10. Review of State and Territory Legislation

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Summary

10.1 This chapter discusses the implications of the ALRC's proposals for state and territory laws that have an impact on the exercise of legal capacity. The Terms of Reference for the Inquiry focus on Commonwealth laws and legal frameworks, but also ask the Inquiry to consider how maximising individual autonomy and independence could be 'modelled'.

10.2 Modelling a new approach to individual decision-making at the Commonwealth level provides an opportunity to guide law reform at the state and territory level. Reform at the state and territory level is critical to the implementation of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) because many important areas of decision-making are governed by state and territory law—including in relation to guardianship, administration, financial management, powers of attorney and consent to medical treatment.

10.3 The key elements of the ALRC's approach include the proposed National Decision-Making Principles and the Commonwealth supporter and representative scheme ('Commonwealth decision-making model'), which reflects them.

10.4 The ALRC proposes that state and territory governments should facilitate review of legislation that deals with decision-making by people who need decision-making support to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. This chapter explains some of the implications of this proposal and how the ALRC's proposals might be applied in specific areas of state and territory law.

Review of state and territory legislation

Proposal 10–1 State and territory governments should review laws that deal with decision-making by people who need decision-making support to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In conducting such a review, regard should also be given to:

(a) interaction with any supporter and representative schemes under Commonwealth legislation;

(b) consistency between jurisdictions, including in terminology;

(c) maximising cross-jurisdictional recognition of arrangements; and

(d) mechanisms for consistent and national data collection.

Any review should include, but not be limited to, laws with respect to guardianship and administration; informed consent to medical treatment; mental health; and disability services.

10.5 The practical outcomes of the ALRC's Inquiry will depend, in significant part, on whether it serves as a catalyst for review of state and territory laws. This is mainly because guardianship and administration laws are state and territory based, and remain the primary mechanism in which others are vested with power to make decisions on behalf of people who need decision-making support.[1]

10.6 Further, many Commonwealth agencies and Commonwealth funded services, such as aged care service providers, rely on state and territory appointed substitute decision-makers in managing their relationships with individuals. In some areas—such as disability services under the National Disability Insurance Scheme (NDIS)—while states and territories will continue to play the major role in providing or overseeing the provision of services, 'federal authorities … will likely exercise more direct federal regulation of, and prescription of, the way states and territories administer disability funding'.[2] Such federal regulation might include encouraging supported decision-making.

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1 In 2007, there were over 4,000 people under public guardianship in Australia: NSW Office of the Public Guardian, Submission No 7 to the NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, 2010. At the end of August 2009, the NSW Trustee and Guardian was directly managing the affairs of 9,182 individuals and overseeing the work of a further 2,795 Private Managers: NSW Trustee and Guardian, Submission No 13 to the NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, 2010. The Victorian body, State Trustees protects the legal and financial interests of over 9,500 people: State Trustees, *Did You Know?* <https://www.statetrustees.com.au/our-story/did-you-know>.

2 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26, 33.

10.7 As discussed in Chapter 3, the proposed National Decision-Making Principles and associated Guidelines are intended to be consistent with the terms of art 12 of the CRPD. By reviewing guardianship and other laws in the light of the proposal, states and territories will advance fuller implementation of the CRPD in Australia.

10.8 This is important as, under international law, parties to treaties undertake to ensure that the terms of the treaty are applied in all parts of federal states. This is a requirement of the *Vienna Convention on the Law of Treaties*, to which Australia is a party,[3] and is an obligation required expressly by art 4(5) of the CRPD.[4]

10.9 In the Australian context, although it is the Australian Government that entered into the CRPD, the provisions of the Convention are binding not only upon the Australian Government, but also upon each state and territory government.[5]

10.10 The proposal indicates to states and territories that, in light of the ALRC's approach and its application in areas of Commonwealth law, similar state and territory laws also should be reviewed.

10.11 The intention is that states and territories would examine relevant legislation to see how the approaches represented by the National Decision-Making Principles and associated guidelines might be incorporated—most fundamentally by facilitating a shift from substitute to supported decision-making.

