

## 7. Access to Justice

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### Summary

7.1 This chapter discusses issues concerning decision-making ability that have implications for access to justice. People with disability may be involved in court processes in a number of different roles, including as parties and witnesses in criminal and civil proceedings. The issues discussed include those affecting people with disability as:

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

7.2 In each of these areas there are existing tests of a person's capacity to exercise legal rights or to participate in legal processes that the ALRC proposes should be reformed consistently with the National Decision-Making Principles, based on art 12 of the CRPD and other sources.<sup>1</sup>

### **Access to justice issues**

7.3 The Issues Paper observed that a range of personal and systemic issues may affect the ability of people with disability to participate fully in court processes. These include:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;
- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and
- misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses.<sup>2</sup>

7.4 Article 13 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) stipulates that States Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including by:

- providing procedural and age-appropriate accommodations to facilitate their role as direct and indirect participants, including as witnesses, in all legal proceedings; and
- promoting appropriate training for those working in the field of administration of justice, including police and prison staff.

7.5 In its 2014 report, *Equal Before the Law: Towards Disability Justice Strategies*,<sup>3</sup> the Australian Human Rights Commission (AHRC) identified the barriers people with disabilities face in achieving equality before the law. It recommended that each jurisdiction in Australia, in addressing these barriers, should develop a Disability Justice Strategy, incorporating the following core set of principles and actions:

- **Appropriate communications**—Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.

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1 See Ch 3.

2 IP 44 (2013), citing Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice', (2009) *Justice Issues*, Law and Justice Foundation, Paper No 10.

3 Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies' (2014).

- Early intervention and diversion—Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.
- Increased service capacity—Increased service capacity and support should be appropriately resourced.
- Effective training—Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.
- Enhanced accountability and monitoring—People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.
- Better policies and frameworks—Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.<sup>4</sup>

7.6 The access to justice issues addressed in the context of this ALRC Inquiry are narrower in scope. The focus of the Inquiry is on laws and legal frameworks affecting people who may need decision-making support.

7.7 In this chapter, the ALRC examines how a range of Commonwealth laws and legal frameworks affecting people involved in court proceedings might be reformed to reflect the National Decision-Making Principles.<sup>5</sup> By providing models in Commonwealth laws, the ALRC also seeks to inform and provide a catalyst for reform of state and territory laws.

7.8 One theme is the tension between laws that are intended to operate in a ‘protective’ manner—including in order to ensure, for example, a fair trial—and increasing demands for equal participation, in legal processes, of people who may require decision-making support.

### **Unfitness to stand trial**

7.9 At common law, a person who is considered ‘unfit’ to stand trial cannot be tried. The justification for this rule has been stated in various ways, including as being to:

- avoid inaccurate verdicts—forcing the defendant to be answerable for his or her actions when he or she is incapable of doing so could lead to an inaccurate verdict;

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4 Ibid 7.

5 Administrative tribunals are another important element of the federal civil justice system. However, the issues discussed in this chapter do not arise in the same way in tribunal proceedings, which involve merits review of government decisions, and are generally less formal and adversarial than in the courts. There is no equivalent, for example, of rules about the competency of witnesses: see Matthew Groves, ‘Do Administrative Tribunals Have to Be Satisfied of the Competence of Parties Before Them?’ (2013) 20 *Psychiatry, Psychology and Law* 133.

- maintain the ‘moral dignity’ of the trial process—requiring that a defendant is fit to stand trial recognises the importance of maintaining the moral dignity of the trial process, ensuring that the defendant is able to form a link between the alleged crime and the trial or punishment and be accountable for his or her actions; and
- avoid unfairness—it would be unfair or inhumane to subject someone to the trial process who is unfit.<sup>6</sup>

7.10 In addition to avoiding incorrect verdicts, the UK Law Commission expressed the rationale for the unfit to stand trial rules as being that it would be ‘an abuse of the process of the law to subject someone to a trial when he or she is unable to play any real part in that trial’.<sup>7</sup>

7.11 At common law, there is a ‘presumption’ of fitness to stand trial. That is, if the defence raises the issue, the onus is on the defence to prove, on the balance of probabilities, that the defendant is unfit to stand trial.<sup>8</sup> If the issue is raised by the prosecution, and contested, then the issue must be proved beyond reasonable doubt.<sup>9</sup> In addition, some Australian jurisdictions have enacted express statutory presumptions of fitness.<sup>10</sup>

### **The test of unfit**

7.12 The presumption of fitness means that it is more correct to refer to a test of ‘unfitness’ to stand trial.<sup>11</sup> The test may arise as an issue before or during the trial. When the defendant is present for trial, it may appear that he or she is unfit to plead. Alternatively, he or she may enter a plea and thereafter, it may appear that he or she is unfit to be tried. All Australian jurisdictions have enacted legislation dealing with fitness to stand trial.<sup>12</sup>

7.13 At common law, the test of unfit to stand trial is, simply stated, whether an accused has sufficient mental or intellectual capacity to understand the proceedings and

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6 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 52. See also Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 3–5.

7 ‘This goes further than merely requiring that a person understands the trial process; it is concerned with whether or not he or she can meaningfully engage in the trial’: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 4.

8 *R v Podola* [1960] 1 QB 325. Queensland Advocacy observed that the diversion scheme under ch 7, pt 2 of the *Mental Health Act 2000* (Qld) ‘presumes incapacity’ in relation to people on existing Forensic Orders or Intensive Treatment Orders and ‘therefore (some would argue positively) discriminates against people with mental illness and intellectual disability’: Queensland Advocacy Incorporated, *Submission* 45.

9 *R v Robertson* (1968) 3 All ER 557.

10 Eg, *Crimes (Mental Impairment and Unfitness to Be Tried Act) 1997* (Vic) s 7(1); *Criminal Law Consolidation Act 1935* (SA) s 269I; *Crimes Act 1900* (ACT) s 312. The Commonwealth has not enacted such a statutory presumption: *Crimes Act 1914* (Cth) s 20B.

11 See, eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 53.

12 See, Thomson Reuters, *The Laws of Australia* [9.3.1960].

to make an adequate defence.<sup>13</sup> The Victorian Supreme Court in *R v Presser* set out six factors relevant to the test:

- an understanding of the nature of the charges;
- an understanding of the nature of the court proceedings;
- the ability to challenge jurors;
- the ability to understand the evidence;
- the ability to decide what defence to offer; and
- the ability to explain his or her version of the facts to counsel and the court.<sup>14</sup>

7.14 The common law test of unfitness to stand trial has been criticised in a number of recent inquiries in Australia and overseas. In particular, the common law may place an undue emphasis on a person's intellectual ability to understand specific aspects of the legal proceedings and trial process,<sup>15</sup> and too little emphasis on a person's decision-making ability. The rules on unfitness to stand trial are characterised as 'protective'<sup>16</sup>—ensuring that a person cannot be tried for a crime unless capable of defending themselves.

7.15 However, in practice, the rules can lead to adverse outcomes for the individuals concerned, who may be subject to detention, for an uncertain period, in prison or in secure hospital facilities—although most jurisdictions have legislated to divert such people away from the criminal justice system.<sup>17</sup> The risk is that incentives exist for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness.

7.16 The Anti-Discrimination Commissioner (Tasmania) observed that as a result of being determined unfit to stand trial, a person may 'end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts'. They 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed'.<sup>18</sup>

Once a person is issued with a forensic order that follows a finding of being unfit to plead it is extremely difficult to be discharged from the order. This is due in

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13 In *R v Pritchard*, the test was stated as being whether the defendant is 'of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any of [the jury] to whom he may object—and to comprehend the details of the evidence ...': *R v Pritchard* (1836) 173 ER 135, [304].

14 *R v Presser* (1958) 45 VR.

15 But is not comprehensive in this regard—eg, there is no reference in common law tests to the defendant's ability to give their own evidence: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 29.

16 Thomson Reuters, *The Laws of Australia* [9.3.1950].

17 See, *Ibid* [9.3.2010]–[9.3.2030].

18 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.

part to a medical approach to disability and a view that if you have an illness for life, you will have an order for life.<sup>19</sup>

7.17 In some cases, the defendant's interests may not be served in being found unfit to stand trial if the outcome is that he or she is put on a supervision order, particularly for less serious offences. Such defendants may later be unable to have their supervision orders revoked because they continue to breach the conditions of the order or commit offences. Further, they remain at risk of the order being varied from non-custodial to custodial if they continue to pose a danger to the community.<sup>20</sup>

A person who is able to understand the process involved in a plea of guilty will often be better off being dealt with by a criminal sanction, rather than being placed on an indefinite supervision order.<sup>21</sup>

7.18 The key criticisms raised in recent inquiries into this issue have included that:

- the test, by focusing on intellectual ability, generally sets too high a threshold for unfitness and is inconsistent with the modern trial process,<sup>22</sup>
- the test is difficult to apply to defendants with mental illness because the criteria were not designed for them,<sup>23</sup>
- a defendant may not be unfit to stand trial even where the court takes the view that he or she is not incapable of making decisions in his or her own interests.<sup>24</sup>

7.19 Stakeholders raised concerns about the test of unfitness to stand trial. Brain Injury Australia observed that, in practice, the threshold for standing trial is low and 'practitioners regularly take instructions from clients with mild mental illness or intellectual disabilities'. On the other hand, people with an acquired brain injury may fail to meet the test:

This could be due to some typical effects of [acquired brain injury], including: difficulty processing information; inability to understand abstract concepts; impaired decision-making ability; memory loss or impairment (which may impede not only the defendant's ability to recall the events the subject of the charge, but also their ability to follow the trial); deficits in spoken or received language; problems learning new information; and dependence (the failure to assume responsibility for one's actions).<sup>25</sup>

7.20 The Victorian Law Reform Commission (VLRC) is conducting a review of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic)* (CMI Act).<sup>26</sup>

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19 Ibid.

