

## 11. Other Issues

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### Summary

11.1 This chapter discusses a number of other issues that are relevant to the focus of the Inquiry on Commonwealth laws and legal frameworks that have an impact on the exercise of legal capacity. These involve:

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

11.2 In addition, the ALRC received submissions on a number of areas which are not the focus of the Inquiry. While the ALRC does not intend to make recommendations in these areas, some of the key concerns are outlined.

### Incapacity and contract law

11.3 The assumption underlying any contract is that each party has freely entered into a binding agreement, having assessed whether or not the terms are in their best

interests. Some categories of person—including minors and people with impaired mental capacity—have traditionally been regarded by the law as being incapable of looking after their own interests, and through various rules, a ‘legal disability’ has been imposed on them.<sup>1</sup>

11.4 Generally, if people under a legal disability attempt to make a contract, that contract can be declared ineffective.<sup>2</sup> Contract law does not, however, require a person’s ability to understand the implications of a contract to be assessed. Instead, the common law developed a complex set of rules categorising transactions, especially by minors, in terms of whether there is a legal disability.

11.5 In practice, the existing law of contract may work for the benefit of persons with impaired decision-making ability. A contract may be avoided on the ground that a person lacked the capacity to understand the consequences of entering into it. It has been said that:

This rule (probably by accident), reflects the modern realisation that mental incapacity has a wide variety of forms with very different degrees of impairment. The idea that people should be presumed to be capable unless shown to be otherwise enhances their dignity and capacity to manage their affairs. The treatment of contracts as binding unless avoided complements this approach.<sup>3</sup>

11.6 In order to avoid the contract on the ground of incapacity, the onus is on the party seeking to have the contract avoided to first establish that: (a) the contracting party was unable, due to mental impairment, to understand the contract at the time of formation; and (b) that the other party either knew or ought to have known of the impairment. This is said to be very similar to the law relating to unconscionable conduct<sup>4</sup>—which is given statutory recognition in the Australian Consumer Law (ACL).<sup>5</sup>

11.7 Effectively, the common law recognises a presumption of capacity and treats contracts as binding unless avoided. Arguably, any reform that required more scrutiny of capacity may work against the interests of persons with impaired decision-making ability to enter into contracts.

11.8 For example, introducing any new test of decision-making ability (as proposed in other areas of law) into contract law may be counterproductive—it would not necessarily assist people, and may deprive them of the ability to contract, or make contracting so risky for the other party that they will refuse to enter into contractual relations.

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1 See Thomson Reuters, *The Laws of Australia* [7.3.160]. Much of the background discussion of contractual incapacity below is taken from the ‘Contract Law’ title of *The Laws of Australia*, edited by Dr Nicholas C Seddon (1994–2003) and Emeritus Professor JLR Davis (1994–). See also Ch 2.

2 There are exceptions to the general rule, under which persons who lack legal capacity to contract may contract for the necessities of life, such as food, clothing, shelter and education or training for work: see *Ibid* [7.3.230]–[7.3.260].

3 *Ibid* [7.3.580].

4 *Ibid* [7.3.590]–[7.3.600].

5 *Australian Consumer Law* (Cth) s 20 (Unconscionable conduct within the meaning of the unwritten law).

11.9 There are arguments for abolishing the common law relating to contractual incapacity in its entirety. Arguably, this would have no adverse consequences, as questions about the validity of a contract could be dealt with satisfactorily by the laws relating to unfair and unconscionable contracts, undue influence and misrepresentation.<sup>6</sup>

11.10 However, in practice, such a reform may have limited benefit as the likely outcomes of legal disputes about the validity of contracts would be the same. Any reform would be constitutionally problematic as there is no head of Commonwealth legislative power dealing specifically with contract law. Reform covering all contracts would likely require the cooperation of states and territories either under a referral of power to the Commonwealth Parliament (s 51(xxxvii)) or through the enactment of model laws in all jurisdictions.<sup>7</sup>

## Consumer protection laws

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

11.11 There are a range of consumer protection laws that allow contracts to be challenged, including under the ACL and the *National Consumer Credit Protection Act 2009* (Cth).

11.12 The ACL contains provisions under which contracts or contractual terms may be avoided. These include provisions in relation to misleading or deceptive conduct, unconscionable conduct, unfair contract terms and unsolicited consumer agreements.<sup>8</sup>

11.13 Legal Aid Queensland submitted that the existing consumer law framework ‘effectively encourages people with a disability to participate in society to the fullest extent possible without being denied goods or services because it might be more difficult to ensure they are aware of their legal obligations’ and reflects the CRPD approach to capacity. That is, applying this to consumer law specifically, ‘a person may have the ability and understanding to engage with simple consumer products or transactions but may not have the capacity to understand or engage with more complex consumer products’.<sup>9</sup>

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6 Thomson Reuters, *The Laws of Australia* [7.3.180].

7 ‘Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ (Discussion Paper, Australian Government Attorney-General’s Department, 2012).

8 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 20, 22–24; pt 3–2, div 2.