10.12 This would involve review of legislation that deals with decision-making by people who require decision-making support to ensure, among other things, that:

- legislative tests of decision-making capacity do not provide that people are assumed to lack capability on the basis of having a disability, and that ability is assessed by reference to the decision to be made and the available supports;
- supported decision-making is facilitated by appropriate legislative recognition of supporters;
- laws providing for the appointment of representative decision-makers do so only as a last resort and not as a substitute for appropriate support;
- laws providing for the appointment of representative decision-makers provide for appointments that are limited in scope, proportionate, and apply for the minimum time; and
- laws providing for supported and representative decision-making ensure that a person's 'will, preferences and rights' are respected—including by imposing appropriate duties on supporters and representative decision-makers.

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3 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) art 27.

4 'The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions': *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 4(5).

5 See Philip French, Julie Dardel and Sonya Price-Kelly, 'Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment' (People with Disability Australia, 2010) 14–15.

10.13 To some extent, states and territories have already commenced this process—at least with regard to guardianship, the legislative area of most obvious relevance. For example:

- the Victorian Law Reform Commission (VLRC), in its review of the *Guardianship and Administration Act 1986* (Vic), was asked to have regard to 'the principle of respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, and the other General Principles and provisions' of the CRPD;[6] and
- the Queensland Law Reform Commission has recommended that the General Principles in the *Guardianship and Administration Act 2000* (Qld) be amended to 'reflect more closely the relevant articles' of the CRPD.[7]

10.14 The Law Council of Australia suggested that

> a co-operative approach with States and Territories, in the form of mirror legislation or for the State and Territories to adopt model Commonwealth legislation, is the most practical way to achieve consistency across jurisdictions.[8]

10.15 The NSW Public Guardian submitted that '[a] uniform approach should fit with the Nation Disability Insurance Scheme'.[9]

10.16 A more comprehensive national review process might be coordinated through the Council of Australian Governments (COAG) or its ministerial councils, such as the Disability Reform Council, Law Crime and Community Safety Council or Health Council, in consultation with peak bodies such as the Australian Guardianship and Administration Council. The ALRC would be interested in comment on the best way to ensure that the agenda suggested by its proposals is advanced nationally.

Application of the National Decision-Making Principles

10.17 The following material discusses, in general terms, how the National Decision-Making Principles and associated Guidelines might be used to guide review and amendment of state and territory laws in the particular areas of:

- guardianship and administration;
- consent to medical treatment; and
- mental health.

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6 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) xi.

7 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) i, rec 4–1.

8 Law Council of Australia, *Submission 83*.

9 NSW Public Guardian, *Submission 50*.

Guardianship and administration

10.18 As discussed in Chapter 2, one of the key debates of central importance to this Inquiry concerns the extent to which art 12 of the CRPD permits 'substitute' or 'fully supported' decision-making.

10.19 A major implication of this debate concerns the extent to which the CRPD permits decision-making in the form of guardianship and administration, as currently provided for under state and territory laws.

10.20 However, regardless of the lack of consensus with respect to the status of guardianship laws in relation to the CRPD, there is 'a general acknowledgement', underpinned by the paradigm shift heralded by the CRPD that 'the focus must move from what a person with disability cannot do to the supports that should be provided to enable them to make decisions and exercise their legal capacity'.[10]

10.21 There should remain some room for fully supported decision-making. This conclusion is, in part, dictated by the reality that some people will always need decisions made for them.

10.22 The AGAC submitted that there needs to be 'careful development of supported decision making practices', but supported decision-making cannot 'completely replace substitute decision making and there will be an ongoing need for substitute decision making in limited circumstances'.[11] The Caxton Legal Centre noted:

> given the projected exponential increase in the ageing population and the consequent increase in the incidence of terminal cognitive diseases such as dementia and Alzheimer's, coupled with the factor of social isolation and sparse or non-existent support networks for many older people, the retention of a process of formal substituted decision making may be essential.[12]

10.23 Guardianship and administration laws need to be reviewed to ensure, among other things, that guardianship and administration are:

- invoked only as a last resort and after considering the availability of support to assist people in decision-making;
- as confined in scope and duration as is reasonably possible;[13]

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10 Office of the Public Advocate Systems Advocacy (Qld), 'Autonomy and Decision-Making Support in Australia: A Targeted Overview of Guardianship Legislation' (February 2014).