20 Office of Public Prosecutions Victoria, *Submission to Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990 (Vic)*.

21 Ibid. For such people, a higher threshold of unfitness to stand trial may therefore be advantageous.

22 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 27.

23 Rather, it was developed through experience with defendants who were deaf and mute and, by extension, defendants with an intellectual disability: Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

24 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 28.

25 Brain Injury Australia, *Submission 02*.

26 The VLRC is due to report in June 2014.

This review includes consideration of the *Presser* test, which is incorporated in the CMI Act.<sup>27</sup> In relation to the criticisms highlighted above, the VLRC observed:

An accused person with a mental illness, for example, may have no trouble having a factual or an intellectual understanding of their right to challenge a juror, but their delusional beliefs may hinder them from making decisions to exercise that right (or having a ‘decision-making capacity’). On the other hand, an accused person with a cognitive impairment or intellectual disability may have more trouble than an accused person with a mental illness to understand this right. This raises the question of whether the current criteria are suitable for people with a mental illness and whether the threshold for unfitness to stand trial is currently set at the right level for these people.<sup>28</sup>

7.21 In its Consultation Paper, the VLRC asked, among other things, whether the test for unfitness to stand trial should include a consideration of a defendant’s decision-making capacity, effective participation in the trial, or capacity to be rational.<sup>29</sup>

7.22 Similar questions were examined by the Law Commission of England and Wales (Law Commission) in its 2010 Consultation Paper, *Unfitness to Plead*.<sup>30</sup> The Law Commission made provisional proposals for reform of the test of unfitness. These proposals would replace the current test with a new legal test which assesses whether the defendant ‘has decision-making capacity for trial’ and takes into account ‘all the requirements for meaningful participation in the criminal proceedings’.<sup>31</sup>

The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings.<sup>32</sup>

7.23 In determining the defendant’s decision-making capacity, the court would be required to take account of the ‘complexity of the particular proceedings and gravity of the outcome’ and, in particular, how important any disability is likely to be in the context of the decisions the defendant must make in the proceedings.<sup>33</sup>

7.24 The Law Commission proposed that a defendant should be found unfit to stand trial if he or she is unable:

- (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial,
- (2) to retain that information,

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27 *Crimes (Mental Impairment and Unfitness to Be Tried Act) 1997* (Vic) s 6.

28 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

29 *Ibid* Questions 1–7.

30 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010). A final report on this topic is expected towards the end of 2014.

31 *Ibid* Proposal 1.

32 *Ibid* Proposal 3.

33 *Ibid* Proposal 4.

- (3) to use or weigh that information as part of decision making process, or
- (4) to communicate his or her decisions.<sup>34</sup>

7.25 The formulation of this test was based on provisions of the *Mental Capacity Act 2005* (UK), which defines capacity for the purposes of decisions about a person's personal welfare, property and financial affairs and the appointment of substitute decision-makers.<sup>35</sup>

7.26 The Law Commission anticipated that if a person meets its proposed test, the person would also satisfy the requirements of the existing test,<sup>36</sup> because the common law criteria set a higher threshold for unfitness to stand trial than a test based on decision-making ability.<sup>37</sup>

7.27 In contrast, the New South Wales Law Reform Commission (NSWLRC) has recommended that the common law criteria for unfitness to stand trial, represented by the *Presser* standards, should not be fundamentally changed. In response to stakeholder concerns, the NSWLRC recommended that the standards simply be updated and incorporated into statute,<sup>38</sup> as in most Australian jurisdictions.<sup>39</sup>

7.28 However, as part of this reform, the NSWLRC recommended that the test for unfitness to stand trial should expressly refer to a person's ability to use information as part of a 'rational' decision-making process.<sup>40</sup>

7.29 While the criminal justice system rightly places weight on 'the right of defendants to make their own decisions (even if those decisions might appear misguided to an impartial observer)', the NSWLRC said that defendants cannot be said to be effectively participating in a trial if they are unable to make rational decisions, for example 'because they cannot distinguish between delusion and reality'.<sup>41</sup>

7.30 The NSWLRC also recommended that the test for unfitness to stand trial should include reference to the 'overarching principle' that the defendant must be able to have a fair trial. This was said to be the 'touchstone' for assessing whether or not the defendant's degree of incapacity is sufficient to do those things required by the test.<sup>42</sup>

7.31 This approach could be a significant step away from the common law because the defendant would not necessarily be required to be meet all the criteria in the test:

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34 Ibid 54.

35 *Mental Capacity Act 2005* (UK) s 3.

36 Based on the criteria in *R v Pritchard* (1836) 173 ER 135.

37 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 62.

38 In the *Mental Health (Forensic Provisions) Act 1990* (NSW).

39 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) xv–xvi.

40 In the UK, the Law Commission considered, but rejected, the idea that it should be required that any decision made by the defendant be rational: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Proposal 2.

41 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) 31.

42 Ibid xvi.



If the defendant was unable, for example, to give evidence effectively, he or she might still be fit for trial if it is possible for a fair trial to be held. Conversely, the list of considerations need not be comprehensive. If the court considers that the defendant lacks an essential capacity that is not listed in the statutory considerations, and cannot be afforded a fair trial, then the defendant can be found unfit.<sup>43</sup>

### Assistance and support

7.32 Existing tests of unfitness to stand trial do not consider the possible role of assistance and support for defendants. Law reform bodies have, however, considered the role of such assistance and support, and the possible implications for assessments of whether a person is unfit to stand trial.

7.33 The Law Commission proposed that decision-making capacity should be assessed with a view to ascertaining whether a defendant could stand trial ‘with the assistance of special measures and where any other reasonable adjustments have been made’.<sup>44</sup> It explained:

The inclusion of the consideration of special measures as part of the test will serve to further the development of special measures on a case by case basis and ensure that the courts adapt to the needs of a particular defendant.<sup>45</sup>

7.34 The Law Commission observed that, if the possibility of having ‘special measures’ to assist the defendant, were to be a factor in a reformed test of unfitness, this would ‘presumably increase the prospects of some defendants who would currently be found unfit to plead being able to stand trial’.<sup>46</sup>

7.35 The NSWLRC made a similar recommendation about modifications to trial processes. It recommended that, in determining whether a person is unfit for trial, the matters that a court must consider should include:

- (a) whether modifications to the trial process can be made or assistance provided to facilitate the person’s understanding and effective participation
- (b) the likely length and complexity of the trial, and
- (c) whether the person is legally represented.<sup>47</sup>

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43 Ibid 26.

44 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Proposal 5.

45 Ibid.

46 Ibid 88.

47 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) rec 2.2.

## Reform of the test

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

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

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

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

7.36 The common law test of unfitness to stand trial is based primarily on a person’s intellectual ability to understand specific aspects of the legal proceedings. The Law Commission described the existing criteria as placing ‘emphasis on an ability to understand rather than the ability to function or to do something (in other words, mental capacity)’. At common law, fitness to stand trial is

a global concept which can be said to cover a general state, and is not context-specific or time-specific. It has tended to be construed as being about the accused’s cognitive ability which is, to all intents and purposes, seen in the abstract.<sup>48</sup>

7.37 This comes close to requiring that a person must be considered as lacking decision-making ability on the basis of having an (intellectual) disability—and, on that basis, is inconsistent with the approach taken by the CRPD and the National Decision-Making Principles.

7.38 Rather, in the ALRC’s view, any test for unfitness to stand trial should be based on a person’s decision-making ability in the context of the particular criminal proceedings which he or she faces.

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48 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 38.

7.39 The proposal above would introduce a new test of unfitness to stand trial into the *Crimes Act 1914* (Cth), based on the guidelines for determining decision-making ability proposed by the ALRC in Chapter 3.

7.40 Interestingly, similar conclusions about the primary importance of decision-making ability have been reached by other law reform bodies that have considered the issues—even though these bodies were not expressly informed by the approach reflected in art 12 of the CRPD. The focus of these inquiries was more on the need to ensure fair trials<sup>49</sup> and the effective participation of defendants.<sup>50</sup>

7.41 The way in which the new test might operate in practice for people with disability was explained by the VLRC:<sup>51</sup>

The new test would require an accused person to:

- *Understand the information relevant to the decisions that they will have to make in the course of the trial*—for example, an accused person with an acquired brain injury who has very low cognitive ability and is unable to understand new or unfamiliar information would be unfit to stand trial.
- *Retain that information*—for example, someone with Attention-Deficit Hyperactivity Disorder (ADHD) who cannot focus and finds it almost impossible to remember any new information given to them would be unfit to stand trial.
- *Use or weigh that information as part of a decision-making process*—for example, an accused person who suffers from paranoid schizophrenia who has a factual understanding of the charge, but indicates to the court that he wants to plead guilty because he sees no point in pleading not guilty as everyone in court is part of a conspiracy, would be unfit to stand trial.
- *Communicate their decisions*—for example, an accused person with autism who is able to understand information and process it but does not acknowledge others, may be unfit to stand trial.<sup>52</sup>

7.42 The ALRC recognises the proposed new test of unfitness to stand trial raises many issues that may need to be resolved before implementation. For example, the VLRC has observed that such a formulation may operate too widely because it has the potential to include defendants who have ‘no recognised mental illness but are unable to use or weigh information as part of a decision-making process, for example, because of stress, overwhelming tiredness or poor education or social background’.<sup>53</sup>

7.43 For this reason, some commentators have suggested that the test should include some threshold requirement that, for example, impaired decision-making ability is due

49 Eg, New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) 25–26.

50 Eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.

51 Referring to the similar criteria in the Law Commission’s provisional proposal: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 54.

52 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 60.