9 Legal Aid Qld, *Submission 64*.

11.14 The *National Consumer Credit Protection Act 2009* (Cth) contains provisions on responsible lending conduct.<sup>10</sup> These essentially require credit providers to assess the capability of all consumers—not only consumers with disabilities—and assist them to understand consumer credit and financial products being offered.

11.15 Legal Aid Queensland submitted that the consumer credit provisions offer ‘adequate protections for people with disabilities without the need to adopt an overarching definition of capacity or disability in the legislation’—an approach, it said, that may serve as a useful model for other legislation in the Commonwealth jurisdiction.<sup>11</sup>

11.16 For example, the National Association of Community Legal Centres submitted that, to improve protection for people with disability entering into contracts, companies and retailers should be subject to regulations requiring them to ‘ensure that consumers have the capacity to understand and fulfil the terms of contracts’—for example, through asking a ‘mandatory list of questions to ensure that a consumer has understood the contract’.<sup>12</sup>

11.17 Similarly, the Public Interest Advocacy Centre suggested that there is a need for ‘greater protection of people with disabilities in signing up for consumer contracts, particularly when this is done over the phone and through door-to-door sales’.<sup>13</sup>

11.18 On the other hand, reforms that place undue focus on assessment of a person’s abilities, including by imposing positive obligations to make inquiries about the understanding consumers have of particular transactions, may end up disadvantaging some people because goods and services may not be made available to them.

11.19 However, the ALRC is interested in further comment on possible reform. For example, should provisions similar to those requiring responsible lending conduct apply to other consumer contracts, such as telephone or door-to-door sales? That is, should businesses have obligations to ensure that a consumer contract is suitable for the consumer, including making all reasonable inquiries and ensuring that the consumer fully understands the contract terms?

## **Marriage**

11.20 Article 23 of the CRPD recognises the right of people with disability to marry and found a family.<sup>14</sup> Persons with disability face a range of difficulties in exercising the right to marry and form intimate relationships. However, the focus of this section is on the *Marriage Act 1961* (Cth) and the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* (the Guidelines).

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10 *National Consumer Credit Protection Act 2009* (Cth) ch 3.

11 Legal Aid Qld, *Submission 64*.

12 National Association of Community Legal Centres and Others, *Submission 78*.

13 Public Interest Advocacy Centre, *Submission 41*.

14 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 23.

11.21 The ALRC asks whether amendment is required to the threshold under the *Marriage Act* for ‘real consent’ to marriage,<sup>15</sup> to provide that the consent of either of the parties may not be real consent where that party did not have decision-making ability with respect to the marriage.

11.22 In addition, the ALRC proposes that existing guidelines for marriage celebrants be amended to ensure they are consistent with the National Decision-Making Principles so that people who may have impaired decision-making ability are not unnecessarily prevented from entering a marriage.

### Real consent to marriage

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

11.23 The *Marriage Act 1961* (Cth) provides that a marriage will be void in a number of circumstances. Specifically, s 23B(1)(d)(iii) of the *Marriage Act* provides that a marriage is void where ‘the consent of either of the parties was not a real consent because ... that party was mentally incapable of understanding the nature and effect of the marriage ceremony’.<sup>16</sup>

11.24 As a result, before a marriage is entered into, the person solemnising the marriage must determine that the parties to the marriage are mentally capable of understanding the nature and effect of the marriage ceremony.<sup>17</sup> It is an offence for a celebrant to solemnise a marriage where he or she has reason to believe that one of the parties does not meet this standard.<sup>18</sup>

11.25 Disability Rights Now has expressed the view that these provisions effectively exclude ‘some people with disability, particularly those with cognitive impairments from entering into marriage’.<sup>19</sup> Similarly, the Illawarra Foundation submitted that ‘terminology must be reviewed to reflect a clear distinction between intellectual disability and mental capacity ... people with disability should be assessed on their mental capacity as opposed to their disability’.<sup>20</sup>

15 *Marriage Act 1961* (Cth) s 23B(1)(d)(iii).

16 *Ibid.*

17 A number of categories of people are authorised celebrants for the purpose of solemnising marriages under the *Marriage Act*. Ministers of Religion are registered with states and territories to solemnise marriages for a recognised denomination. Certain state and territory officers are also entitled to solemnise marriages; for example, officers of the relevant registry of births, deaths and marriages. There are also Commonwealth registered marriage celebrants, who are registered under the Commonwealth Marriage Celebrants program: *Ibid* pt IV div 1.

18 *Ibid* s 100.

19 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012).

20 The Illawarra Forum, *Submission 19*.

11.26 However, academics Bruce Arnold and Dr Wendy Bonython submitted that,

as a binding legal agreement, inherent with responsibilities as well as rights, it is of fundamental importance that parties entering a marriage understand what it is they are binding themselves to. For people who lack the capacity to understand this, marriage should not be available.<sup>21</sup>

11.27 Section 23B(1)(d)(iii) reveals a tension between the need to protect people with disability from exploitation or forced marriage, while ensuring that any person with disability who is able to understand and consent should be entitled to marry freely.