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

12 Caxton Legal Centre, *Submission 67*.

13 The Office of the Public Advocate (SA) highlighted that 'there are different rates of full (plenary) appointments as opposed to limited appointments (limited to one area of decision making) between jurisdictions, and different rates for the appointments of private guardians': Office of the Public Advocate (SA), *Submission 17*.

- subject to accessible mechanisms for review; and
- consistent with decision-making that respects the will, preferences and rights of the individual.

10.24 For example, the provisions of state and territory guardianship legislation differ in the extent to which decision-making that respects the will, preferences and rights of the individual is expressly promoted. In New South Wales, Western Australia and the Northern Territory, there is an overriding duty of guardians and administrators to act in the 'best interest' of the person.[14] In Victoria and Tasmania, the 'best interest' of the person is an equal consideration along with the wishes of the person and the least restrictive alternative.[15] In the ACT and Queensland, guardians are obliged to act in a way that least interferes with a person's right to make a decision, [16] or to give effect to a person's wishes, so far as they can be determined.[17] South Australia provides for substitute judgment, where the paramount consideration is the guardian's opinion of what the wishes of the person would have been if they were not mentally incapacitated.[18]

10.25 Recent reviews give important leads on how guardianship and administration laws may change. For example, the VLRC review recommended the development of a supported decision-making and a co-decision-making structure.[19]

10.26 Briefly, this would provide recognition to supporters—trusted persons providing support and assistance to an adult who needs help in making a decision—and external oversight by the Victorian Civil and Administrative Tribunal (VCAT). The co-decision maker would act jointly with the adult, and decisions would have to be with the consent and authority of the represented person, and would be treated as if they were the acts of the represented person with capacity.

10.27 Appointments would be made by the VCAT and the range of decisions specified for which the person needs support, which, in principle, could range across the areas previously covered by guardians and administrators. Safeguards against exploitation are detailed and include registration of co-decision-making orders, regular review on a range of grounds and the options to renew, amend or revoke the order.

10.28 Stakeholders in this Inquiry expressed support for continuing review of Australian guardianship laws,[20] and this has also been called for by the UNCRPD.[21]

10.29 In addition to highlighting the desirability of reviewing state and territory laws to ensure consistency with the National Decision-Making Principles and the

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14 *Guardianship Act 1987* (NSW) s 4; *NSW Trustee and Guardian Act 2009* (NSW) s 39; *Guardianship and Administration Act 1990* (WA) s 4; *Adult Guardianship Act 1988* (NT) s 4.

15 *Guardianship and Administration Act 1986* (Vic) s 4, (WA) s 6.

16 *Guardianship and Administration Act 2000* (Qld) ss 5–7, sch 1.

17 *Guardianship and Management of Property Act 1991* (ACT) ss 4, 5A.

18 *Guardianship and Administration Act 1993* (SA) s 5.

19 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) chs 8–9.

20 See, eg, National Seniors Australia, *Submission 57*.

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

Commonwealth decision-making model, the ALRC's proposal also highlights a number of particular considerations that should inform such review. These are briefly discussed below, with particular reference to guardianship laws.

Interaction with Commonwealth supporter and representative schemes

10.30 As discussed in Chapter 4, the ALRC proposes that a Commonwealth decision-making model, including 'supporters' and 'representatives' should be introduced into relevant Commonwealth legislation, including that relating to the NDIS, social security, aged care, eHealth and privacy.[22]

10.31 If implemented, the interaction of these Commonwealth schemes with state and territory guardianship and administration laws may need to be taken into account in review of the latter.

10.32 Chapter 4 highlights some of the issues involved. The nature of these issues will vary depending on what approach is taken in Commonwealth laws. For example, if it is possible to have both a Commonwealth supporter or representative and a state or territory appointed decision-maker with power to make decisions in the same area, there may need to be a mechanism to resolve any conflict between the two.

10.33 If Commonwealth schemes provide for separate assessment of a person's decision-making capabilities and support needs for Commonwealth purposes, even where a guardian or administrator has already been appointed, other interaction issues will arise.

