration Council (AGAC)	Perth
Australian Health Ministers' Advisory Council (AHMAC) Secretariat	Sydney
Aware Industries	Wodonga
Professor Eileen Baldry, Associate Professor Leanne Dowse and Peta MacGillivray, School of Social Sciences, UNSW	Sydney
Associate Professor Lee Ann Basser, La Trobe Law School, La Trobe University	Melbourne
Belvoir Special School	Wodonga
Michelle Browning, former Acting Principal Guardian, NSW Public Guardian	Sydney
The Hon Chief Justice Diana Bryant AO, Family Court of Australia	Melbourne
Carers Australia	Canberra
Emeritus Professor Terry Carney, Sydney Law School, University of Sydney	Sydney
Dr John Chesterman, Office of the Public Advocate, Victoria	Melbourne
Children with Disability Australia	Melbourne
The Hon Justice Berna Collier, Federal Court of Australia	Sydney
Community Legal Centre Roundtable: Legal Aid Queensland and Caxton Legal Centre	Brisbane
Adele Cox, National Congress of Australia's First Peoples	Perth
Disability Advocacy and Information Service (DAIS)	Albury
Disability Discrimination Legal Service	Melbourne

Name	**Location**
Disability Services Commissioner, Victoria	Melbourne
Imelda Dodds, CEO of the NSW Trustee and Guardian	Sydney
Ethnic Disability Advocacy Centre	Perth
Ethnic Disability Advocacy Centre	Sydney
FECCA Disability Committee	Melbourne
Phillip French, Director, Australian Centre for Disability Law	Sydney
Damian Griffis, First People's Disability Network Australia	Sydney
Professor Sandra Hale, School of Humanities & Languages and Mehera San Roque, UNSW Law School, UNSW	Sydney
Dr Paul Harpur, TC Beirne School of Law, University of Queensland	Sydney
Human Rights Law Centre	Melbourne
Justice Connect	Melbourne
Rosemary Kayess, UNSW; Anna Artstein-Kerslake, National University of Ireland, Galway; and the Australian Human Rights Commission	Sydney
Rae Lamb, Aged Care Commissioner	Sydney
Law Council of Australia	Sydney
Professor Gwynnyth Llewellyn, Associate Professor Ian Kerridge and Sascha Callaghan, University of Sydney; Dr Margaret Spencer and Gina Andrews	Sydney
Professor Catriona MacKenzie and Professor Wendy Rogers, Faculty of Arts, Macquarie University	Sydney
John Mathieson, Deputy Registrar of the Federal Court of Australia and Adele Byrne, Principal Registrar of the Federal Circuit Court of Australia	Sydney

Name	**Location**
Alastair McEwin, Director, Community Legal Centres NSW	Sydney
Professor Bernadette McSherry, Social Equity Institute, University of Melbourne	Melbourne
Professor Bernadette McSherry, Social Equity Institute, University of Melbourne	Sydney
Mental Health Council of Australia	Canberra
Mental Health Council of Australia	Sydney
Multicultural Disability Advocacy Association	Sydney
National Disability Insurance Agency	Canberra
National Disability Insurance Agency	Sydney
National Mental Health Commission	Sydney
National Rural Health Alliance	Canberra
National Welfare Rights Network	Sydney
NCOSS NSW Disability Network	Sydney
NSW Don't Dis My Ability Reference Group	Sydney
NSW Office of the Public Guardian	Sydney
NSW Supported Decision-Making Pilot Team, Department of Family and Community Services	Sydney
Office of the Public Advocate (Queensland)	Brisbane
People with Disability Australia	Sydney
People with Disabilities Western Australia	Perth
Public Advocates: Pauline Bagdonavicius (OPA WA); John Brayley (OPA SA); Graeme Smith (NSW Public Guardian); Jodie Cook (OPA Qld); Kevin Martin (Qld Adult Guardian); Nicole O'Reilly (NT government); John Chesterman (OPA Vic) and Tai Chin Cheng (Singapore)	Perth