53 Ibid 61.

to ‘mental or physical illness, whether temporary or permanent’<sup>54</sup> or some clinically recognised condition.<sup>55</sup>

7.44 The second proposal also reflects an element of the National Decision-Making Principles—that decision-making ability must be assessed in the context of available supports.

7.45 At present, the test for unfitness does not allow for this. The fact that a person may be able to be supported in understanding trial processes, and making decisions about, and participating in, the proceedings cannot affect their fitness to stand trial. From one perspective:

the introduction of support measures to potentially increase the level of fitness of an accused person is desirable... the provision of support and education about court processes to an accused person who falls ‘just short’ of meeting the test for fitness is a humane option that may ultimately enable them to participate fully in their trial.<sup>56</sup>

7.46 On the other hand, in practice, there may be limited options for supporting a defendant who needs decision-making support through a criminal trial. Providing that available support should be taken into account in determining unfitness to stand trial may work against equality before the law—in that a person with support may be able to stand trial but another, with similar ability but without support, may not be tried.<sup>57</sup>

### **Modelling in Commonwealth law**

7.47 The ALRC proposes that the reformed test of unfitness to stand trial be modelled in Commonwealth law through amendments to the existing legislative provisions in the *Crimes Act*, which set out the processes for finding federal offenders unfit to be tried, and the consequences of such a finding.<sup>58</sup>

7.48 The ALRC recognises that, in practice, such a provision would have limited application. First, most criminal prosecutions occurring in Australia fall within the responsibilities of the states and territories. Secondly, most federal offenders are tried in state and territory courts.<sup>59</sup>

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54 Helen Howard, ‘Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission’s Proposals for a New Capacity Test’ (2011) 75 *Journal of Criminal Law* 194, 201–202 cited in Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 61.

55 Scottish Law Commission, *Insanity and Diminished Responsibility*, Discussion Paper No 122 (2003) 49.

56 Victorian Institute of Forensic Mental Health, *Submission to Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990 (Vic)*.

57 Of course, as discussed below, it may or may not be in the interests of the defendant to be found unfit to stand trial.

58 *Crimes Act 1914* (Cth) ss 20B–20BI.

59 The use of state courts is made possible by ss 71 and 77(iii) of the *Australian Constitution*. The judicial power of the Commonwealth is vested in the High Court, in such other federal courts as the Parliament of Australia creates, and in such other courts as it invests with federal jurisdiction: *Australian Constitution* s 71. Parliament may make laws investing state courts with federal jurisdiction: *Ibid* s 77(iii).

7.49 The *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions.<sup>60</sup> The Act makes specific provision for the exercise of federal criminal jurisdiction by both state and territory courts.<sup>61</sup> Importantly, under the Act, state and territory laws, including those relating to ‘procedure, evidence and the competency of witnesses’ are applied to federal prosecutions in state and territory courts.<sup>62</sup>

7.50 Essentially this means that, even if the *Crimes Act* were amended to introduce a new test of unfitness to stand trial, if the matter is being heard in a state or territory court, the issue of unfitness would still be determined in accordance with the procedures applicable under state or territory law.<sup>63</sup>

7.51 The ALRC nevertheless considers that modelling a new approach to unfitness to stand trial in Commonwealth law will provide an opportunity to guide law reform at state and territory level, to reflect a new approach to determining decision-making ability in criminal justice settings.

### Limits on detention

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

7.52 A wide range of concerns have been raised about the processes and outcomes of unfitness determinations. These include concerns about the availability or otherwise of appropriate accommodation, support services, and diversion from the criminal justice system. For example, Queensland Advocacy Incorporated expressed a range of concerns about the scheme for diverting offenders to the Mental Health Court under the *Mental Health Act 2000* (Qld).<sup>64</sup> Many of these issues do not directly concern decision-making or are too particular to a state or territory jurisdiction to be a focus of this Inquiry.<sup>65</sup>

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60 *Judiciary Act 1903* (Cth) s 39(2).

61 *Ibid* s 68(2).

62 *Ibid* ss 68(1), 79.

63 *Kesavarajah v R* (1994) 181 CLR 230.

64 Queensland Advocacy Incorporated, *Submission 45*.

65 Eg, concerns that Queensland law makes no provision for unfitness to stand trial in relation to summary offences: Qld Law Society, *Submission 53*.

7.53 Some outcomes of unfitness to stand trial rules have generated significant public concern, including, for example, in the cases of Marlon Noble and Rosie Anne Fulton.<sup>66</sup> These concerns have led the AHRC to call for a national audit of people held in prison after being found unfit to stand trial.<sup>67</sup>

7.54 The Safeguards Guidelines proposed by the ALRC state that decisions, arrangements and interventions in relation to people who need decision-making support should be least restrictive of the person's human rights; subject to mechanisms of appeal; and subject to monitoring and review. Some aspects of the limits on detention, and review of detention orders in relation to persons found unfit to stand trial are discussed below.

7.55 The consequences of a determination that a federal offender is unfit are set out in the *Crimes Act*.<sup>68</sup> These provisions apply to federal offenders being dealt with by state or territory courts—despite the operation of the *Judiciary Act* discussed above. In relation to proceedings for federal offences, the provisions of state or territory law give way to provisions of the *Crimes Act* to the extent of any inconsistency.<sup>69</sup> While state or territory law regulates the mode of determination of unfitness to stand trial, the consequences flowing from the determination will be regulated by Commonwealth law.<sup>70</sup>

7.56 Under the *Crimes Act*, where the issue of unfitness is raised on commitment for trial, the proceedings must be referred to the court to which the proceedings would have been referred had the defendant been committed for trial. If that court finds the defendant unfit to be tried, it must determine whether a prima facie case exists. Where no prima facie case exists, the person must be discharged.<sup>71</sup>

7.57 If a prima facie case exists, the court must dismiss the charge if satisfied that it is inappropriate to inflict any punishment, or any punishment other than nominal punishment, having regard to the defendant's 'character, antecedents, age, health or mental condition', the triviality of the offence and the extent of any mitigating circumstances.<sup>72</sup> Otherwise, the court must determine, after considering medical

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66 Marlon Noble was charged in 2001 with sexual assault offences that were never proven. A decade after he was charged, the allegations were clearly shown to have no substance. Marlon spent most of that decade in prison, because he was found unfit to stand trial. Rosie Anne Fulton was held in Kalgoorlie prison for over 18 months after being charged with crimes related to a motor vehicle and being found unfit to stand trial due to her cognitive impairment. She was sent to Kalgoorlie prison because no other suitable accommodation was available for her: Australian Human Rights Commission, 'Send Rosie Anne Home' <[www.humanrights.gov.au/news/stories/send-rosie-anne-home](http://www.humanrights.gov.au/news/stories/send-rosie-anne-home)>.

67 Australian Human Rights Commission, *Jailed without Conviction: Commissioners Call for Audit* <<https://www.humanrights.gov.au/news/stories/jailed-without-conviction-commissioners-call-audit>>.

68 *Crimes Act 1914* (Cth) pt 1B div 6.

69 *Australian Constitution* s 109.

70 *R v Ogawa* [2011] 2 Qd R 350, [89]–[114]. The Queensland Law Society suggested that consideration be given to the adoption of state procedures for dealing with defendants charged with indictable Commonwealth offences, so that consistency of process is achieved: Qld Law Society, *Submission 53*.

71 *Crimes Act 1914* (Cth) s 20B(1).

72 *Ibid* s 20BA(2).

reports whether, on the balance of probabilities, the person will become fit to be tried within 12 months.<sup>73</sup>

7.58 The court may order a person who is likely to become fit to be tried within 12 months to be detained in a hospital, otherwise the proceedings must resume as soon as practicable. If the court finds that the defendant is not likely to become fit, it must determine whether the defendant is ‘suffering from a mental illness, or a mental condition, for which treatment is available in a hospital’ and, if so, whether he or she objects to being detained in hospital.<sup>74</sup>

7.59 The court must order detention in hospital if the person is found to be mentally ill and does not object to being detained in hospital, or in prison or some other place. However, this period of detention must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.<sup>75</sup> Further, before that time, the court may order the person’s release from custody, either unconditionally or subject to conditions lasting not more than three years, if in the court’s opinion this is more appropriate than continuing detention.<sup>76</sup>

7.60 Under the *Crimes Act*, where a person is found unfit to stand trial, the Attorney-General of Australia must, at least once every six months, consider whether or not the person should be released from detention based on medical or other reports.<sup>77</sup> The Attorney-General must not order release unless satisfied that the person is not a threat or danger either to himself or herself or to the community.<sup>78</sup>

7.61 These provisions of the *Crimes Act* were inserted in 1989.<sup>79</sup> While the ALRC has no detailed information about how the provisions operate in practice, or the outcomes they produce for federal offenders who are found unfit to stand trial, the *Crimes Act* appears to provide safeguards that do not exist in all state and territory jurisdictions.

7.62 Some jurisdictions do not provide statutory limits on the period of detention for those found unfit to stand trial. For example:

- in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial,<sup>80</sup>
- in the Northern Territory, the *Criminal Code* (NT) provides that supervision orders for persons found not fit to stand trial are ‘for an indefinite term’;<sup>81</sup> and

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73 Ibid s 20BA(4)–(5).

74 Ibid s 20BB(2).

75 Ibid s 20BC(2).

76 Ibid s 20BC(5).

77 Ibid s 20BD.

78 Ibid s 20BE.

79 *Crimes Legislation Amendment Act (No 2) 1989* (Cth).

80 *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 19.

81 *Criminal Code Act 1983* (NT) sch 1, s 43ZC.