Consistency

10.34 It is clearly desirable for there to be consistency between Commonwealth, state and territory legislation dealing with individual decision-making, including in relation to terminology. At present, no such consistency exists:

> Terminology varies considerably between state/territory jurisdictions, including terms such as guardian, manager, administrator, which are inconsistently defined. Powers held under these appointments may also vary—noting that they are often specified by orders of a tribunal, within the scope of powers outlined in legislation; and cross-recognition is, at best, arbitrary.[23]

10.35 Such inconsistency causes problems, in particular because the criteria and scope of state and territory appointments vary; and appointments may not be recognised in other jurisdictions.

10.36 Stakeholders supported a nationally consistent approach. National Disability Services, for example, said that unless there are 'nationally consistent definitions, processes and safeguards around legal capacity assessment and decision support',

> people with disability and their families can experience inconsistent and additional administrative hurdles across different jurisdictions or areas of their lives. These hurdles can be more than just a logistical burden. The lack of recognition of a

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22 See Chs 5 and 6.

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

> supported decision-making arrangement across a jurisdictional boundary has the potential to undermine key relationships, support networks and the autonomy of people with disability.[24]

10.37 The problem of inconsistency and its consequences was also noted by the Office of the Public Advocate (SA):

> Because these appointments are made under different laws, with different definitions of incapacity, the rights of people to make decisions, or to be supported to make their own decisions, will depend on which state they live. For example, there are significant differences in the population rate of guardianship appointments between jurisdictions, reflecting different laws, and also different interpretation of laws by tribunals at different times depending on the prevailing rights-based or welfare-based view at the time. There can be considerable 'bandwidth' in how laws are read, and whether or not an appointment is necessary in the circumstances contributing to variation.[25]

10.38 It suggested that a nationally consistent approach to mental incapacity would be helpful as

> it would be an effective way to ensure that rights are upheld according to the UNCRPD across all jurisdictions. The law could not only define mental incapacity, but also define a range of measures for supporting a person's incapacity that are recognised nationally.[26]

10.39 National Seniors Australia said that a nationally consistent approach to capacity would 'inform the initiation of further decision making supports', but cautioned that:

> A national approach to capacity should only take place following a review of Guardianship and Administration Acts and precedent in each state and territory. This will ensure that an appropriate mechanism for measuring decision making capacity will be evidence-based, supportive of individual circumstances and secure against forms of elder abuse or exploitation of power of attorney status.[27]

10.40 The Queenslanders with Disability Network (QDN) highlighted the opportunity the NDIS may provide to promote a more consistent approach to the appointment and powers of decision-makers, in order to prevent 'confusion in the appointment of nominees with regard to disability supports for the NDIS'. That is, where the appointment of NDIS nominees may not correlate with existing guardianship arrangements at a state level, the 'NDIS should be used as a catalyst for systemic change in this area'.[28]

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24 National Disability Services, *Submission 49*. With respect to the impact on movement interstate, see also: AFDS, *Submission 47*; Office of the Public Advocate (SA), *Submission 17*.

25 Office of the Public Advocate (SA), *Submission 17*. The submission includes a state-by-state comparison of the rate of public guardianship as at 30 June 2013, for states in which data could be obtained from online annual reports.

26 Ibid. The OPA (SA) also noted that it would aid monitoring and data collection in implementing the National Disability Strategy's area of policy action in rights protection and that there 'could be meaningful comparisons across jurisdictions'.

27 National Seniors Australia, *Submission 57*.

28 QDN, *Submission 59*.

Cross-jurisdictional recognition

10.41 A related issue is the need to maximise cross-jurisdictional recognition of appointments and other decision-making arrangements.

10.42 A number of stakeholders emphasised the need for cross-jurisdictional recognition of appointments—especially as people commonly travel between jurisdictions or live in towns which straddle jurisdictional boundaries.[29] The QDN, for example, stated that:

> One of the great advantages of the NDIS will be that it will allow people with disability more freedom to move interstate, without having to be concerned with different support systems across jurisdictions. It would be a terrible shame for such significant reforms to be undermined by other inter-jurisdictional hurdles such as legal capacity definitions.[30]

10.43 Academics Bruce Arnold and Dr Wendy Bonython submitted that the 'rise of yet another class of substitute decision-makers or power-holders' appointed under Commonwealth legislation may lead to problems if it