11.28 This formulation of the test was first introduced in the *Matrimonial Causes Act 1959* (Cth).<sup>22</sup> There have only been three reported decisions with respect to this test.<sup>23</sup> Most recently in *Oliver and Oliver*, Forster J concluded that the test

not only required a capacity to understand ‘the effect’ but also refers to ‘the marriage’ rather than ‘a marriage’ ... taken together the matters require more than a general understanding of what marriage involves.<sup>24</sup>

11.29 Foster J also expressed the view that ‘the relevant point of time proving mental incapacity is the time of the marriage ceremony’.<sup>25</sup>

11.30 This interpretation of the provision reflects the ALRC’s approach to capacity being context and time specific, and relevant to the particular decision to be made. However, in order to ensure clarity, and consistency with the ALRC’s approach to language in this Inquiry and the one taken in relation to a similar provision under the *Commonwealth Electoral Act 1918* (Cth),<sup>26</sup> it may be necessary to amend 23B(1)(d)(iii).

11.31 Therefore, the ALRC seeks stakeholder comment on possible amendments including, for example, whether the provision should provide that ‘the consent of either of the parties was not a real consent because ... that party did not have decision-making ability with respect to the marriage’.

11.32 The ALRC does not intend, however, to make proposals to include a statutory test of decision-making ability in the *Marriage Act*, or to require consideration of the available decision-making supports. This is largely because of concerns that such inclusions may have the unintended consequence of making the test under the

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

22 The *Matrimonial Causes Act 1959* (Cth) was then repealed by the *Family Law Act 1975* (Cth), and the test was later incorporated into the *Marriage Act 1961* (Cth). See, eg, *Oliver and Oliver* [2014] FamCA 57, [241]–[243].

23 *Brown and Brown* (1982) 92 FLC 232; *AK and NC* (2003) 93 FamCA 178; *Oliver and Oliver* [2014] FamCA 57.

24 *Oliver and Oliver* [2014] FamCA 57, [255].

25 *Ibid* [201].

26 Section 23B(1)(d)(iii) is similarly worded to the second part of s 93(8) of the *Commonwealth Electoral Act 1918* (Cth) which provides that people are not entitled to have their name placed or retained on the Electoral Roll, or to vote, where they are a person ‘who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting’.

*Marriage Act*, which currently only requires ‘a very simple or general understanding ... of the marriage ceremony and what it involves’,<sup>27</sup> more difficult to satisfy.

### ***Guardians and consent***

11.33 In some jurisdictions, under guardianship legislation, a guardian of a person with disability cannot consent or refuse to consent to a marriage, but may give an opinion as to whether the guardian thinks the marriage should proceed.<sup>28</sup>

11.34 Disability Rights Now has suggested this may give guardians ‘undue influence over the extent to which a person with disability can realise their right to freely marry’.<sup>29</sup> 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’.<sup>30</sup> This may be an issue that could be considered in the course of review of state and territory guardianship legislation.

### **Guidelines on the Marriage Act**

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

11.35 Commonwealth registered marriage celebrants may solemnise marriages under the *Marriage Act* and *Marriage Regulations 1963* (Cth) and must comply with the Code of Practice for Marriage Celebrants and ongoing professional development obligations.<sup>31</sup> There are a number of guidelines for celebrants,<sup>32</sup> and celebrants must undergo performance reviews by the Registrar of Marriage Celebrants.<sup>33</sup>

11.36 As outlined above, it is an offence for a celebrant to solemnise a marriage where he or she has reason to believe that one of the parties does not meet the standard contained in s 23B(1)(d)(iii).<sup>34</sup> The Guidelines state that if a celebrant believes the

27 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 [8.6].

28 See, eg, The Illawarra Forum, *Submission 19*; Family Planning NSW, *Submission 04*.

29 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 152.

30 Family Planning NSW, *Submission 04*. See, also, The Illawarra Forum, *Submission 19*.

31 *Marriage Act 1961* (Cth) s 39G.

32 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012; Australian Government Registrar of Marriage Celebrants, *Guidelines on Advertising for Commonwealth-Registered Marriage Celebrants*, (2012); Australian Government Registrar of Marriage Celebrants, *Guidelines on Conflict of Interest and Benefit to Business for Commonwealth-Registered Marriage Celebrants*, (2012). Note, at the time of writing the *Guidelines on the Marriage Act 1961* were under review.

33 *Marriage Act 1961* (Cth) s 39(H).

34 *Ibid* s 100.

consent of one or both parties is not a real consent, they ‘should refuse to marry the couple, even if the marriage ceremony has commenced’.<sup>35</sup>

11.37 The Guidelines suggest that to determine whether a party’s consent is real, a celebrant should speak to the party in the absence of the other party, speak to third parties and keep relevant records.<sup>36</sup> The Guidelines state:

in cases of mental capacity to understand the nature and effect of the marriage ceremony, a very simple or general understanding will be sufficient. A high level of understanding is not required. The authorised celebrant should ask questions of the person about whom they have concerns in order to gauge the level of their understanding of the marriage ceremony and what it involves.<sup>37</sup>

11.38 The Guidelines also provide a list of questions to assist celebrants to identify situations where consent issues may arise.<sup>38</sup>