Name	**Location**
Queensland Advocacy Incorporated (QAI)	Brisbane
Queensland Advocacy Incorporated Roundtable	Brisbane
Queenslanders with Disability Network (QDN)	Brisbane
Associate Professor Paul Ramcharan, School of Global, Urban and Social Studies, RMIT University	Melbourne
Christina Ryan, Chair of the Disability Advocacy Network of Australia (DANA)	Sydney
Dominique Saunders, General Counsel, Australian Health Practitioner Regulation Agency (AHPRA)	Melbourne
Malcolm Schyvens, President and Jan Redfern, Deputy President of the Guardianship Division, NSW Civil and Administrative Tribunal	Sydney
Dr Karen Soldatic, School of Social Sciences, UNSW	Sydney
Professor Cameron Stewart, Sydney Law School, University of Sydney	Sydney
The Personnel Group	Sydney
Helen Versey, former Principal Lawyer at the Mental Health Legal Centre	Melbourne
Victorian Law Reform Commission	Sydney
Patricia Weekes, CEO, Mercy Centre	Albury
Professor Ben White, Professor Lindy Willmott, Dr Andrew McGee, Dr Kelly Purser, Dr Elizabeth Dickson and Shih-Ning Then, Faculty of Law, Queensland University of Technology	Sydney
Youth Disability Advocacy Service	Melbourne

Abbreviations

AAT	Administrative Appeals Tribunal
ADACAS	ACT Disability, Aged and Carer Advocacy Service
ACDL	Australian Centre for Disability Law
ACL	Australian Consumer Law
AEC	Australian Electoral Commission
AGAC	Australian Guardianship and Administration Council
AHMAC	Australian Health Ministers' Advisory Council
AHR Centre	Australian Human Rights Centre
ALRC	Australian Law Reform Commission
APP	Australian Privacy Principles
ARC	Australian Research Council
ABA	American Bar Association, Chapter 7
ABA	Australian Bankers' Association, Chapter 6
AHRC	Australian Human Rights Commission
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
CDLP Galway	Centre for Disability Law and Policy, National University of Ireland, Galway
CEO	Chief Executive Officer
CHRE	Centre for Human Rights Education, Curtin University

CMI Act	*Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic)
COAG	Council of Australian Governments
CRPD	*United Nations Convention on the Rights of Persons with Disabilities*
DANA	Disability Advocacy Network Australia
DDA	*Disability Discrimination Act 1992* (Cth)
DDLC	NSW Disability Discrimination Legal Centre
DDLS	Disability Discrimination Legal Service Victoria
DHS	Department of Human Services
DRO	Divisional Returning Officer
DSS	Department of Social Services
EAV	Electronically Assisted Voting
Electoral Act	*Commonwealth Electoral Act 1918* (Cth)
ICCPR	*International Covenant on Civil and Political Rights*
Justice Connect	Justice Connect and Seniors Rights Victoria
Law Commission	Law Commission of England and Wales
Law Council	The Law Council of Australia
LIV	Law Institute of Victoria
LRCWA	Law Reform Commission of Western Australia
MDAA	Multicultural Disability Advocacy Association
MHCA	Mental Health Council of Australia
MHCC	Mental Health Coordinating Council

NACLC	National Association of Community Legal Centres
National Framework	*National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*
NCAT	NSW Civil and Administrative Tribunal
NCOSS	Council of Social Service of NSW
NDAP	National Disability Advocacy Program
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDIS Act	*National Disability Insurance Scheme Act 2013* (Cth)
NDS	National Disability Strategy
NMHCCF	National Mental Health Consumer and Carer Forum
Nominee Rules	*National Disability Insurance Scheme (Nominee) Rules 2013* (Cth)
NSWCID	NSW Council for Intellectual Disability
NSWLRC	NSW Law Reform Commission
CDLP Galway	Centre for Disability Law and Policy, National University of Ireland, Galway
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
OPA	Office of the Public Advocate
OPCAT	*Optional Protocol on the Convention against Torture*
PCEHR Act	*Personally Controlled Electronic Health Records Act 2012* (Cth)
PIAC	Public Interest Advocacy Centre
PWDA	People with Disability Australia

QAI	Queensland Advocacy Incorporated
QDN	Queenslanders with Disability Network
QLRC	Queensland Law Reform Commission
SIS Act	*Superannuation Industry (Supervision) Act 1993* (Cth)
SIS Regulations	*Superannuation Industry (Supervision) Regulations 1994* (Cth)
UNCRPD	United Nations Committee on the Rights of Persons with Disabilities
VCAT	Victorian Civil and Administrative Tribunal
Vicdeaf	Victorian Deaf Society
VLRC	Victorian Law Reform Commission