> creates uncertainty about the validity of pre-emptive appointments made by people in anticipation of future loss of capacity, particularly if they lose capacity outside the jurisdiction the appointment was made in, or if they hold assets in multiple jurisdictions.
>
> In the event that this occurs, and an instrument is not recognised, the default is appointment of a guardian by the tribunal under the relevant jurisdictions' guardianship frameworks—a process which contributes a significant burden to all involved, including family members, healthcare and social workers, and the tribunal itself.[31]

10.44 There are some provisions permitting cross-jurisdictional recognition. However, these arrangements are not comprehensive and should be improved. For example, while the Victorian legislation makes provision for the recognition of interstate guardianship and administration orders,[32] Queensland has no corresponding law.

Data collection

10.45 Stakeholders raised concerns about difficulties associated with obtaining consistent data in relation to the appointment of substitute decision-makers. A range of stakeholders emphasised the need for improved data collection to facilitate comparisons across jurisdictions and inform policy development.[33] Arnold and Bonython observed that

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29 See, eg, Office of the Public Advocate (SA), *Submission 17*.

30 QDN, *Submission 59*.

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

32 *Guardianship and Administration Act 1986* (Vic) pt 6A.

33 See, eg, B Arnold and Dr W Bonython, *Submission 38*; Office of the Public Advocate (SA), *Submission 17*.

> although data is often collected by service providers, regulatory bodies and third parties that data is often held within institutional silos and is not readily accessible. That inaccessibility militates against informed policy-making.[34]

10.46 State and territory review of guardianship and administration legislation may provide an opportunity to promote mechanisms for consistent and national data collection about supported and fully supported decision-making.

Informed consent to medical treatment

10.47 At common law, all competent adults can consent to and refuse medical treatment. If consent is not established, there may be legal consequences for health professionals. Under the law of trespass, patients have a right not be subjected to an invasive procedure without consent or other lawful justification, such as an emergency or necessity. At the international level, the CRPD expresses this in terms of a 'right to respect for his or her physical and mental integrity on an equal basis with others'.[35]

10.48 'Informed consent' refers to consent to medical treatment and the requirement to warn of material risk prior to treatment. As part of their duty of care, health professionals must provide such information as is necessary for the patient to give consent to treatment, including information on all material risks of the proposed treatment. Failure to do so may lead to civil liability for an adverse outcome, even if the treatment itself was not negligent.[36]

10.49 The common law recognises that there are circumstances where an individual may not be capable of giving informed consent (for example, due to impaired decision-making ability) or where consent to treatment may not be required, as in the case of emergency. However, except in the case of children—where the High Court has recognised the courts' *parens patriae* jurisdiction in authorising treatment[37]—it does not provide significant guidance on supported decision-making in health care settings.

10.50 State and territory guardianship and mental health legislation (discussed below) does provide detailed rules for substitute decision-making concerning the medical treatment of adults who are deemed incapable of giving consent.[38]

10.51 Guardianship legislation outlines criteria for appointing substitute decision-makers, the hierarchy of possible decision-makers and the scope of their powers, which depend on the age of the patient and the type of treatment proposed.

10.52 In all jurisdictions, except the Northern Territory, guardianship legislation provides for a decision-maker who is chosen (for example, an enduring guardian), assigned by the legislation (for example, a spouse, close friend or relative) or appointed

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

35 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) ART 17.

36 *Rogers v Whitaker* (1992) 175 CLR 479.

37 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

38 Eg, *Guardianship and Management of Property Act 1991* (ACT) ss 32B, 32D; *Mental Health Act 2009* (SA) ss 56, 57.

(for example, by a court) to make health decisions for an adult who is not capable of giving consent.[39]

10.53 In exercising their powers, substitute decision-makers are required to adopt one of two tests (or a combination of both in some jurisdictions) in reaching their decision for the person with impaired decision-making capacity. One is the best interests test, which requires a balancing of the benefit to the patient against the risks of the proposed treatment, and the other is the substituted judgment test, which involves making a decision which is consistent with what the person would have decided if they had the capacity to do so. Evidence of such wishes may be provided by advance care directives, religious beliefs and previous history of treatment.[40]

