

## 11. Other Issues

---

### Contents

Summary	289
Incapacity and contract law	290
Consumer protection laws	291
Marriage	293
Real consent to marriage	294
Guidelines on the Marriage Act	296
Other concerns	298
Superannuation	299
Board membership and other corporate roles	302
Holding public office	304
Other issues	306
Employment	306
Anti-discrimination	307
Insurance	308
Parenthood and family law	309

### Summary

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

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

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

11.3 The ALRC received submissions on a number of other areas which are not a focus of the Inquiry. While the ALRC does not make recommendations in these areas, some of the key concerns are outlined.

### **Incapacity and contract law**

11.4 The assumption underlying any contract is that each party has freely entered into a binding agreement, having assessed whether or not the terms are in their best interests. Some categories of person—including minors and people with impaired mental capacity—have traditionally been regarded by the law as being incapable of looking after their own interests, and through various rules, a ‘legal disability’ has been imposed on them.<sup>1</sup>

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

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

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

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

---

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

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

3 *Ibid* [7.3.580].

4 *Ibid* [7.3.590]–[7.3.600].

5 The ACL is contained in sch 2 of the *Competition and Consumer Act 2010* (Cth): sch 2, s 20 ‘Unconscionable conduct within the meaning of the unwritten law’.

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

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

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

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

## Consumer protection laws

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

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

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

---

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

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

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

9 Legal Aid Qld, *Submission 64*.

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

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

11.17 For example, the National Association of Community Legal Centres (NACLC) submitted that, to improve protection for people with disability entering into contracts, companies and retailers should be subject to regulations requiring them to ‘ensure that consumers have the capacity to understand and fulfil the terms of contracts’.<sup>12</sup> This may involve, for example, through asking a ‘mandatory list of questions to ensure that a consumer has understood the contract’.<sup>13</sup>

11.18 Similarly, the Public Interest Advocacy Centre suggested that there is a need for ‘greater protection of people with disabilities in signing up for consumer contracts, particularly when this is done over the phone and through door-to-door sales’.<sup>14</sup>

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

11.20 In the Discussion Paper, the ALRC asked whether provisions similar to the responsible lending provisions of the *National Consumer Credit Protection Act* should apply to other consumer contracts.<sup>15</sup> That is, should businesses have obligations to ensure that a consumer contract is suitable for the consumer, including making all reasonable inquiries and ensuring that the consumer fully understands the contract terms?

11.21 Some stakeholders considered that such obligations should underlie consumer contracts,<sup>16</sup> but recognised concerns about the practical implications of law reform in this direction. KinCare Services, for example, stated that while it supported the notion that ‘all interactions with people with disability should take place under conditions where the customer’s decision-making capability is assured’, this could be costly and would increase market regulation. It suggested that the aims of the *United Nations*

---

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

11 Legal Aid Qld, *Submission 64*.

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

13 *Ibid*.

14 Public Interest Advocacy Centre, *Submission 41*.

15 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 11–1.

16 Illawarra Forum, *Submission 124*; KinCare Services, *Submission 112*.

*Convention on the Rights of Persons with Disabilities* (CRPD)<sup>17</sup> may be pursued more effectively through ‘the development of recommended standard contract clauses or improved availability of accessible communication tools’.<sup>18</sup>

11.22 The Queenslanders with Disability Network (QDN) observed that the ‘potential for some people with disability to sign a contract that is unsuitable for their needs is high’ and welcomed ‘any attempt to protect consumers from financial commitments that they may not fully understand’.<sup>19</sup> However, it expressed concern that reform in this area will ‘lead to an overly conservative approach in the offering of services to people with disability’.<sup>20</sup>

11.23 NACLCL submitted that, rather than any broader reform,

The introduction of very targeted and basic suitability requirements only in certain high-risk consumer contracts may be a preferable approach. This could, for example, apply to contracts such as purchasing a car without finance, high value phone contracts, and other high value consumer contracts and require a basic consideration of affordability and suitability.<sup>21</sup>

11.24 Similarly, Legal Aid NSW considered that there is a need for reform in relation to ‘financial products, particularly insurance, as well as reforms that target particular product types and business models such as life insurance, funeral insurance and door to door and telephone sales’.<sup>22</sup>

11.25 The ALRC considers that it would not be appropriate to make any recommendations in consumer protection law without further consideration of the possible ramifications for persons with disability who do not have decision-making vulnerabilities.