- in Victoria, custodial supervision orders are for an indefinite period,<sup>82</sup> although the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) also requires the court to set a ‘nominal term’ for the purposes of review.<sup>83</sup>

7.63 The Anti-Discrimination Commissioner (Tasmania) provided data from Tasmania’s Forensic Tribunal, which illustrates that, for forensic patients placed on a mental health order for offences other than murder, the period of detention under an order is substantially more than it would have been if they had been found guilty of the offence.<sup>84</sup>

7.64 All jurisdictions have review mechanisms for people held in detention because they are unfit to stand trial, to determine whether a person should be released. Reviews are conducted by different bodies, including courts, mental health and other tribunals and, in the case of the Commonwealth, the Attorney-General.

7.65 However, some jurisdictions may have inadequate review mechanisms for those detained. For example, in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not provide for review. Rather, the person is essentially detained at the ‘Governor’s pleasure’.<sup>85</sup>

7.66 In the ALRC’s view, state and territory legislation governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention. This would at least ensure that a person is no longer a forensic prisoner after some reasonable maximum period. If he or she is a threat or danger to themselves or the public at that time, they should be the responsibility of mental health authorities, not the criminal justice system.<sup>86</sup>

7.67 Regular periodic review of detention orders is also essential. For example, in Victoria, the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) provides judges with the flexibility to decide how often to review, or further review, custodial supervision orders. The VLRC has recommended that legislation should require regular, automatic review of each custodial supervision order at an interval of no longer than every two years.<sup>87</sup>

## Conducting civil litigation

7.68 At common law, the capacity test for a person to participate in civil proceedings is the same as that required for a person to enter into legal transactions.<sup>88</sup> There is a presumption of capacity ‘unless and until the contrary is proved’.<sup>89</sup>

82 *Crimes (Mental Impairment and Unfitness to Be Tried Act) 1997* (Vic) s 27.

83 *Ibid* s 28. The nominal terms are generally equivalent to the maximum term of imprisonment available for the offence.

84 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.

85 *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 35.

86 In this context, the *Crimes Act* requires state or territory mental health authorities to be notified when a person is due to be released because the period of that person’s detention has ended: *Crimes Act 1914* (Cth) s 20BH.

87 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 431.

88 *Goddard Elliot v Fritsch* [2012] VSC 87, [555].

89 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [26].



7.69 The focus of the test is on the capacity of the person to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given.<sup>90</sup>

7.70 The test is issue-specific. That is, capacity must be considered in relation to the particular proceedings and their nature and complexity. This contrasts with the test of unfitness to stand trial in criminal law.

The civil test takes a functional approach to capacity in that it assesses a person's ability to make a particular decision at a particular moment in time, and not a person's ability to make decisions more generally.<sup>91</sup>

7.71 The test is able to take into account the level of legal representation. In particular, the level of capacity required to be a litigant in person is higher than where the person is required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation. Therefore, 'a person who does not have the mental capacity to represent themselves may have sufficient capacity to be able to give instructions to a lawyer to represent them'.<sup>92</sup>

### Litigation representatives

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

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

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

7.72 Where a person does not have capacity to conduct litigation, a litigation representative may be appointed. A litigation representative may also be known as a litigation guardian, case guardian, guardian *ad litem*, next friend, tutor or special representative.<sup>93</sup> In broad terms, a litigation representative acts in the place of the person and is responsible for the conduct of the proceedings.<sup>94</sup>

90 *Goddard Elliot v Fritsch* [2012] VSC 87, [557].

91 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 52.

92 *Goddard Elliot v Fritsch* [2012] VSC 87, [558].

93 The term 'litigation guardian' is used in the High Court and Federal Circuit Court, 'litigation representative' in the Federal Court and 'case guardian' in the Family Court.

94 The ALRC has chosen to use the term litigation representative, which is also used by the Federal Court, because the current duties of people acting in this role are consistent with the ALRC's usage of the term

7.73 The circumstances in which a litigation representative may be appointed are set out in rules of court. In general, a litigation representative is appointed by the court, on the application of a party or an interested person, such as a parent or guardian or, sometimes, the person's own lawyer.

7.74 Litigation representatives can also be removed or substituted by the court, on the application of a party or on its own motion. There are no other review mechanisms for the conduct of a litigation representative, except to the extent that the representative's conduct may be reviewed under state and territory guardianship laws, if the representative is also a guardian or administrator.

7.75 Under federal court rules, a person may be assessed as needing a litigation representative if the person:

- is 'under disability' (High Court);<sup>95</sup>
- is 'under a legal incapacity' because of being a 'mentally disabled person' and 'not capable of managing the person's own affairs in a proceeding' (Federal Court);<sup>96</sup>
- is 'with a disability' and 'does not understand the nature or possible consequences of the case; or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case' (Family Court);<sup>97</sup>
- 'does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding' (Federal Circuit Court).<sup>98</sup>

7.76 The way in which some of these federal court rules are drafted is clearly inappropriate and inconsistent with contemporary conceptualisations of capacity and disability. In particular, some rules adopt elements of a 'status-based' approach that is inconsistent with the CRPD.

7.77 While the common law capacity test for civil proceedings may be used to interpret the application of rules of court dealing with the appointment of litigation representatives, the rules could more closely reflect the common law—and its focus on capacity in relation to the particular transaction or proceedings, rather than 'disability'.

7.78 The ALRC proposes that—as with the new test in criminal proceedings proposed above—the rules of federal courts concerning the appointment of litigation representatives should reflect the guidelines for determining decision-making ability in the National Decision-Making Principles.

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'representative' elsewhere in this Discussion Paper—notably, in relation to 'supporters' and 'representatives' in Ch 4.

95 *High Court Rules 2004* (Cth) r 20.08.

96 *Federal Court Rules 2011* (Cth) r 9.61, Dictionary.

97 *Family Law Rules 2004* (Cth) r 6.08, Dictionary.

98 *Federal Circuit Court Rules 2001* (Cth) r 11.08.

7.79 Arguably, there is little difference between the proposal and the position that applies at common law in determining whether a person has capacity to conduct civil litigation.<sup>99</sup>

7.80 The National Decision-Making Principles recognise that there is a spectrum of decision-making ability—and that ability should be assessed by reference to the decision to be made—and that ability may evolve or fluctuate over time. In contrast, the existing test for capacity to conduct litigation is ‘once and for all’ (that is, for the course of the proceedings)—except to the extent that a person represented can apply to the court to have their litigation representative removed. However, this may be sensible administratively and for practical reasons concerning the efficient resolution of disputes.

7.81 A more major change than the proposed test of decision-making ability is to require courts to consider the available decision-making support in determining whether a person needs a litigation representative.

7.82 Existing rules do not expressly enable the availability of support to be taken into account in assessing whether a litigation representative should be appointed. However, in some ways this is simply a manifestation of the existing approach of assessing capacity in the context of the particular transaction or proceedings.

7.83 Implementation of these proposals is more likely than not to result in more people being involved in civil litigation without having a litigation representative formally appointed.

7.84 An overarching purpose of federal civil practice and procedure provisions is to facilitate the just resolution of disputes, according to law, and ‘as quickly, inexpensively and efficiently as possible’.<sup>100</sup> From some perspectives this reform may be seen as making the resolution of some disputes less ‘efficient’.

7.85 Arguably, lawyers and courts need to know from whom they should take instructions and applications—that is, for the interests of a party to be represented by one voice. Facilitating and ensuring the participation of litigants with impaired decision-making ability may be considered too complex for lawyers and courts to manage.

7.86 Another relevant factor is that, under an adversarial system, courts are not easily able to facilitate the participation of persons with impaired decision-making ability in legal proceedings. The problems unrepresented litigants face in civil justice settings have been well documented over the years.<sup>101</sup>

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99 The Law Commission of England and Wales has made this point in relation to the similarity between the capacity test under the *Mental Capacity Act 2005* (UK) and that which applies at common law: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 51.

100 *Federal Court of Australia Act 1976* (Cth) s 37M.

101 See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [5.148]–[5.157]; Productivity Commission, ‘Access to Justice Arrangements’, Draft Report. (2014) Ch 14.

7.87 However, in the ALRC's view, such concerns are outweighed by the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings.

### **The role of litigation representatives**

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

- (a) must support the person represented to express their will and preferences in making decisions;
- (b) where it is not possible to determine the wishes of the person, must determine what the person would likely want based on all the information available;
- (c) where (a) and (b) are not possible, must consider the human rights relevant to the situation; and
- (d) must act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented.

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

7.88 Under federal court rules, a person who is found to need a litigation representative may only conduct proceedings through that representative. Relevant rules of court provide as follows:

- 'A person under disability shall commence or defend a proceeding by litigation guardian' (High Court);<sup>102</sup>
- 'A person under a legal incapacity may start, or defend, a proceeding only by the person's litigation representative' (Federal Court);<sup>103</sup>
- 'A person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian' (Family Court);<sup>104</sup>
- 'A person who needs a litigation guardian may start, continue, respond to or seek to be included as a party to a proceeding only by his or her litigation guardian'. (Federal Circuit Court).<sup>105</sup>

7.89 There is no obligation under common law or court rules for a litigation representative to make decisions that reflect the will, preferences and rights of the person represented. Rather, at common law, a litigation representative has a 'duty to

102 *High Court Rules 2004* (Cth) r 21.08.1.

103 *Federal Court Rules 2011* (Cth) r 9.61.

104 *Family Law Rules 2004* (Cth) r 11.09.

105 *Federal Circuit Court Rules 2001* (Cth) Rule 6.08.

see that every proper and legitimate step for that person's representation is taken<sup>106</sup>— which seems akin to a 'best interests' test.

7.90 A litigation representative has no obligation to consult or facilitate the participation of the person represented, except to the extent that such duties may be imposed by state or territory guardianship legislation (if the person is also a guardian or administrator).