Supported decision-making in health care

10.54 Stakeholders expressed opposition to existing substitute decision-making mechanisms in health care.[41] The NCOSS argued for supported decision-making and stated that 'quality of life decisions should be made by the affected person';[42] and the Illawarra Forum, stated that 'every effort should be made to support people to make informed decisions and choices'.[43]

10.55 Stakeholders suggested that a supported decision-making framework would be more likely to result in health care decisions that accord with an individual's personal beliefs and values.[44] The Carers Alliance asserted the primacy of the family in supporting people with disability to exercise capacity.[45] Family Planning NSW considered that encouraging supported decision-making may help overcome a lack of understanding about what constitutes informed consent in reproductive and sexual health.

> A supported decision making framework needs to encompass the requirement for clinicians, other health and support workers to take on the role of assisting a person to make decisions. This means that they need to develop the skills necessary to talk about reproductive and sexual health in ways that encourage the person to make their own decisions.[46]

10.56 A number of stakeholders expressed concerns about informed consent in the specific context of sterilisation procedures. Women with Disabilities Australia

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39 In the NT, there is no provision for consent to medical treatment without an appointment being made. SA has legislation specific to informed consent, which provides for medical powers of attorney: *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

40 See, eg, *Hunter and New England Area Health Service v A* [2009] NSWSC 761. The Supreme Court of NSW confirmed a person's advance care directive to refuse medical treatment is valid if it is made by a capable adult, is clear and unambiguous and applies to the situation at hand.

41 See, eg, NCOSS, *Submission 26*; The Illawarra Forum, *Submission 19*; Office of the Public Advocate (SA), *Submission 17*.

42 NCOSS, *Submission 26*.

43 The Illawarra Forum, *Submission 19*.

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

45 Carers Alliance, *Submission 84*. It was suggested that there is currently insufficient recognition of the role and contribution of carers and family members who possess 'intimate knowledge and understanding of the cognitively impaired person': N Widdowson, *Submission 31*.

46 Family Planning NSW, *Submission 04*.

submitted the 'best interest' approach to the sterilisation of women and girls has been used in a discriminatory way and the lack of education and accessible services can prevent women from making choices regarding their fertility and conception.[47]

10.57 Children with Disability Australia submitted that the criminalisation of forced sterilisation may be justified, as existing requirements for court authorisation have failed to protect the rights of people with disability, under the CRPD, to be free from violence and to retain their physical integrity.[48] Several other stakeholders supported legislative prohibition of sterilisation without informed consent.[49]

Review of the law

10.58 The law on decision-making in health care is complex. Inconsistency in language, and different tests of decision-making capacity and processes across the jurisdictions may cause difficulties for health service providers and consumers.

10.59 A number of recent reports have suggested reforms. The VLRC's guardianship report recommended consolidating existing laws into new legislation distinguishing 'health decision makers' from 'guardians', and 'significant' from 'routine' medical procedures.[50] In the context of developing a national code of conduct for unregistered health care workers, the Australian Health Ministers' Advisory Council (AHMAC) has queried whether a national 'minimum enforceable standard' for informed consent should be introduced.[51]

10.60 In 2011, AHMAC developed a national policy framework for advance care directives to address challenges posed by divergent laws affecting consent to medical treatment,[52] and the ALRC received submissions noting the desirability of nationally consistent and enforceable laws on advance care directives.[53]

10.61 The Mental Health Council of Australia and the National Mental Health Consumer and Carer Forum expressed support for a legal framework for assessing health care decision-making ability in line with developments in the United Kingdom under the *Mental Capacity Act 2005* (UK).[54] This would place a focus on the ability of people to understand information relevant to a health care decision; retain that

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47 WWDA, *Submission 58*.

48 Children with Disability Australia, *Submission 68*.

49 Law Council of Australia, *Submission 83*; Women's Legal Services NSW, *Submission 76*; ADACAS, *Submission 29*.

50 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 12, 199–219, ch 13.

51 'Consultation Paper: A National Code of Conduct for Health Care Workers' (Australian Health Ministers' Advisory Council, March 2014) 16. Most state and territory health departments issue guidelines on consent to health care.

52 Australian Health Ministers' Advisory Council, *National Framework for Advance Health Care Directives*, September 2011.