## Marriage

11.26 Article 23 of the CRPD recognises the right of persons with disabilities to marry and found a family. The focus of this Inquiry is on the Commonwealth legal framework for marriage, namely the *Marriage Act 1961* (Cth) and the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* (the Guidelines), to ensure that persons with disability are ‘not unnecessarily prevented from entering a marriage’.<sup>23</sup>

11.27 Stakeholders supported the ALRC’s proposal for amendment to the threshold under the *Marriage Act* for ‘real consent’ to marriage,<sup>24</sup> to provide that, instead of a

---

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

18 KinCare Services, *Submission 112*.

19 Queenslanders with Disability Network, *Submission 119*.

20 Ibid. See also Vicdeaf, *Submission 125*.

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

22 Legal Aid NSW, *Submission 137*.

23 National Mental Health Consumer & Carer Forum, *Submission 100*.

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

reference to mental incapacity, the consent of either of the parties may be void where that party did not have decision-making ability with respect to the marriage.<sup>25</sup>

11.28 The Victorian Deaf Society raised concerns about difficulties facing the people who would assess a person's decision-making ability with respect to marriage and of discerning 'real consent' as 'there are people who don't get the concept of marriage but do enjoy the time they spend together'.<sup>26</sup>

11.29 To assist in the role of marriage celebrants to determine real consent, the ALRC recommends that existing guidelines for marriage celebrants also be amended.

### Real consent to marriage

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

11.30 The *Marriage Act 1961* (Cth) provides that a marriage will be void in a number of circumstances. Specifically, ss 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act* states that a marriage is void where 'the consent of either of the parties was not a real consent because ... that party was mentally incapable of understanding the nature and effect of the marriage ceremony'.<sup>27</sup>

11.31 Before a marriage is entered into, the person solemnising the marriage must determine that the parties to the marriage are mentally capable of understanding the nature and effect of the marriage ceremony.<sup>28</sup> It is an offence for a celebrant to solemnise a marriage where they have reason to believe that one of the parties does not meet this standard.<sup>29</sup>

11.32 Disability Rights Now has expressed the view that these provisions effectively exclude 'some people with disability, particularly those with cognitive impairments from entering into marriage'.<sup>30</sup> Similarly, the Illawarra Forum submitted that the 'terminology must be reviewed to reflect a clear distinction between intellectual

25 National Mental Health Consumer & Carer Forum, *Submission 100*; Family Planning NSW, *Submission 109*; Illawarra Forum, *Submission 124*.

26 Vicdeaf, *Submission 125*.

27 *Marriage Act 1961* (Cth) s 23(1)(iii) applies to marriages solemnised on or after 20 June 1977 and before the commencement of s 13 of the *Marriage Amendment Act 1985* (Cth) and s 23B(1)(d)(iii) applies to marriages solemnised after the commencement of s 13 of the *Marriage Amendment Act*.

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

29 *Ibid* s 100.

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

disability and mental capacity ... people with disability should be assessed on their mental capacity as opposed to their disability'.<sup>31</sup>

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

as a binding legal agreement, inherent with responsibilities as well as rights, it is of fundamental importance that parties entering a marriage understand what it is they are binding themselves to. For people who lack the capacity to understand this, marriage should not be available.<sup>32</sup>

11.34 Sections 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act* reveal a tension between the need to protect persons with disability from exploitation or forced marriage, while ensuring that any person with disability who is able to understand and consent to marriage should be entitled to marry freely.

11.35 This formulation of the test was first introduced in the *Matrimonial Causes Act 1959* (Cth).<sup>33</sup> There have only been three reported decisions with respect to this test.<sup>34</sup> In 2014, Foster J in *Oliver and Oliver* concluded that the test

not only required a capacity to understand 'the effect' but also refers to 'the marriage' rather than 'a marriage' ... taken together the matters require more than a general understanding of what marriage involves.<sup>35</sup>

11.36 Foster J also stated that 'the relevant point of time in proving mental incapacity is the time of the marriage ceremony'.<sup>36</sup>

11.37 This interpretation of the provision reflects the ALRC's approach to decision-making ability being context and time specific, and relevant to the particular decision to be made. However, in order to ensure clarity, and consistency with the ALRC's approach to language in this Inquiry,<sup>37</sup> the ALRC recommends amendment of ss 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act* to void a marriage if 'a party did not understand the nature and effect of the marriage ceremony'.

11.38 The ALRC does not, however, make recommendations to include a statutory test of decision-making ability in the *Marriage Act*, or to require consideration of the available decision-making supports. This is because of concerns about such provisions

---

31 The Illawarra Forum, *Submission 19*.

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

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

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

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

36 *Ibid* [201].