7.91 In her submission, the Hon Chief Justice Diana Bryant AO observed that the role of a litigation representative has been described as:

an invidious one in the sense that the person is taking on the decision-making responsibilities of the litigant whilst having to ensure that their own interests do not conflict with those of the litigant. *That means that the case guardian has to make decisions which are often unpalatable to the individual litigant.*<sup>107</sup>

7.92 Clearly, this is far from the preferred will and preferences approach to supported decision-making proposed by the ALRC. Further, case law makes it clear that the role of a litigation representative is not only to 'protect' the person represented. The Full Court of the Federal Court has held that the purpose of the power to appoint a litigation representative is 'to protect plaintiffs and defendants who would otherwise be at a disadvantage, as well as to protect the processes of the court'.<sup>108</sup>

7.93 Case law also emphasises concerns about protecting the rights of the other parties in the litigation. It has been said that requiring litigation representatives helps to ensure, in some cases, that 'parties to litigation are not pestered by other parties who should be to some extent restrained' and that a 'defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend'.<sup>109</sup>

7.94 In the ALRC's view, litigation representatives should be required to act, so far as is practicable, in accordance with the National Decision-Making Principles.<sup>110</sup> To this end, the rules of federal courts should provide, among other things, that in making decisions, litigation representatives have a duty to consider the will, preferences and rights of the person represented; to promote their personal, social and financial wellbeing; and to consult with others.

7.95 The ALRC recognises that, in practice, other problems relating to litigation representatives may be of equal or greater significance, but are not a focus of this Inquiry. For example, submissions raised concerns about:

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106 *Read v Read* [1944] SASR 26, 28.

107 Quoting *Anton & Malitsa* [2009] FamCA 623, [2]: D Bryant, *Submission 22* (emphasis added).

108 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [25].

109 *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511, [31], [65].

110 As discussed in Ch 3, the Inquiry is only concerned with issues surrounding the decision-making ability of adults. The ALRC is not, for example, making any proposals with respect to the duties of case guardians representing children in Family Court proceedings.

- the cost and availability of litigation guardians for people who are unable to instruct legal counsel;<sup>111</sup>
- the lack of funding to meet the legal costs of case guardians in Family Court proceedings;<sup>112</sup>
- the difficulties in securing the nomination by the Attorney-General of case guardians in Family Court proceedings where another suitable person is not available;<sup>113</sup>
- the availability of legal representatives who are independent of guardians appointed by state tribunals.<sup>114</sup>

### Solicitors' duties

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

- the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and
- the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative?

7.96 The National Decision-Making Principles require that people should be provided with the support necessary for them to make, communicate and participate in decision-making. In some cases, this support will include the appointment of a litigation representative. The barriers to obtaining this support may include solicitors' duties to their clients.<sup>115</sup>

7.97 Solicitors have a duty to act in the best interests of their clients,<sup>116</sup> and to follow a client's lawful, proper and competent instructions.<sup>117</sup> A solicitor who has concerns about his or her client's decision-making ability may be unwilling to act for a client who refuses, or is unable to agree to, investigations in relation to their ability or an application for the appointment of a litigation representative.

111 Office of the Public Advocate (Vic), *Submission 06*.

112 D Bryant, *Submission 22*.

113 *Ibid*.

114 Queensland Advocacy submitted that 'a conflict of interest arises when a QCAT-appointed guardian (wrongly, although lawfully, in our view) rejects an adult's request to litigate a matter simply because in the Guardian's view it is not in that person's best interests': Queensland Advocacy Incorporated, *Submission 45*.

115 See, eg, Lauren Adamson, Mary-Anne El-Hage and Julianna Marshall, 'Incapacity and the Justice System in Victoria' (Discussion Paper, Public Interest Law Clearing House, 2013).

116 Law Council of Australia, *Australian Solicitors' Conduct Rules* (2011) r 4.1.1.

117 *Ibid* r 8.1.

7.98 Solicitors must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement, subject to limited exceptions—which do not include seeking decision-making support.<sup>118</sup>

7.99 However, the duty of solicitors to the court and the administration of justice is paramount.<sup>119</sup> Once proceedings are commenced, solicitors have a clear and unambiguous duty to raise with the court any concerns about a client's capacity to conduct litigation.<sup>120</sup>

7.100 There is some case law establishing that concerns about a client's capacity may ground an exception to duties of confidentiality. In *R v P*, a solicitor had sought the appointment of a public guardian to have control of his client's estate and existing court proceedings, independently of his client's wishes. The New South Wales Court of Appeal held that:

the solicitor's concern for the interest of the client, so long as it is reasonably based and so long as it results in no greater disclosure of confidential information than absolutely necessary, can justify the bringing of proceedings and such disclosure of confidential information as is absolutely necessary for the purpose of such proceedings.<sup>121</sup>

7.101 The Court also stated that the bringing of such actions is extremely undesirable because it involves the solicitor in a conflict between the duty to do what the solicitor considers in the client's best interests and the duty to follow the client's instructions (and maintain confidentiality).<sup>122</sup>

7.102 It has been suggested that, if there is no clear exception to solicitors' duties of confidentiality, they may 'cease acting for disadvantaged clients' resulting in clients 'moving from lawyer to lawyer or worse, being left unrepresented'.<sup>123</sup> However, there are also arguments against reform, including on the basis that, if a statutory exception were to be introduced,

there may be a risk that lawyers would more readily make applications for the appointment of a substitute decision maker. Applications could potentially be made without the lawyer first trying to adequately support the client to enable the client to provide instructions themselves.<sup>124</sup>

7.103 One option for reform would be new legal professional rules to make it clear that solicitors may disclose information when there is reason to believe the client lacks

118 Ibid r 9.

119 Ibid r 3.1.

120 *Pistorino v Connell & Ors* [2012] VSC 438, [6]. 'Once the matter is raised the court will inquire into the question ... In the exercise of jurisdiction the court is acting both to protect the interests of the person with a relevant disability and to protect the court's own processes'.

121 *R v P* [2001] NSWCA 473, [66]. The Law Society of NSW has stated that *R v P* is 'an important qualification to the duty of confidentiality owed by solicitors to clients': see 'When a Client's Capacity Is in Doubt: A Practical Guide for Solicitors' (Law Society of NSW, 2009) 9, App E.

122 *R v P* [2001] NSWCA 473, [64]. 'It is therefore preferable, if possible, if a family or health care professional makes the application [for the appointment of a substitute decision-maker]': 'When a Client's Capacity Is in Doubt: A Practical Guide for Solicitors', above n 121, 9.

123 Adamson, El-Hage and Marshall, above n 115, 3.

124 Ibid.

the ability to instruct. This would at least ensure that disclosure is not grounds for professional disciplinary action, but would not remove doubts about liability for breach of confidence or other liability under the general law.

7.104 One model is provided by the American Bar Association's Model Rules for Professional Conduct. These provide that:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities ... and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.<sup>125</sup>

7.105 The Queensland Law Society submitted that such rules could 'provide greater clarity for practitioners along with professional certainty of being able to act to protect client's interests'.<sup>126</sup>

## **Witnesses**

7.106 People with disability face a range of barriers that may limit their ability to participate as witnesses. In relation to court processes, the barriers include rules on the competency of witnesses, and difficulties in accessing the necessary support and assistance in giving evidence. Aspects of these issues are discussed below.

7.107 More generally, the Judicial Commission of NSW has observed:

People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.<sup>127</sup>

7.108 In 2012, Disability Rights Now reported to the United Nations that, in Australia, the 'capacity of people with cognitive impairments to participate as witnesses in court proceedings is not supported and this has led to serious assault, sexual assault and abuse crimes going unprosecuted'.<sup>128</sup>

7.109 In particular, it was said that people with cognitive disability face barriers to establishing credibility when interacting with the justice system because of the assumptions 'constantly made by police and court officers, such as prosecutors, judges

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125 American Bar Association, *Model Rules of Professional Conduct*, r 1.14.

126 Qld Law Society, *Submission 53*. See also Andrew Taylor, 'Representing Clients with Diminished Capacity' *Law Society Journal (February 2010)* 56, 58.

127 'Equality before the Law Bench Book' (Judicial Commission of New South Wales, 2006) 5301.

128 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 71.



and magistrates'.<sup>129</sup> In this Inquiry, the Anti-Discrimination Commissioner (Tasmania) submitted:

The perception that a person with disability lacks credibility as a witness to or victim of crime often leads to the decision not to prosecute alleged perpetrators. This heightens the vulnerability of people with disability to further harm because the perpetrator is aware that charges are less likely be brought or prosecuted than if the victim were a person without disability.<sup>130</sup>

## Competency

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

7.110 At common law, as a general rule, all witnesses who are able to comply with testimonial formalities—such as the giving of oaths—are competent to give evidence. There is no other common law test of physical or psychological competence, but a judge has discretion, in exceptional cases, to refuse to permit a witness to testify where the evidence is likely to be unreliable. Otherwise, matters of competence are relevant only to the witness's credibility and the weight that may be placed on the evidence given.<sup>131</sup>

7.111 The AHRC has observed that people with disabilities frequently experience prejudicial assessments of their competency to give evidence as a witness to criminal proceedings.<sup>132</sup> This is despite research suggesting that 'contrary to public perception, most people with intellectual disabilities are no different from the general population in their ability to give reliable evidence' (as long as communication techniques are used that are appropriate for the particular person).<sup>133</sup>

7.112 In Commonwealth law, the *Evidence Act 1995* (Cth) deals with the competence of witnesses. Similar or identical provisions apply in the other jurisdictions that have adopted the Uniform Evidence Acts.<sup>134</sup> Section 13 of the *Evidence Act* provides

129 Ibid 78.

130 Anti-Discrimination Commissioner (Tasmania), *Submission 71*. The Commissioner also observed that 'the best way to ensure prosecution of the charge is to ensure that a person with disability receives adequate support to participate in the process'.

131 Thomson Reuters, *The Laws of Australia* [16.4.280].

132 'Equal Before the Law: Towards Disability Justice Strategies', above n 3, 21.