53 Mental Health Coordinating Council, *Submission 07*; ADACAS, *Submission 29*; Law Council of Australia, *Submission 83*.

54 NMHCCF and MHCA, *Submission 81*.

information; use or weigh that information as part of a decision-making process; and communicate the decision.[55]

10.62 The ALRC proposes that state and territory governments review legislation relating to informed consent to medical treatment, including in relation to advanced care directives, with a view to reform that is consistent with the National Decision-Making Principles and the Commonwealth decision-making model.

10.63 For example, reform encouraging a supported decision-making model might involve recognition that a person may be able to give informed consent to medical treatment with the assistance of a supporter. The implications of such a change, including in relation to the legal liability of health practitioners, would need to be carefully assessed.

10.64 Any new approach to informed consent would need to be reflected in guidance such as the Australian Charter of Rights in Healthcare, the National Safety and Quality Health Service Standards, the National Framework on Advance Care Directives, publications on communication with patients[56] and the national codes of conduct of health practitioners.[57]

Mental health

10.65 All states and territories have mental health laws that regulate consent to medical treatment, including the involuntary detention and treatment of people with severe mental illness. Generally, mental health laws have provided for treatment based on a person's need for treatment and the risk of harm posed to themselves and others.[58]

10.66 New mental health legislation in Tasmania and Victoria has changed the focus of criteria for the involuntary detention and treatment from the risk of harm to a person's capacity to consent to treatment;[59] and there are active mental health reviews and legislative initiatives in other jurisdictions.[60]

10.67 The Mental Health Coordinating Council (MHCC) submitted that the *Mental Health Act 2007* (NSW) is 'problematic' because there is little detail about the basis of decisions made by doctors on the treatment of detained psychiatric patients, particularly those who retain decision-making capacity in relation to certain treatment

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55 See *Mental Capacity Act 2005* (UK) s 3. This approach is reflected in the ALRC's proposed Representative Decision-Making Guidelines: see Ch 3.

56 'General Guidelines for Medical Practitioners on Providing Information to Patients' (National Health and Medical Research Council, 2004); 'Communicating with Patients: Advice for Medical Practitioners' (National Health and Medical Research Council, 2004).

57 The codes of conduct for the 14 national boards of health practitioners are available at Australian Health Practitioner Regulation Agency, *National Boards* <http://www.ahpra.gov.au/National-Boards.aspx>.

58 See, eg, *Mental Health and Related Services Act* (NT) s 14; *Mental Health Act 2007* (NSW) s 14.

59 The *Mental Health Act 2013* (Tas) factors in a person's decision-making capacity, and not just the mental illness or a risk of harm in the assessment criteria: s 8; the *Mental Health Act 2014* (Vic) defines 'capacity to give informed consent' and provides a statutory presumption of capacity: (Vic) ss 68, 70.

60 See, eg, ACT second exposure draft bill to amend the *Mental Health (Treatment and Care) Act 1994*; Mental Health Bill 2013 (WA); SA Department of Health review of the *Mental Health Act 2009* (SA); Queensland review of the *Mental Health Act 2000* (Qld); NSW review of the *Mental Health Act 2007* (NSW).

decisions and who have a view about the preferred treatment or wish to forgo certain treatments.[61]

10.68 The MHCC stated that the law should outline the rights of patients to refuse and receive treatment and deal with how patients' preferences can be taken into account in medical decisions—including by way of advance care directives—to ensure that doctors override patients' preferences only in limited circumstances, where a patient lacks capacity to make that decision, and the proposed treatment is 'manifestly in the person's best interests'.[62]

10.69 New legislation in Tasmania and Victoria protects the rights of mental health patients through statements of rights. In Tasmania, the rights of involuntary patients are outlined in statute and whenever a person is admitted to, or discharged from, an approved facility, its controlling authority must give the person a statement of their rights.[63] In Victoria, a statement of rights must be explained to people being assessed or receiving treatment in relation to their mental illness.[64]

10.70 A person's rights under the *Mental Health Act 2014* (Vic) include the right to communicate, make advance statements and have a nominated person to support them and help represent their interests.[65] The role of a nominated person is to receive information about the patient; be one of the persons who must be consulted in accordance with the Act about the patient's treatment; and assist the patient to exercise any right under the Act.[66] A person can only nominate another person in writing and the nomination must be witnessed.[67] A nomination can be revoked in the same manner by the person who made the nomination or if a nominated person declines to act in the role.[68]