37 Section 23B(1)(d)(iii) is similarly worded to s 93(8)(b) of the *Commonwealth Electoral Act 1918* (Cth) which provides that people are not entitled to have their name placed or retained on the Electoral Roll, or to vote, where they are a person 'who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'. See further, Ch 9.

unintentionally resulting in a higher threshold for real consent to marry for persons with disability.<sup>38</sup>

### **Guardians and consent**

11.39 In some jurisdictions, under guardianship legislation, a guardian of a person with disability cannot consent or refuse to consent to a marriage, but may give an opinion as to whether the guardian thinks the marriage should proceed.<sup>39</sup>

11.40 Disability Rights Now has suggested this may give guardians ‘undue influence over the extent to which a person with disability can realise their right to freely marry’.<sup>40</sup> Similarly, Family Planning NSW expressed the view that ‘the opinion of a person with disability’s guardian should not be taken into account when determining a person’s capacity to consent to marriage’.<sup>41</sup> The ALRC suggests this may be an issue that could be considered in the course of review of state and territory guardianship legislation.<sup>42</sup>

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

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

11.41 Commonwealth registered marriage celebrants may solemnise marriages under the *Marriage Act* and *Marriage Regulations 1963* (Cth) and must comply with the Code of Practice for Marriage Celebrants and ongoing professional development obligations.<sup>43</sup> There are a number of guidelines for celebrants<sup>44</sup> and celebrants must undergo performance reviews by the Registrar of Marriage Celebrants.<sup>45</sup>

38 The *Marriage Act 1961* (Cth) currently only requires ‘a very simple or general understanding ... of the marriage ceremony and what it involves’: Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014 pt 8.6.

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

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

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

42 See Ch 10.

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

44 Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014; Australian Government Registrar of Marriage Celebrants, *Guidelines on Advertising for Commonwealth-Registered Marriage Celebrants*, 2012; Australian Government Registrar of Marriage Celebrants, *Guidelines on Conflict of Interest and Benefit to Business for Commonwealth-Registered Marriage Celebrants*, 2012. The *Guidelines on the Marriage Act 1961* were updated in July 2014 to reflect changes brought about through the *Marriage Amendment (Celebrant Administration and Fees) Act 2014* (Cth), the *Marriage (Celebrant Registration Charge) Act 2014* (Cth) and the *Marriage Amendment (Fees and Charges) Regulation 2014* (Cth).

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



11.42 As outlined above, it is an offence for a celebrant to solemnise a marriage where they have reason to believe there is ‘a legal impediment’.<sup>46</sup> The Guidelines state that, if a celebrant believes the consent of one or both parties is not a real consent, they ‘should refuse to marry the couple, even if the marriage ceremony has commenced’.<sup>47</sup>

11.43 The Guidelines suggest that to determine whether a party’s consent is real, a celebrant should speak to the party in the absence of the other party, speak to third parties and keep relevant records.<sup>48</sup> The Guidelines state:

in cases where there is doubt about whether a party has the mental capacity to understand the nature and effect of the marriage ceremony, a very simple or general understanding will be sufficient. A high level of understanding is not required. The authorised celebrant should ask questions of the person about whom they have concerns in order to gauge the level of their understanding of the marriage ceremony and what it involves.<sup>49</sup>

11.44 The Guidelines also provide a list of questions to assist celebrants to identify situations where consent issues may arise.<sup>50</sup> However, stakeholders considered the existing guidance to be inadequate. The Physical Disability Council of NSW submitted that a celebrant who may not have any knowledge of disability should not be authorised to make a judgement about a person’s capacity to consent to marriage.<sup>51</sup>

11.45 Further, the Physical Disability Council of NSW highlighted that the Guidelines do not ‘consider communication needs and augmented communication used by people with disability’.<sup>52</sup> The Council recommended amendment to clauses of the Guidelines which relate to obtaining a translator or interpreter<sup>53</sup> in order to ensure compliance with art 21 of the CRPD, which requires acceptance and facilitation of the use of ‘sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions’.<sup>54</sup>

11.46 The revised 2014 Guidelines provide for ceremonies conducted in a sign language such as Auslan<sup>55</sup> and for vows to be exchanged in a sign language.<sup>56</sup> The ALRC acknowledges this positive development and encourages provision of additional

---

46 Ibid s 100.

47 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 pt 8.6.