133 'Equality before the Law Bench Book', above n 127, 5301. The Bench Book cites Mark Kebbell, Christopher Hatton and Shane Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' (2004) 9 *Legal and Criminological Psychology* 23.

134 That is, NSW, Victoria, Tasmania, the ACT and the Northern Territory: *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT).

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
- (a) the person does not have the capacity to understand a question about the fact; or
  - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;
- and that incapacity cannot be overcome.

7.113 A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact, if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.<sup>135</sup> However, the person may give unsworn evidence after being informed by the court about the importance of telling the truth (and certain other matters set out in the Act).<sup>136</sup>

7.114 In this way, the test for competence to give evidence amounts to the capacity to understand the obligation to give truthful evidence.<sup>137</sup> The probative value of an unsworn statement will be assessed and the court may refuse to admit evidence that may be unfairly prejudicial to a party, misleading or confusing, or result in undue delays.<sup>138</sup>

7.115 The wording of s 13(3) implies that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence. The ALRC proposes that the *Evidence Act*—consistently with the National Decision-Making Principles—should expressly provide that competence must be determined in the context of the available support.

7.116 There may be concerns about fairness to parties in legal proceedings if competence is determined by reference to available support—the practical extent and effectiveness of which may be difficult to determine at the point in time that the court must rule on the competence of a potential witness. Another criticism of the ALRC proposal may be that, without some obligation being placed on courts to provide support, reform may have no practical effect.

### **Assistance in giving evidence**

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

135 *Evidence Act 1995* (Cth) s 13(3).

136 *Ibid* ss 13(4)–(5).

137 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) ch 7.

138 *Evidence Act 1995* (Cth) s 135.

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

7.117 Concerns about the extent to which existing laws and legal frameworks facilitate support for witnesses were expressed in submissions. The Office of the Public Advocate (Qld) submitted that the Commonwealth and Queensland state governments should consider implementing new practices to facilitate the giving of evidence by people with disability, ‘by allowing questions to be explained and assistance to be given in communicating the answers’.<sup>139</sup> The Office of the Public Advocate (Vic) considered that greater ‘witness support’ should be provided to assist people with cognitive impairments and mental illness to navigate the justice system.<sup>140</sup>

7.118 Sections 30 and 31 of the *Evidence Act* provide examples of the assistance that may currently be provided ‘to enable witnesses to overcome disabilities’.<sup>141</sup> Section 30 provides that a witness may give evidence about a fact through an interpreter and s 31 relates to ‘deaf and mute witnesses’.

7.119 Section 31 states that a witness who cannot hear adequately may be questioned in ‘any appropriate way’; and that a witness who cannot speak adequately may give evidence by ‘any appropriate means’ and the court may give directions concerning this.

7.120 Deaf Australia expressed concerns about the dated language<sup>142</sup> and drafting of s 31 and observed that the phrase ‘may be questioned in any appropriate way’ is open to interpretation and does not specify that the person’s communication needs must be taken into consideration. It also suggested that use of the term ‘communication support’ should be considered, so as to include modes of support such as live-captioning and hearing loops.<sup>143</sup>

7.121 The Anti-Discrimination Commissioner (Tas) stated that the *Evidence Act 2001* (Tas) does not make adequate ‘provision for regulating or adjusting court processes to accommodate people with disability’. For example, ‘communication by way of gestures is not viewed as a witness statement, despite this being the only way some people can communicate’. The Commissioner observed that the existing provisions,

139 The OPA (Qld) referred to laws in NSW, Western Australia and the UK as providing suitable models, referring to provisions of the *Civil Procedure Act 1986* (NSW); *Evidence Act 1906* (WA); and *Youth Justice and Criminal Evidence Act 1999* (UK); Office of the Public Advocate (Qld), *Submission 05*.

140 Office of the Public Advocate (Vic), *Submission 06*.

141 *Evidence Act 1995* (Cth) s 13 (note).

142 The word ‘mute’ refers to inability to speak. The current appropriate term is ‘speech impaired’: Deaf Australia, *Submission 37*.

143 *Ibid.* See also AFDS, *Submission 47*.

including ss 30–31, ‘highlight that it is not easy for people with disability to have the process modified to increase their participation’.<sup>144</sup>

7.122 At the least, the ALRC considers that there is no reason to limit the application of provisions such as ss 30–31 to particular categories of witnesses needing support. Arguably, there should be express provision for any witness who needs support to give evidence in any appropriate way that enables them to understand questions and communicate answers.

7.123 More broadly, witnesses who need support in order to give evidence should be entitled to the assistance of a supporter. At the Commonwealth level, the *Crimes Act* does provide an extensive range of provisions protecting ‘vulnerable persons’ in their interactions with the justice system.<sup>145</sup>

7.124 These include provisions allowing vulnerable persons to choose someone to accompany them while giving evidence in a proceeding.<sup>146</sup> In relation to adults, the right applies only to ‘vulnerable adult complainants’<sup>147</sup> and ‘special witnesses’. A special witness includes a person who is ‘unlikely to be able to satisfactorily give evidence in the ordinary manner’, including ‘because of a disability’.<sup>148</sup>

7.125 Section 15YO of the *Crimes Act* states only that the person chosen ‘may accompany the person’ and must not prompt the person or otherwise influence the person’s answers; or disrupt the questioning of the person. Any words spoken by the accompanying person must be able to be heard by the judge and jury (if any) in the proceeding. It is unclear how much the person can support or assist the witness, beyond simply ‘moral’ or emotional support.

7.126 Some state and territory criminal procedure legislation makes broader provision for supporting witnesses. For example, in New South Wales, under the *Criminal Procedure Act 1986* (NSW), vulnerable persons have a right to the presence of another person while giving evidence. A vulnerable person for the purposes of these provisions means ‘a child or a cognitively impaired person’.<sup>149</sup>

7.127 The *Criminal Procedure Act* states that, in criminal and certain other proceedings, a vulnerable person ‘is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence’.<sup>150</sup> The supporter ‘may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with

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144 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.

145 *Crimes Act 1914* (Cth) pt IAD.

146 *Ibid* s 15YO.

147 A vulnerable adult complainant is a person who is a victim of slavery or human trafficking: *Ibid* s 15YAA.

148 *Ibid* s 15YAB(1).

149 *Criminal Procedure Act 1986* (NSW) s 306M. ‘Cognitive impairment’ is defined to include: (a) an intellectual disability; (b) a developmental disorder (including an autistic spectrum disorder); (c) a neurological disorder; (d) dementia; (e) a severe mental illness; (f) a brain injury.

150 *Ibid* s 306ZK(2).

an impairment or a disability, or for the purpose of providing the vulnerable person with other support'.<sup>151</sup>

7.128 The ALRC proposes that the *Crimes Act* should be amended to include more comprehensive provisions giving witnesses who need support the right to have a support person present while giving evidence. It should be made clear that such a person may act as a communication assistant, assisting the person with any difficulty in giving evidence associated with a disability.

7.129 There may be concerns about the effect of supporters on the fairness of proceedings—including perceptions that evidence is essentially being communicated to the court by the support person, rather than the witness, and about the opportunities for undue influence on the evidence. However, as with other rules of procedure and evidence, the permissible role of a supporter in the giving of evidence should be subject to judicial discretion and the overriding duty of the judicial officer to ensure that court proceedings are fair.

7.130 The ALRC acknowledges that the proposal does nothing to ensure that support is actually available. In South Australia, the Attorney-General has proposed that the *Evidence Act 1929* (SA) be amended to 'give people with complex communication needs a general entitlement to have a Communication Assistant present for any contact with the criminal justice system'; and to 'increase access to appropriate support persons for vulnerable witnesses'. For these purposes, a service, available throughout the criminal justice process, is proposed to be established in the non-government sector.<sup>152</sup>

7.131 In its 2013 report on the justice system and people with intellectual disability, the Parliament of Victoria's Law Reform Committee<sup>153</sup> highlighted the witness intermediary scheme in the UK, established under the *Youth Justice and Criminal Evidence Act 1999* (UK).

7.132 Under this scheme, the function of an intermediary is to assist intellectually disabled and other vulnerable witnesses by effectively acting as a 'go-between' to facilitate communication between the witness and the court. An Intermediary Registration Board oversees registration and standards for intermediaries.<sup>154</sup>

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151 Ibid s 306ZK(3).

152 Government of South Australia Attorney-General's Department, 'Draft Disability Justice Plan 2014-2016' (2014) Priority Actions 2.1–2.2.

153 Parliament of Victoria Law Reform Committee, 'Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers', Final Report, (2013).

154 Ibid 283. Intermediaries may include speech and language therapists, clinical psychologists, mental health professionals and special needs education professionals.

### Guidance for judicial officers

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

7.133 The *Evidence Act* and *Crimes Act* contain a range of other provisions that may be used to assist people who need support in giving evidence. In addition to those discussed above, the *Evidence Act* includes provisions protecting witnesses from improper questioning, and allowing the giving of evidence in narrative form.<sup>155</sup>

7.134 The *Crimes Act* also contains protective provisions that, among other things, may disallow inappropriate or aggressive cross-examination of vulnerable and special witnesses;<sup>156</sup> allow for the use of alternative arrangements for giving evidence, such as closed-circuit television<sup>157</sup> and the exclusion of members of the public from the courtroom;<sup>158</sup> and ensure vulnerable persons are not compelled to give further evidence unless it is necessary in the interests of justice.<sup>159</sup>

7.135 Legislative provisions are, however, only part of the solution to facilitating the participation of people with disability in the justice system. For example, Victoria Legal Aid observed that flexibility should be encouraged in Commonwealth court and tribunal proceedings to adapt procedures. In addition:

It is important for courts and tribunals to recognise and be sensitive to the challenges that people with disabilities face when interacting with the justice system. Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach. Registry staff, judicial officers and tribunal members should be educated about the difficulties facing those with a disability and encouraged to exercise discretion in excusing trivial breaches and dispensing with standard protocols where appropriate.<sup>160</sup>

7.136 The law may be flexible enough to allow support and assistance to be provided but, in practice, the willingness or ability of courts to respond is likely to be circumscribed by limited resources and lack of awareness in the court and community about available options.<sup>161</sup>

7.137 Greater awareness of the measures that courts and judicial officers may take to assist witnesses who need support giving evidence may be desirable. One model is the Judicial Commission of NSW Equality before the Law Bench Book.<sup>162</sup> The Bench Book contains a section on people with disability and, among other things, discusses

155 *Evidence Act 1995* (Cth) ss 41, 29(2).