11.39 Stakeholders expressed a number of concerns about the Guidelines. The Physical Disability Council of NSW, for example, submitted that it did not consider

that a celebrant who may not have any knowledge of disability should be authorised to base this judgement. Issues could potentially arise where for example, a person with physical disability who has issues with their speech be incorrectly classed as ‘incapable’.<sup>39</sup>

11.40 Similarly, The Illawarra Forum submitted that the Act needs to be amended so that the marriage celebrant does not have the right or responsibility to ascertain ‘mental capacity’.<sup>40</sup>

11.41 The Physical Disability Council of NSW highlighted that the Guidelines do not ‘consider communication needs and augmented communication used by people with disability’.<sup>41</sup> The Council recommended amendment to clauses of the Guidelines which relate to obtaining a translator or interpreter<sup>42</sup> 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’.<sup>43</sup>

11.42 The ALRC recognises stakeholder concerns about the expertise of a marriage celebrant in determining whether a person has decision-making ability with respect to the marriage and the need for consideration of the communication needs of people with

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35 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 79.

36 Ibid [8.6].

37 Ibid.

38 Ibid.

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

40 The Illawarra Forum, *Submission 19*.

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

42 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 [4.1.2], [5.9].

43 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 21(b).



disability. It may be necessary to amend the Guidelines to provide additional guidance for marriage celebrants in relation to potential issues relating to decision-making ability and communication needs and requirements. The ALRC proposes amendment to the Guidelines to incorporate and have regard to the National Decision-Making Principles and guidelines. The NSW Capacity Toolkit also provides a useful model.<sup>44</sup>

### Other concerns

11.43 In Australia, many persons with disability experience discrimination or difficulties in exercising their rights to marry, form intimate relationships, and sexual expression. In particular, persons with disability

experience paternalistic and moralistic attitudes from support staff and service providers and their needs for assistance in developing and maintaining relationships and friendships and their decisions to enter into marriage or partnerships receive little or no support at a policy or service delivery level.<sup>45</sup>

11.44 The ‘subject of sexuality and intimate relationships are generally silent, ignored and invisible aspect of the lives of people with disability’.<sup>46</sup> Some stakeholders emphasised that many people with disability may be denied the right to engage in intimate relationships. Stakeholders emphasised a range of difficulties including: legislative barriers under state and territory law;<sup>47</sup> attitudes of family, carers and service providers;<sup>48</sup> risk management processes and policies;<sup>49</sup> limited access to information;<sup>50</sup> difficulty accessing sex workers;<sup>51</sup> and the need for education and awareness raising in relation to people with disability and sexual and reproductive health.<sup>52</sup>

11.45 While important, some of these issues arise at a state or territory level and the key to addressing many of the others extends beyond the limits of law or legal

44 New South Wales, Attorney General’s Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

45 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 15–16. See also: Family Planning NSW, *Submission 04*.

46 Family Planning NSW, *Submission 04*. See also, Family Planning NSW, ‘Love & Kisses: Taking Action on the Reproductive and Sexual Health and Rights of People with Disability 2014-2018’ (December 2013) <[http://www.fpnsw.org.au/disability\\_advocacy.pdf](http://www.fpnsw.org.au/disability_advocacy.pdf)>.

47 For example, provisions that make it an offence to have sexual intercourse with a person who, for example, does not have the capacity to consent to sexual intercourse because of ‘cognitive incapacity’: *Crimes Act 1900* (NSW) s 61HA(4)(a) and the broad definition of cognitive impairment under s 61H(1A), *Crimes Act 1958* (Vic) ss 50–52. See, also, Touching Base, *Submission 40*.

48 See, eg, Queenslanders with Disability Network, *Submission 59*; B Arnold and Dr W Bonython, *Submission 38*; Family Planning NSW, *Submission 04*. See, also, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 158. Michael Kirby, ‘Adult Guardianship: Law, Autonomy and Sexuality’ (2013) 20 *Journal of Law and Medicine* 866, 873.

49 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 158.

50 Vicdeaf, *Submission 56*.

51 Queenslanders with Disability Network, *Submission 59*; Touching Base, *Submission 40*; Physical Disability Council of NSW, *Submission 32*.

52 Family Planning NSW, *Submission 04*. See more generally: The Illawarra Forum, *Submission 19*; Senate Standing Committee on Community Affairs, ‘The Involuntary or Coerced Sterilisation of People with Disabilities in Australia’ (Commonwealth of Australia, 2013).

frameworks, the focus of the ALRC's work.<sup>53</sup> The ALRC does not intend to make proposals in relation to these issues.

## **Superannuation**

11.46 Many decision-making issues in relation to superannuation concern the operation and power of state and territory appointed decision-makers, including powers of attorney. As they arise under state and territory law, these issues go beyond the scope of this Inquiry. The focus of this chapter is confined to decision-making issues that may require amendment to Commonwealth legislation and legal frameworks.

11.47 The *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) govern the operation of superannuation funds in Australia.<sup>54</sup> The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Commissioner of Taxation supervise superannuation funds.<sup>55</sup> Individual superannuation funds are also governed by their trust deeds and governing rules.