10.71 A similar model for supported decision-making in mental health services is contained in the Mental Health Bill 2013 (WA) (the WA Bill).[69] Under the proposed legislation, mental health services are obliged to comply with a charter of mental health care principles. The charter recognises the involvement of other people such as family members and carers.[70] In addition, the WA Bill would give effect to a carers' charter provided for in the *Carers Recognition Act 2004* (WA).[71]

10.72 The WA Bill provides for a 'nominated person', someone chosen by the person with mental illness to assist them in ensuring their rights under the Act are observed and their interests and wishes are taken into account by medical practitioners and

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61 Mental Health Coordinating Council, *Submission 07*.
62 Ibid.
63 *Mental Health Act 2013* (Tas) ss 62, 129, sch 1.
64 From 1 July 2014: *Mental Health Act 2014* (Vic) ss 12, 13.
65 Ibid pt 3.
66 Ibid s 23.
67 Ibid s 24.
68 Ibid ss 25–27.
69 The Mental Health Bill 2013 (WA) was adopted by the WA Legislative Assembly in April 2014 and is expected to progress to the Legislative Council for review. If enacted, it will replace the *Mental Health Act 1996* (WA).
70 Mental Health Bill 2013 (WA) sch 1.
71 Ibid cl 319(2)(g), 332(3)(e).

mental health workers.[72] A nominated person is entitled to 'uncensored' communication with the person with mental illness, and to receive information related to the person's treatment and care.[73]

10.73 Under the WA Bill, a nominated person may exercise the rights of the person with mental illness under the legislation, but is not authorised to apply for the admission to or discharge by a mental health service.[74] Unless the provision of information is not in the best interests of the patient, a nominated person has a right to be involved in matters relating to the treatment and care of the patient, including the consideration of the options that are reasonably available for the patient and the provision of support to the patient.[75]

10.74 The ALRC proposes that state and territory governments review mental health legislation, with a view to reform that is consistent with the National Decision-Making Principles and the Commonwealth decision-making model. This might involve, for example, moving towards supported decision-making models similar to those contained in the Victorian legislation and in the WA Bill.

10.75 COAG's Standing Council on Health has long overseen developments in mental health laws, and may be able to advance such an initiative. The AHMAC, a component committee of the Standing Council, commissioned a national project on model mental health legislation, which was completed in 1994.[76] This project propelled review of mental health laws in every state and territory in Australia in the late 1990s.[77]

Disability services

10.76 State and territory disability services legislation provides the statutory basis for the provision of supports and services to people with disability.[78]

10.77 The role of disability services legislation in regulating restrictive practices is a major focus of Chapter 8, where the ALRC proposes the development of a national or nationally consistent approach that considers, among other things, the need for regulation of restrictive practices in disability services.

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72 Ibid cl 263.

73 Ibid cl 264(2). This includes information about the grounds on which an involuntary treatment order was made, the treatment provided to the patient and the patient's response to that treatment, and the seclusion of, or use of bodily restraint on, the patient: Ibid cl 266(1)(a).

74 Mental Health Bill 2013 (WA) cl 264(5)–(6).

75 Ibid cl 266(1)(b).

76 The University of Newcastle, 'Model Mental Health Legislation' (Australian Health Ministers' Advisory Council, 1994).

77 Chris Sidoti, 'Mental Health for All: What's the Vision?' (Speech delivered at the National Conference on Mental Health Services, Policy and Law Reform in the Twenty First Century, Newcastle, 13–14 February 1997).

78 *Disability Act 2006* (Vic); *Disability Services Act 2006* (NSW); *Disability Services Act 2006* (Qld); *Disability Services Act 1993* (SA); *Disability Services Act 1993* (WA); *Disability Services Act 1993* (NT); *Disability Services Act 1991* (ACT). NSW concluded public consultation on the Disability Inclusion Bill 2014 (NSW) to replace the *Disability Services Act 1993* (NSW).

10.78 More generally, disability services legislation is another area where state and territory governments should facilitate review to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model.