156 *Crimes Act 1914* (Cth) s 15YE.

157 *Ibid* ss 15YI, 15YL.

158 *Ibid* s 15YP.

159 *Ibid* s 15YNC.

160 Legal Aid Victoria, *Submission 65*.

161 'Equal Before the Law: Towards Disability Justice Strategies', above n 3, 23.

162 'Equality before the Law Bench Book', above n 127.

the implications of different types of disability for people involved in court proceedings, examples of the barriers for people with disabilities in relation to court proceedings, and making adjustments for people with disability.<sup>163</sup>

7.138 The Bench Book is intended primarily to provide guidance for NSW judicial officers in performing their duties. Bench books may, however, serve a broader educative function within the justice system, as lawyers and parties may also refer to them as a guide to the available options.

## Forensic procedures

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

7.139 Barriers to obtaining consent for the taking of DNA and other forensic samples under Commonwealth, state and territory forensic procedures legislation,<sup>164</sup> may prejudice the investigation and prosecution of crimes against people with disability.

7.140 In particular, some legislation regulating the taking of intimate forensic samples from people deemed unable to provide consent may result in undue delay, which may compromise the value of DNA samples as evidence. This may be of particular concern where people with disability are victims of sexual assault.

7.141 Forensic procedure legislation generally provides that, where forensic samples are needed from a person who is not a suspect, and who is incapable of giving consent, the starting point is that the consent of a parent or guardian is required. However, the taking of DNA samples may be outside the scope of ‘medical treatment’ for the purposes of a guardian’s decision-making powers.

7.142 Problems in obtaining forensic samples from victims may arise where:

- there is no guardian, and parents are unable or unwilling to consent; and
- there is a guardian, but the guardian does not have authority to authorise consent to the forensic procedure.

7.143 At a Commonwealth level, forensic procedures are regulated by pt ID of the *Crimes Act*.<sup>165</sup> Under the *Crimes Act*, a magistrate may order the carrying out of a forensic procedure on an ‘incapable person’<sup>166</sup> if the consent of a guardian cannot

163 Ibid s 5.

164 Eg, *Crimes Act 1914* (Cth) pt ID; *Police Powers and Responsibilities Act 2000* (Qld) ch 17; *Forensic Procedures Act 2000* (Tas).

165 Eg, *Crimes Act 1914* (Cth) pt ID.

166 An ‘incapable person’ is defined to mean an adult who is incapable of understanding the general nature, effect and purposes of a forensic procedure; or of indicating whether he or she consents to it: *Crimes Act 1914* (Cth) s 23WA.

reasonably be obtained; or the guardian refuses consent and the magistrate is satisfied that there are reasonable grounds to believe that the parent or guardian is a suspect and the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence.<sup>167</sup> In determining whether to make the order, the magistrate must take into account, among other things, the seriousness of the alleged offence; the ‘best interests’ of incapable person; and ‘so far as they can be ascertained, any wishes’ of the incapable person with respect to the forensic procedure.<sup>168</sup>

7.144 Procedures in other jurisdictions may require investigators to obtain an emergency order from the state or territory guardianship tribunal, resulting in significant delay.

7.145 The existing Commonwealth provisions may help to address problems with the timeliness of obtaining consent, by allowing a magistrate to order a forensic procedure. Other approaches might involve amending:

- forensic procedures legislation to adopt a hierarchy of decision-makers similar to that found in some guardianship legislation dealing with medical treatment.<sup>169</sup>
- guardianship legislation dealing with consent to medical treatment to include reference to the taking of forensic samples.

## Jury service

7.146 Trial by jury is an important element of the justice system in Australia. Juries are made up of citizens randomly chosen from the electoral roll. They serve as a means for members of the community to participate in the administration of justice, and to ensure that the application of the law is fair and consistent with community standards.

7.147 An essential characteristic of juries, as an institution, is that they be representative of the wider community.<sup>170</sup> Their representative nature depends on all those capable of serving, whatever their individual characteristics, having an opportunity to serve, unless there are defensible reasons for excluding them from jury membership.<sup>171</sup> There are longstanding concerns that, in practice, people with disability are prevented from serving on juries in Australia without sufficient reason:

The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian community. This means that

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167 Ibid s 23XWU(1).

168 Ibid s 23XWU(2).

169 That is, consent may be given for a person incapable of doing so, by a ‘responsible person’—including a spouse or de facto partner; a parent; public advocate or guardian; or ‘another person who has responsibility for the day-to-day care of the incapable person’. An example of this approach is found in Western Australian legislation dealing with ‘identifying procedures’: *Criminal Investigation (Identifying People) Act 2002* (WA) s 20(1)(b).

170 NSW Law Reform Commission, *Jury Selection*, Report No 117 (2007) 49, citing the High Court in *Cheatle v The Queen* (1993) 177 CLR 541, 560.

171 See Ibid 9–10.



the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.<sup>172</sup>

7.148 State and territory legislation generally refers to disability as a ground for disqualification from serving as a juror; or implies that people with disability may be disqualified on the grounds that they are not capable of performing the duties of a juror.

7.149 These legislative and other barriers to jury service have been examined as part of a number of inquiries, including by the NSWLRC, the Law Reform Commission of Western Australia (LRCWA), and the Queensland Law Reform Commission (QLRC).<sup>173</sup> In South Australia, the Attorney-General has proposed ‘further research and investigation on identifying and overcoming barriers to jury duty for people with disability’.<sup>174</sup>

7.150 Inquiries have recommended various legislative changes to facilitate jury service by people with disability and, in particular, amendments to provisions that implied disqualification on the basis of physical disability. For example:

- The NSWLRC recommended that people who are blind or deaf should be qualified to serve on juries, and not prevented from doing so on the basis of that physical disability alone; but that the Court should have power to stand aside a blind or deaf person if the person is unable to discharge the duties of a juror notwithstanding provision of reasonable adjustments.<sup>175</sup>
- The LRCWA recommended that a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability; but a physical disability that renders a person unable to discharge the duties of a juror should constitute a sufficient reason to be excused under the *Juries Act 1957* (WA).<sup>176</sup>
- The QLRC recommended that *Jury Act 1995* (Qld) should be amended to remove the ineligibility of persons with a physical disability, and should instead provide that prospective jurors should inform the Sheriff of any physical disabilities and special needs that they have; but that a person who has an intellectual, psychiatric, cognitive, or neurological impairment that makes the

172 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August, 2012 81.

173 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006); Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Report No 99 (2010); Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011).

174 ‘Draft Disability Justice Plan 2014-2016’, above n 152, Priority Action 1.5.

175 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(a)–(c). These recommendations have not been implemented.

176 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Report No 99 (2010) rec 56.1. This recommendation has been implemented.

person incapable of effectively performing the functions of a juror is ineligible for jury service.<sup>177</sup>

7.151 More recently, Disability Rights Now has recommended to the United Nations that, in Australia, ‘all people with disability be made eligible for jury service’<sup>178</sup> and an Individual Communication has claimed that law and practice concerning jury qualification constitutes a violation of rights guaranteed under the CRPD, including rights to equal recognition under the law and access to justice.<sup>179</sup>

7.152 Submissions have highlighted this issue as being of continuing concern,<sup>180</sup> and expressed support for earlier law reform commission recommendations for change.<sup>181</sup> The Disability Discrimination Legal Service, for example, stated that:

current national and state jury laws should be reformed to avoid exclusion of people with disabilities from participating in jury duty ... the law should allow potential jurors with disabilities to participate in jury duty where such disabilities can be reasonably accommodated. This should replace the current legal position where prospective jurors with auditory and visual disabilities are readily challenged or stood down from a panel.<sup>182</sup>

### **Juries in the Federal Court**

7.153 At the Commonwealth level, only the *Federal Court of Australia Act 1976* (Cth) has provisions dealing with jury qualification and membership, and it is the focus of the discussion below.

7.154 Historically, juries have not been constituted in Federal Court proceedings. As discussed above, most federal offenders are tried in state and territory courts, and the Federal Court has not dealt with indictable criminal offences.

7.155 This position changed, however, with the criminalisation of ‘serious cartel conduct’ in 2009,<sup>183</sup> when jurisdiction to try indictable cartel offences by jury was conferred on the Federal Court. A procedural framework for the Federal Court to exercise jurisdiction over indictable offences—including jury provisions—was enacted.<sup>184</sup>

177 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) recs 8–8, 8–9, 8–14. These recommendations have not been implemented.

178 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 82.

179 Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013. (Referring to CPRD arts 12, 13, 21, 29).

180 See, eg, Disability Discrimination Legal Service, *Submission 55*; Qld Law Society, *Submission 53*; Public Interest Advocacy Centre, *Submission 41*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; The Illawarra Forum, *Submission 19*.

181 Supporting NSWLRC recommendations: Public Interest Advocacy Centre, *Submission 41*. Supporting consideration of QLRC recommendations: Qld Law Society, *Submission 53*.

182 Disability Discrimination Legal Service, *Submission 55*.

183 Introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth)—now *Competition and Consumer Act 2010* (Cth) pt IV, div 1, subdiv B.