11.48 This section discusses two specific questions with respect to superannuation and binding death benefit nominations. The first question is whether the SIS Act and SIS Regulations should be amended to provide for supported decision-making when a member of a superannuation fund nominates a beneficiary. The second question relates to whether, when a member of a superannuation fund has appointed a state or territory decision-maker, that decision-maker should be able to nominate a beneficiary on behalf of the member.

### **Binding death benefit nominations**

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

- (a) for supported decision-making regarding a binding death nomination of a beneficiary;
- (b) that a state or territory decision-maker (such as under an enduring power of attorney) may nominate a beneficiary on behalf of the member?

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53 See, eg, B Arnold and Dr W Bonython, *Submission 38*.

54 The SIS Act makes provision for the prudent management of certain superannuation funds and applies to all private sector funds and certain public sector funds that have elected to be regulated by the SIS Act: *Superannuation Industry (Supervision) Act 1993* (Cth) s 3(1).

55 *Ibid.*

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

11.49 Superannuation is generally provided through a trust structure in which trustees hold the funds on behalf of members. The SIS Act and SIS Regulations provide mechanisms to allow superannuation fund rules to permit a member of the superannuation fund to complete a binding notice nominating a beneficiary.<sup>56</sup> A member can nominate a legal personal representative, or a dependant or dependants as their beneficiary.<sup>57</sup> Nominations are generally only binding for three years, but can be renewed.<sup>58</sup> On or after the member's death, the trustee of the fund must then provide the member's benefits to the person or people mentioned in the notice.<sup>59</sup>

11.50 'Legal personal representative' is defined under the SIS Act to mean 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person'.<sup>60</sup> The ALRC is interested in stakeholder feedback on whether amendment may be required to this definition.

11.51 The SIS Regulations require that the notice nominating a beneficiary must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18 and neither of whom is mentioned in the nomination; and

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56 Ibid s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. There is also provision for a non-binding death benefit nomination which is not binding on the trustee of the superannuation fund, however the trustee will take the member's wishes into consideration when making a decision as to whom to pay the benefit: Ibid reg 6.22.

57 Superannuation law restricts who is an eligible dependant to receive a death benefit payment to a spouse (including same-sex and de facto), child, or person with whom the member has an interdependency relationship: *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10, 10A.

58 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(7). When a binding nomination lapses there is some confusion about whether the death benefit becomes part of the estate or the nomination just becomes non-binding. Although it is outside the terms of reference this has been raised as an issue of concern.

59 This is subject to a trustee of the entity complying with any conditions contained in the regulations, and the member's notice being given in accordance with the regulations. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 59; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. A dependant is defined to include the spouse, child or any person with whom the person has an interdependency relationship: ss 10, 10A.

60 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

- contain a declaration signed and dated by the witness stating that the notice was signed by the member.<sup>61</sup>

#### 11.52 The Law Council of Australia submitted that

some funds accept nomination by a person holding an enduring power of attorney granted by the member, generally without inquiring as to the wishes of the member. Some funds do not accept a nomination by a person holding an enduring power of attorney, with the result that binding nominations cannot be made by these members.<sup>62</sup>

11.53 Subject to the scope of the appointment of a state or territory decision-maker, such as a power of attorney, there does not appear to be any restriction in the SIS Act or SIS Regulations that would prevent a person acting under a power of attorney from completing and signing a binding death benefit nomination. The Superannuation Complaints Tribunal has held that an enduring power of attorney would have permitted such an action.<sup>63</sup>

11.54 The Law Council of Australia has suggested that superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.<sup>64</sup>

11.55 There appear to be key three issues. First, if persons with disability are being prevented from nominating a beneficiary because they require decision-making support, the SIS Act and SIS Regulations may need to be amended to remedy this situation. The ALRC is interested in stakeholder feedback in relation to this issue.

11.56 Secondly, should the SIS Act and SIS Regulations be amended to limit the provision of a binding death nomination to persons with disability who are able to make the decision, with support? For example, should a person acting for a person with disability, under an enduring power of attorney, be restricted from making a binding death nomination? While a nomination is a lifetime act, the effect is will-like in nature—as it affects property after the death of the person who holds the superannuation interest.<sup>65</sup>

11.57 Under strict conditions, wills can now be authorised by the court in some jurisdictions ('statutory wills'), where a person is regarded as having lost, or never having had, legal capacity.<sup>66</sup> 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

61 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

62 Law Council of Australia, *Submission 83*.

63 Superannuation Complaints Tribunal, Decision D07-08\030 (3 September, 2007) [34].

64 Law Council of Australia, *Submission 83*.

65 See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [3.10]–[3.12].

66 *Succession Act 2006* (NSW) ss 18–26; *Succession Act 1981* (Qld); ss 21–28; *Wills Act 1936* (SA) s 7; *Wills Act 2008* (Tas) ss 21–28; *Wills Act 1997* (Vic) ss 21–30; *Wills Act 1970* (WA) s 40; *Wills Act 1968* (ACT) ss 16A–16I; *Wills Act 2000* (NT) ss 19–26.

require decision-making assistance discussed in Chapter 2. The legislation also reflects the time of its introduction in the standard applied by the courts.<sup>67</sup> For example, the courts have to ask whether the proposed will would ‘accurately reflect the testator’s likely intentions’; is a will that is ‘reasonably likely’ to be one that the testator would have made; ‘is or may be a will ... that the person would make’; or ‘is one which could be made by the person’.<sup>68</sup>

11.58 For the purposes of this Inquiry, the key question is whether a similar approach should be taken in relation to binding death nominations. This would require strict provisions for testing whether the nomination is one that the person would really want: that is, does it express their will and preferences? If it is considered that binding death nominations should only be made by the person whose superannuation interest is affected, with appropriate support in making that decision, then the SIS Act and SIS Regulations should be clarified to this effect.