48 Ibid.

49 Ibid.

50 Ibid.

51 Physical Disability Council of NSW, *Submission 32*. See also The Illawarra Forum, *Submission 19*.

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

53 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, 2012 pt 5.9.

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

55 Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014 pt 5.9.

56 Ibid pt 5.7.

guidance for marriage celebrants in relation to determining real consent, including ensuring different communication needs are met.<sup>57</sup>

### Other concerns

11.47 In Australia, persons with disability may experience discrimination or difficulties in exercising their rights to marry and to form intimate relationships. In particular, the Disability Rights Now report asserted that persons with disability

experience paternalistic and moralistic attitudes from support staff and service providers and their needs for assistance in developing and maintaining relationships and friendships and their decisions to enter into marriage or partnerships receive little or no support at a policy or service delivery level.<sup>58</sup>

11.48 The ‘subject of sexuality and intimate relationships are [a] generally silent, ignored and invisible aspect of the lives of people with disability’.<sup>59</sup> Some stakeholders emphasised that many persons with disability may be denied the right to engage in intimate relationships. Stakeholders outlined a range of difficulties including: legislative barriers under state and territory law;<sup>60</sup> attitudes of family, carers and service providers;<sup>61</sup> risk management processes and policies;<sup>62</sup> limited access to information;<sup>63</sup> difficulty accessing sex workers;<sup>64</sup> and the need for education and awareness raising in relation to persons with disability and sexual and reproductive health.<sup>65</sup>

11.49 While important, many of these issues arise at a state or territory level. The key to addressing them extends beyond the limits of law or legal frameworks and into other levers for attitudinal and cultural change.<sup>66</sup> The ALRC does not make

---

57 The NSW Capacity Toolkit is another useful model: New South Wales Attorney General’s Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008).

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

59 Family Planning NSW, *Submission 04*. See also Family Planning NSW, ‘Love & Kisses: Taking Action on the Reproductive and Sexual Health and Rights of People with Disability 2014–2018’ (December 2013).

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

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

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

63 Vicdeaf, *Submission 56*.

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

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

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

recommendations in relation to these issues but notes that they may be considered in the review of state and territory legislation.<sup>67</sup>

## Superannuation

11.50 Many decision-making issues in relation to superannuation concern the operation and powers of state and territory appointed decision-makers, including under powers of attorney. The focus of this chapter is confined to decision-making issues that may require amendment to Commonwealth legislation and legal frameworks.

11.51 The *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) govern the operation of superannuation funds in Australia.<sup>68</sup> The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Commissioner of Taxation supervise superannuation funds.<sup>69</sup> Individual superannuation funds are also administered by their trust deeds and in accordance with governing rules.

11.52 Superannuation is generally provided through a trust structure in which trustees hold the funds on behalf of members. The SIS Act and SIS Regulations provide mechanisms to allow superannuation fund rules to permit a member of the superannuation fund to complete a binding death benefit nomination of a beneficiary. The SIS Regulations require that the notice nominating a beneficiary must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18 and neither of whom is mentioned in the nomination; and
- contain a declaration signed and dated by the witness stating that the notice was signed by the member.<sup>70</sup>

11.53 A member can nominate a legal personal representative, or a dependant or dependants as their beneficiary.<sup>71</sup> Nominations are generally only binding for three years, but can be renewed.<sup>72</sup> On or after the member's death, the trustee of the fund

67 See Ch 10.

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

69 Ibid.

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

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

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

must then provide the member's benefits to the person or people mentioned in the notice.<sup>73</sup>

11.54 'Legal personal representative' is defined under the SIS Act to mean 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person'.<sup>74</sup>

11.55 One area of contention identified in the ALRC's Discussion Paper was whether, when a member of a superannuation fund has appointed a state or territory decision-maker, that decision-maker should be able to nominate a beneficiary on behalf of the member.<sup>75</sup>

11.56 As a matter of law, there does not appear to be any restriction in the SIS Act or SIS Regulations themselves that would prevent a person acting under a power of attorney from completing and signing a binding death benefit nomination. The issue arose for consideration by the Superannuation Complaints Tribunal in 2007. In *Determination D07-08\030*, the sister of the member of the relevant superannuation fund (the Deceased Member) was also his legal personal representative. She also held an enduring power of attorney on behalf of the Deceased Member. Exercising the power of attorney, the sister had made a binding death benefit nomination on behalf of the Deceased Member as follows: 25% to herself and 37.5% each to the member's daughter and son. The Trustee of the fund advised the sister that it had decided to accept the validity of the nomination and pay 37.5% each to the member's daughter and son, and 25% to the sister *as the legal personal representative*. By his will, the Deceased Member left one quarter of his estate to his sister and the remaining three quarters to his son and daughter in equal shares. The sister lodged a complaint with the Tribunal that the decision of the trustee to pay 25% of the death benefit to her as the legal personal representative, and not directly to her, was unfair or unreasonable.