184 *Federal Court of Australia Act 1976* (Cth) pt III, div 1A, subdiv D.

7.156 The Federal Court also has the power, in civil proceedings to direct trial of issues with a jury.<sup>185</sup> However, this would only occur in an exceptional case, because the ordinary mode of trial is by judge alone,<sup>186</sup> and state or territory law relating to the qualification of jurors applies in Federal Court civil proceedings.<sup>187</sup>

7.157 Even though juries remain rare in Federal Court proceedings, the ALRC proposes that reform of jury qualification provisions be modelled in Commonwealth law through amendments to the *Federal Court of Australia Act*.

### Qualification to serve on a jury

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

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;
- (b) retain that information to the extent necessary to make these decisions;
- (c) use or weigh that information as part of the jury’s decision-making process; and
- (d) communicate the person’s decisions to the other members of the jury and to the court.

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

7.158 Under the *Federal Court of Australia Act*, the Sheriff must remove a person’s name from the jury list<sup>188</sup> if satisfied that: the person is not qualified to be a juror; or the Sheriff would excuse the person from serving on the jury if the person were a potential juror.<sup>189</sup>

7.159 The Sheriff may, either on application or on his or her own initiative, excuse a potential juror from serving on the jury, if satisfied that they are, ‘in all the circumstances, unable to perform the duties of a juror to a reasonable standard’.<sup>190</sup> In coming to a conclusion about a person’s ability to perform the duties of a juror, the Act

185 Ibid s 40.

186 Ibid s 39. The exercise of this power has been considered in Federal Court defamation proceedings: Steven Rares, ‘The Jury in Defamation Trials’ (Paper Presented at the Defamation & Media Law Conference, Sydney, 25 March 2010).

187 *Federal Court of Australia Act 1976* (Cth) s 41(1).

188 A jury list is prepared for particular proceedings and contains the names and addresses of persons that the Sheriff selects from the jury roll for the applicable jury district, see, eg *Federal Court of Australia Act 1976* (Cth) s 23DM.

189 Ibid s 23DO.

190 Ibid ss 23DQ, 23DR.

requires that the Sheriff must have regard to the *Disability Discrimination Act 1992* (Cth).<sup>191</sup>

7.160 On their face, the jury provisions of the *Federal Court of Australia Act* are an advance on most state and territory legislation because they do not identify disability specifically as a ground for disqualification.

7.161 For example, the *Juries Act 2000* (Vic) disqualifies people who are unable to ‘communicate in or understand the English language adequately’ or who have a ‘physical disability that renders the person incapable of performing the duties of jury service’.<sup>192</sup> The Disability Discrimination Legal Service observed that while ‘this is not an express exclusion of persons with sensory disabilities’ there have been no instances of blind or deaf jurors in the history of the Victorian justice system.<sup>193</sup>

7.162 Similarly, under the *Jury Act 1977* (NSW) persons who are ineligible to serve as jurors include ‘a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror’.<sup>194</sup> The practice appears to be that information indicating a potential juror is blind or deaf is considered sufficient to ground a determination that a person is ineligible to serve as a juror.<sup>195</sup> In particular, blind and deaf jurors may be excluded from serving on juries because of concerns about comprehension and the presence of a 13th person in the jury room where an interpreter is used.<sup>196</sup>

7.163 It is not clear whether similar results would occur under the *Federal Court of Australia Act*. However, the fact that the Act provides little guidance on standards for juror qualification may work against the participation of people with disability. That is, people with disability may still be prevented from serving on a jury, depending upon the Sheriff’s interpretation of the duties of a juror and factors considered in assessing whether these duties can be performed to a ‘reasonable standard’.

7.164 The ALRC recognises there is likely to be ‘some difficulty establishing a more specific objective standard’ for determining juror qualification.<sup>197</sup> However, an approach consistent with the National Decision-Making Principles may facilitate a more inclusive approach to jury service, and help ensure that people with disability are not automatically or inappropriately excluded from serving on a jury. That is, the qualification of jurors should be assessed by reference to a person’s actual decision-

191 Ibid s 23DQ (Note). See, in particular, *Disability Discrimination Act 1992* (Cth) s 29 (Administration of Commonwealth laws and programs).

192 *Juries Act 2000* (Vic) sch 2, cl 3(a),(f).

193 Disability Discrimination Legal Service, *Submission 55*.

194 *Jury Act 1977* (NSW) s 6(b), sch 2.

195 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006); Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013.

196 See, eg, Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013.

197 Law Council of Australia, *Submission 83*.

making ability. Clearly, there should be no presumption that any particular physical or mental disability should be a disqualifying factor.

7.165 In particular, people who require communication devices or communication support workers to ‘expressively communicate’ may be subject to assumptions about their ability to serve on juries.<sup>198</sup> The Disability Discrimination Legal Service observed:

With today’s technology and continuing product development that addresses or alleviates sensory limitations, it is neither reasonable nor necessary to permit arbitrary exclusion from jury service on grounds of disability, English incapacity, or an imputed inability to discharge their duties as a juror, or satisfaction of the Sheriff.<sup>199</sup>

7.166 At present, the fact that a person may be supported in performing the duties of a juror does not seem to be able to be taken into account in determining whether a person is eligible to serve. The ALRC proposes that the *Federal Court of Australia Act*—consistently with the National Decision-Making Principles—should expressly provide that qualification to serve as a juror be determined in the context of the available support. Again, the proposal may be criticised on the basis that, unless support is actually available, there will be no change in jury selection practices.

7.167 Nor does the proposal deal with jury challenges on the basis of perceived disability (that is, peremptory challenges and challenges for cause). No reason need be stated for peremptory challenges, and where a person with a disability is challenged because of that disability, this will be subject to a ruling from the judge, who would have regard to the legislative provisions concerning qualification.

### Assistance for jurors

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

7.168 The National Decision-Making Principles require that people should be provided with the support necessary for them to make, communicate and participate in decision-making. In some cases, this support will include the involvement of an assistant in the courtroom and in the jury room.

7.169 The 2006 recommendations of the NSWLRC referred to ‘interpreters and stenographers’ being allowed to assist a blind or deaf juror, including in the jury room during jury deliberations.<sup>200</sup> ‘Interpreter’ in this context was intended to extend to sign

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198 Disability Discrimination Legal Service, *Submission 55*.

199 *Ibid.*

200 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(d)–(e).

languages, such as AUSLAN, and other communication support, and ‘stenographer’ to include a person providing ‘computer-aided real time transcription’.<sup>201</sup>

7.170 The ALRC’s proposal uses a more open-ended term, introducing the concept of a ‘communication assistant’. The exact parameters of the permissible role of a communication assistant would need to be defined in the Act.

7.171 There is research suggesting that communication assistants would be able to effectively facilitate the participation of some deaf jurors. The NSWLRC and Macquarie University jointly funded a short pilot study to investigate whether people who are deaf could access court proceedings through sign language interpreters.<sup>202</sup> The 2007 report of the study concluded that it had demonstrated that:

- legal facts and concepts can be translated into Auslan;
- Auslan interpreting can provide effective access to court proceedings for a deaf juror;
- hearing people misunderstand court proceedings without being disadvantaged by hearing loss; and
- deaf people are willing and able to serve as jurors.<sup>203</sup>

### **Jury secrecy**

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

- (a) that communication assistants allowed by the trial judge to assist a juror should swear an oath faithfully to communicate the proceedings or jury deliberations;
- (b) that communication assistants allowed by the trial judge to assist a juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements for the secrecy of jury deliberations; and
- (c) for offences, in similar terms to those arising under ss 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

201 Ibid 17–18.

202 The study used a judge’s summing up in a criminal trial to determine the accuracy of the interpretation and the level of comprehension of potential deaf jurors as compared with a control group of hearing jurors: Ibid 14–15.

203 Jemina Napier, David Spencer and Joseph Sabolec, ‘Deaf Jurors’ Access to Court Proceedings via Sign Language Interpreting: An Investigation’ (Research Report 14, NSWLRC and Macquarie University, 2011) 62.

7.172 A common reason given for excluding people who require support from jury service is that an assistant may be seen as an ‘additional’ or ‘thirteenth’ member of the jury, in breach of the secrecy of jury deliberations.<sup>204</sup>

7.173 The rule of jury secrecy, also known as the exclusionary rule, prohibits a juror from discussing the deliberations in the jury room, based on public policy considerations requiring that the verdict of the jury should be final, ensuring that jurors are not subjected to pressure or harassment. However, the rule is a convention or rule of conduct rather than a rule of law,<sup>205</sup> and it is reinforced by statutory provisions that make it an offence to disclose or solicit information about jury deliberations.<sup>206</sup>

7.174 Although there are concerns about maintaining the secrecy of the jury room and allowing a thirteenth person (that is, a communication assistant) to be present, these concerns can be addressed.<sup>207</sup>

7.175 The NSWLRC recommended new legislative provisions requiring the taking of oaths by interpreters and stenographers, extending duties of secrecy to them, and creating new offences. The ALRC proposal above adapts these recommendations in the context of the *Federal Court of Australia Act*.

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204 Deaf Australia referred to a 2013 case in Queensland, in which a deaf person lodged a discrimination complaint against the Queensland Government after being excluded from jury duty. The Queensland Civil and Administrative Tribunal dismissed the complaint because of the ‘thirteenth person’ objection: Deaf Australia, *Submission 37*.

205 See *R v K* (2003) 59 NSWLR 431, [16]. The position is otherwise in the United States: see Peter McClellan ‘Looking Inside the Jury Room’ (Paper Presented at the Law Society of NSW Young Lawyers 2011 Annual Criminal Law Seminar, Sydney, 5 March 2011).

206 Eg, *Federal Court of Australia Act 1976* (Cth) ss 58AK, 58AL.

207 Public Interest Advocacy Centre, *Submission 41*.