11.59 Thirdly, if a person acting under an enduring power of attorney is to be permitted to make a binding death nomination for the person, then the SIS Act and SIS Regulations need, similarly, to be clarified. The standard by which such nomination should be made and the scrutiny made of the nomination by way of safeguards should also be made clear.

11.60 Accordingly, the ALRC asks whether legislative change is required to clarify whether a binding death nomination may be made by a person acting on behalf of another (such as by an enduring power of attorney), and, if so, what standard should be used to guide such action and what safeguards are necessary in relation to it.

### **Board membership and other corporate roles**

11.61 Board participation is one of the areas listed in the Terms of Reference. In the Issues Paper, the ALRC asked in what ways the Commonwealth laws and legal frameworks relating to membership of, or participation on, boards diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity. Stakeholders expressed concern about under-representation of people with disability on corporate, government and non-government boards; and about the operation of legal provisions allowing the removal of directors or board members because of intellectual disability or mental illness.<sup>69</sup>

11.62 The Mental Health Coordinating Council submitted that the language of laws should change to ‘eradicate any stigmatising and discriminating practice towards

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67 See the discussion in Croucher and Vines, above n 65, [6.11]–[6.20]; R Croucher, ‘“An Interventionist, Paternalistic Jurisdiction”? The Place of Statutory Wills in Australian Succession Law’ (2009) 32 *University of New South Wales Law Journal* 674.

68 Croucher and Vines, above n 65, [6.11].

69 See eg, Hobsons Bay City Council, *Submission 44*; Mental Health Coordinating Council, *Submission 07*; The Illawarra Forum, *Submission 19*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; J Meagher *Submission 79*.

people with a mental health condition’—including in relation to some provisions concerning board membership.<sup>70</sup>

11.63 For example, the *Associations Incorporation Act 2009* (NSW) applies model rules to the constitutions of associations, if appropriate provision is not otherwise made.<sup>71</sup> 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’.<sup>72</sup> 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*’.<sup>73</sup>

11.64 Such a broad provision seems inconsistent with the National Decision-Making Principles because it makes status-based assumptions about decision-making ability, and does not recognise that ability may fluctuate over time.<sup>74</sup> 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.<sup>75</sup> In this Inquiry the ALRC proposes to move away from a status-based approach.

11.65 At a Commonwealth level, a number of provisions in the *Corporations Act 2001* (Cth) apply tests of capacity in relation to acting in various corporate roles, including as a director, auditor, liquidator and financial services licence holder:

- **Directors.** If a person who is the only director and the only shareholder of a proprietary company ‘cannot manage the company because of the person’s mental incapacity’, the person’s personal representative or trustee may appoint another person as director.<sup>76</sup>
- **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’.<sup>77</sup>
- **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’.<sup>78</sup>

70 Mental Health Coordinating Council, *Submission 07*.

71 *Associations Incorporation Act 2009* (NSW) s 25.

72 *Associations Incorporation Regulation 2010* (NSW) sch 1, cl 18(2)(f).

73 *Interpretation Act 1987* (NSW) s 21.

74 See, eg, the Representative Decision-Making Guidelines.

75 The Mental Health Coordinating Council proposed that the wording should be changed to ‘permanently incapacitated’ rather than ‘mentally incapacitated’: Mental Health Coordinating Council, *Submission 07*.

76 *Corporations Act 2001* (Cth) s 201F(2).

77 *Ibid* s 1292(7)(b).

78 *Ibid* s 915B.

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

- (a) understand the information relevant to the decisions that they will have to make in performing the role;
- (b) retain that information to the extent necessary to make those decisions;
- (c) use or weigh that information as part of the process of making decisions; and
- (d) communicate the decisions in some way.

11.66 The existing tests of a person’s capacity to act in roles regulated by the *Corporations Act* are inconsistent with the principles of supported decision-making. In particular, they are status-based—referring to concepts such as ‘mental infirmity’ and ‘mental incapacity’. Further, the functional aspect of some of the tests refers broadly to a person’s ability to manage ‘their affairs’ rather than to make particular categories of decision or perform particular duties.

11.67 Such tests, to the extent they are necessary, should be based on a person’s decision-making ability in the context of a particular role or duties. In the ALRC’s view, the *Corporations Act* should be amended to introduce provisions based on the National Decision-Making Principles and Guidelines.