11.57 The Superannuation Complaints Tribunal stated that, in principle, the enduring power of attorney would have permitted the sister to complete and sign the binding death nomination, but the nomination would 'only have been valid if the person nominated to receive the benefit was an individual who was either a dependant, or the Legal Personal Representative acting in that capacity, rather than as an individual'.<sup>76</sup> The trustee decided that she was not a 'dependant' and therefore ineligible under the scheme, hence the only capacity in which she could receive a benefit was as the legal personal representative of her brother.

---

73 This is subject to a trustee of the entity complying with any conditions contained in the regulations, and the member's notice being given in accordance with the regulations. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 59; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

74 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1).

75 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Questions 11-1, 11-2.

76 *Determination No D07-08\30* (Unreported, Superannuation Complaints Tribunal, 3 September 2007) [34].

11.58 The Tribunal said that it was unclear on what basis the sister named herself in the nomination and the trustee should have clarified this ‘before accepting the nomination’.<sup>77</sup> Further, the nomination was ambiguous because there were in fact two legal personal representatives appointed in the will. The Tribunal pointed to the power in the trust deed of the fund to refuse to accept or give effect to a binding nomination, if it is not sufficiently clear to allow the trustee to pay it according to the nomination.<sup>78</sup>

11.59 The Tribunal decided that the trustee should not have accepted the nomination and that the trustee’s decision should be set aside. Instead, the Tribunal determined that 100% of the death benefit should be distributed to the Deceased Member’s estate. As the Tribunal did not decide the matter on the basis of the binding nomination, its comments are not of direct application.

11.60 As a matter of current practice the Law Council of Australia (Law Council) pointed to the different practices of funds:

some funds accept nomination by a person holding an enduring power of attorney granted by the member, generally without inquiring as to the wishes of the member. Some funds do not accept a nomination by a person holding an enduring power of attorney, with the result that binding nominations cannot be made by these members.<sup>79</sup>

11.61 The Law Council suggested that superannuation funds would adopt a more consistent approach if there was greater clarity in legislative provisions governing superannuation death benefits.<sup>80</sup>

11.62 This policy issue is a difficult one, given the difference between a nomination, as a lifetime act, and its effect, which is will-like in nature—as it affects property after the death of the person who holds the superannuation interest.<sup>81</sup> In this context, in the Discussion Paper, the ALRC asked whether a person holding authority under an instrument such as an enduring power of attorney should be *restricted* from nominating a beneficiary on behalf of the person for whom they were acting—assuming that such action was not prevented by the power of attorney itself.<sup>82</sup>

11.63 The Law Council agreed that the main issue around binding death benefit nominations is that there is currently no clear policy position on whether a nomination should be considered similar to a will or simply an instruction in relation to a person’s assets. The Council also agreed with the ALRC’s analysis that nominations are will-like in nature and they should be treated in policy terms ‘similarly to wills’.<sup>83</sup>

---

77 Ibid [35]. Other issues were argued by the son and daughter, including that to exercise the power of attorney in favour of herself was a breach of fiduciary duty by the sister: [21].

78 Ibid [37].

79 Law Council of Australia, *Submission 83*.

80 Ibid.

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

82 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 11–3.

83 Law Council of Australia, *Submission 142*.

11.64 Until recently, a will could *only* be made by the testator themselves, and not, for example, an enduring guardian. Under strict conditions, wills can now be authorised by the court in some jurisdictions ('statutory wills'), where a person is regarded as having lost, or never having had, legal capacity.<sup>84</sup> In the succession context it is a relatively new jurisdiction and exercised cautiously, given the importance accorded to testamentary freedom as a valued property right. Generally speaking, the conditions for such statutory wills reflect the changes in emphasis in approaches to legal capacity and support for those who may require decision-making assistance, discussed in Chapter 2. The standard to be applied by the courts reflects the time the relevant state or territory legislation was introduced.<sup>85</sup> For example, the courts have to ask variously whether the proposed will would 'accurately reflect the testator's likely intentions'; is a will that is 'reasonably likely' to be one that the testator would have made; 'is or may be a will ... that the person would make'; or 'is one which could be made by the person'.<sup>86</sup>