## Other issues

### Employment

11.68 There are many concerns about the employment of people with disability in Australia, including those arising from lower levels of labour force participation and higher unemployment as compared to others;<sup>79</sup> and the lowest employment participation rate for people with disability among OECD countries.<sup>80</sup>

11.69 In addition, in response to the Issues Paper, stakeholders raised concerns about:

- the relationship between employment and social security systems;
- the operation of the Job Services Australia and Disability Employment Services system, including the conduct of employment services assessments;
- the operation of Australian Disability Enterprises;

79 See, eg: Australian Bureau of Statistics, ‘Australian Social Trends’ (Cat No 4102.0).

80 Organisation for Economic Co-Operation and Development, Directorate for Employment, Labour and Social Affairs, *Sickness, Disability and Work*, Background Paper for High-Level Forum, Stockholm, 14–15 May 2009.

- the operation of the supported wage system and business service wage assessment tool (and proposed changes); and
- the declining rate of employment of people with disability in the Commonwealth public service.<sup>81</sup>

11.70 While these are important issues in the lives of persons with disability, the issues do not relate directly to concepts of legal capacity or decision-making ability, and the ALRC does not intend to make proposals in these areas.

### **Anti-discrimination**

11.71 The nature and operation of Commonwealth anti-discrimination legislation raises a range of significant issues for people with disability. These issues relate especially to factors which may limit the ability of people with disability to access the system, including:

- the individualised nature of the complaint system;
- issues of standing;
- failure to cover intersectional discrimination;
- costs associated with proceeding past conciliation;
- reliance on, and the operation of, exceptions;
- coverage;
- positive duties;
- remedies and enforcement; and
- the role, powers and resourcing of the Australian Human Rights Commission.<sup>82</sup>

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81 See, eg, Legal Aid Qld, *Submission 64*; Redfern Legal Centre, *Submission 46*; Deaf Australia, *Submission 37*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

82 See, eg, Law Council of Australia, *Submission 83*; National Association of Community Legal Centres and Others, *Submission 78*; Women's Legal Services NSW, *Submission 57*; Anti-Discrimination Commissioner (Tasmania), *Submission 71*; Children with Disability Australia, *Submission 68*; Coordinating Committee of Women's Legal Services Australia, *Submission 70*; Legal Aid Victoria, *Submission 65*; Legal Aid Qld, *Submission 64*; Spinal Cord Injuries Australia, *Submission 63*; Queenslanders with Disability Network, *Submission 59*; National Seniors Australia, *Submission 57*; Vicdeaf, *Submission 56*; Disability Discrimination Legal Service, *Submission 55*; Mental Health Council of Australia, *Submission 52*; National Disability Services, *Submission 49*; Central Australian Legal Aid Service, *Submission 48*; Redfern Legal Centre, *Submission 46*; MDAA, *Submission 43*; Public Interest Advocacy Centre, *Submission 41*; B Arnold and Dr W Bonython, *Submission 38*; Cairns Community Legal Centre, *Submission 30*; Equal Opportunity Commission of South Australia, *Submission 28*; Deaf Society of NSW, *Submission 24*; Carers NSW, *Submission 23*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Insurance Council of Australia, *Submission 08*; Mental Health Coordinating Council, *Submission 07*; Office of the Public Advocate (Qld), *Submission 05*; Family Planning NSW, *Submission 04*.



11.72 These are systemic concerns about anti-discrimination law and practice and, in the light of this, and the significant work that has been undertaken in this area in recent years,<sup>83</sup> the ALRC does not intend to make proposals in this area.

### Insurance

11.73 In the Issues Paper, the ALRC asked what changes, if any should be made to the insurance exemption under the *Disability Discrimination Act 1992* (Cth) (DDA), and for submissions on other issues relating to insurance. The key concerns expressed by stakeholders with respect to people with disability and insurance relate to:

- the availability of, information about, and the cost of insurance;
- the operation of policy exclusions, including for example in relation to pre-existing conditions and mental illness;
- the relevance, transparency and accessibility of the actuarial and statistical data on which disability-based insurance underwriting and pricing occurs; and
- reliance on the insurance exemption under the DDA.<sup>84</sup>

11.74 Conversely, some stakeholders submitted that ‘laws and legal frameworks concerning insurance do not reduce the equal recognition of people with disability’ and that the operation of the underwriting process or the operation of the exemption under the DDA are appropriate.<sup>85</sup>

11.75 Again, some of the issues highlighted by stakeholders do not relate directly to concepts of legal capacity or decision-making capability, and the ALRC does not intend to make proposals in these areas.

11.76 There have been a number of recent inquiries 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*<sup>86</sup> may also be applicable in the context of disability, including in relation to:

- the need for clear and simple information about available insurance products;
- the desirability of an agreement between the Australian Government and insurers requiring the publication of data upon which insurance offerings based on age rely;

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83 See, eg, Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth); Senate Legal and Constitutional Affairs Committee, *Review of Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Cth), February 2013 (and submissions to the Senate Committee); Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion Paper (2011) and submissions in response to the Discussion Paper.

84 See, eg, Anti-Discrimination Commissioner (Tasmania), *Submission 71*; Mental Health Council of Australia, *Submission 52*; Physical Disability Council of NSW, *Submission 32*.

85 Insurance Council of Australia, *Submission 08*. See, also, Financial Services Council, *Submission 35*.

86 Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013).

- review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age as well as the development of guidance material about the application of any insurance exception under Commonwealth anti-discrimination legislation; and
- amendment of the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct to include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.<sup>87</sup>

### **Parenthood and family law**

11.77 The Terms of Reference identify parenthood and family law as an area for consideration in this Inquiry. Some of the issues which arise are referred to in other parts of the Discussion Paper. For example, issues concerning the appointment of case and litigation representatives and protecting vulnerable witnesses often arise in family law proceedings and are discussed in Chapter 7. Similarly, issues relating to sterilisation are discussed in Chapter 10.

11.78 Another issue raised by stakeholders was concern about the removal of children from parents with disability, particularly through the operation of the child protection system in states and territories.<sup>88</sup> However, as outlined in Chapter 1, the focus of the ALRC's work is on Commonwealth laws and legal frameworks, and examination of the operation of state and territory child protection systems extends beyond the Terms of Reference for this Inquiry.

11.79 Some stakeholders also raised issues relating to the effect that a parent having disability may have on parenting proceedings in the Family Court.<sup>89</sup> However, the Hon Chief Justice Diana Bryant AO expressed the view that:

insofar as it is being suggested that the Act discriminates against parents with an intellectual disability, or that the presence of an intellectual disability is of itself a disqualifying factor in an application in which a parent is seeking to spend substantial time with their child, I believe those views are misconceived.<sup>90</sup>

11.80 In any event, these concerns focus on the application by judges of the primary and secondary considerations in parenting matters under ss 60CC(2) and 60CC(3) of the *Family Law Act 1975* (Cth) and are outside the scope of this Inquiry.

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87 Ibid.

88 See, eg, G Llewellyn, *Submission 82*; Anti-Discrimination Commissioner (Tasmania), *Submission 71*; ADACAS, *Submission 29*; Office of the Public Advocate (Vic), *Submission 06*. See also Office of the Public Advocate (Vic), 'What Even Happened to the Village? The Removal of Children from Parents with a Disability' (Report 1: Family Law—Hidden Issues, December 2013).

89 See, eg, Office of the Public Advocate (Vic), above n 88. See also ADACAS, *Submission 29*; The Illawarra Forum, *Submission 19*.

90 D Bryant, *Submission 22*.

### Holding public office

11.81 People with disability are significantly under-represented in public office.<sup>91</sup> The main barrier to holding public office for persons with disability may be the negative assumptions about their ability to perform the functions in a role of trust. The Law Council of Australia acknowledged that this social disadvantage, rather than any legal restriction, affects the capacity of people to hold public office, as well as to engage in a profession, vocation or other activities.<sup>92</sup>

11.82 The qualifications of members of the House of Representatives and Senators are set out in the *Australian Constitution*.<sup>93</sup> They include eligibility as an elector under the *Commonwealth Electoral Act 1918* (Cth).<sup>94</sup> As discussed in Chapter 9, the ALRC proposes amendment of the ‘unsound mind’ provision contained in the *Commonwealth Electoral Act*.<sup>95</sup>

11.83 Under the *Australian Constitution*, a Commonwealth judicial officer may be removed on an address from both Houses of the Parliament on the ground of ‘proved misbehaviour or incapacity’.<sup>96</sup> A statutory process for assisting the Parliament to consider removal has been established by the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth). Under this Act, the Parliament may establish a commission to investigate and report on an allegation of misbehaviour or incapacity, so that the Parliament is well-informed about the decision at hand.

11.84 The *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) modified various related laws such as the *Family Law Act 1975* (Cth) and the *Federal Court of Australia Act 1976* (Cth) to provide a statutory basis for the heads of jurisdiction<sup>97</sup> to deal with complaints about judicial officers, including establishing a conduct committee.

11.85 The ALRC does not propose any change to these laws because they appear to provide for an impartial and considered approach to the assessment of decision-making ability. These 2012 laws have also not yet been tested. In time, the ALRC’s National Decision-Making Principles may inform the decisions of Parliament and the heads of jurisdictions of Commonwealth courts.

91 In 2010, the Hon Kelly Vincent MLC, South Australia, from the ‘Dignity for Disability’ party was the first member of parliament in Australia to be elected on a disability platform.

92 Law Council of Australia, *Submission 83*.

93 *Australian Constitution* ss 16, 34.

94 Similar provisions exist at state level and, in Victoria, the constitution itself explicitly provides that a person who ‘by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting is not entitled to be enrolled’: *Constitution Act 1975* (Vic) s 48(2)(d).

95 *Commonwealth Electoral Act 1918* (Cth) s 93(8).

96 *Australian Constitution* s 72. Similar grounds apply for the removal of Commissioners of the ALRC: *Australian Law Reform Commission Act 1996* (Cth) ss 17, 17A.

97 The heads of jurisdiction are the Chief Justices of the Federal Court and the Family Court and the Chief Federal Magistrate.