11.65 While a limitation on the power of an enduring guardian is a matter that goes beyond the Terms of Reference for the Inquiry, the ALRC concludes that, as a policy matter, the role of an enduring guardian is one focused on the lifetime needs of the person. It is not appropriate for an enduring guardian to make a binding death benefit nomination, which is like a will in effect. The Law Council submitted that the SIS Act and SIS Regulations could be amended to make this clear so that a nomination 'generally cannot be made on behalf of a member by a person exercising powers under an EPA'.<sup>87</sup>

## Board membership and other corporate roles

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

- (a) understand the information relevant to the decisions that they will have to make in performing the role;
- (b) retain that information to the extent necessary to make those decisions;

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

85 See the discussion in Croucher and Vines, above n 82, [6.11]–[6.20]; R Croucher, "'An Interventionist, Paternalistic Jurisdiction'?: The Place of Statutory Wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674.

86 Croucher and Vines, above n 82, [6.11].

87 Law Council of Australia, *Submission 142*. The Law Council's submission was supported by National Mental Health Consumer & Carer Forum, *Submission 100*.

- (c) use or weigh that information as part of the process of making decisions;  
or
- (d) communicate the decisions in some way.

11.66 Stakeholders expressed concern about under-representation of persons with disability on corporate, government and non-government boards; and about the operation of legal provisions allowing the removal of directors or board members because of intellectual disability or mental illness.<sup>88</sup>

11.67 The Mental Health Coordinating Council submitted that the language of laws should change to ‘eradicate any stigmatising and discriminating practice towards people with a mental health condition’—including in relation to some provisions concerning board membership.<sup>89</sup>

11.68 For example, the *Associations Incorporation Act 2009* (NSW) applies model rules to the constitutions of associations, if appropriate provision is not otherwise made.<sup>90</sup> These default rules provide that a casual vacancy in the office of a member of the committee occurs if the member ‘becomes a mentally incapacitated person’.<sup>91</sup> In turn, the *Interpretation Act 1987* (NSW) defines the term ‘mentally incapacitated person’ to mean a person who is ‘an involuntary patient or a forensic patient or a correctional patient within the meaning of the *Mental Health Act 2007*, or a protected person within the meaning of the *NSW Trustee and Guardian Act 2009*’.<sup>92</sup>

11.69 Such a broad provision is inconsistent with the National Decision-Making Principles because it makes status-based assumptions about decision-making ability, and does not recognise that ability may fluctuate over time.<sup>93</sup> The fact that someone is briefly an involuntary patient, or is subject to some form of administration or guardianship order, should not automatically require them to vacate a position on an association’s committee.<sup>94</sup> In this Inquiry the ALRC recommends a move away from such a status-based approach.

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

- **Directors.** If a person who is the only director and the only shareholder of a proprietary company ‘cannot manage the company because of the person’s

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

89 Mental Health Coordinating Council, *Submission 07*.

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

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

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

93 See Ch 3.

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

mental incapacity', the person's personal representative or trustee may appoint another person as director.<sup>95</sup>

- **Auditors and liquidators.** The Companies Auditors and Liquidators Disciplinary Board must, on an application by ASIC or APRA, cancel the registration of an auditor or liquidator if the person 'is incapable, because of mental infirmity, of managing his or her affairs'.<sup>96</sup>
- **Financial services licence holders.** ASIC may suspend or cancel an Australian financial services licence held by a person who 'becomes incapable of managing their affairs because of mental or physical incapacity'.<sup>97</sup>

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

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

11.73 Some stakeholders, while supporting a move in this direction, pointed out some of its implications.<sup>98</sup> The National Mental Health Consumer and Carer Forum observed that the legal process around the appointment and removal of directors or board members needs 'to take account of the protection of the interests of the governed and an underlying goal of enhancing diverse representation of boards'.<sup>99</sup> Ian Watts raised a number of questions about the possible obligations of the company to provide support, and the duties and obligations of any supporter.<sup>100</sup>

## **Holding public office**

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

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

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

97 *Ibid* s 915B.

98 I Watts, *Submission 114*; National Mental Health Consumer & Carer Forum, *Submission 100*.

99 National Mental Health Consumer & Carer Forum, *Submission 100*.

100 I Watts, *Submission 114*.



11.74 Persons with disability are significantly under-represented in public office.<sup>101</sup> The main barrier to holding public office for persons with disability may be the negative assumptions about their ability. The Law Council acknowledged that this social disadvantage, rather than any legal restriction, affects the capacity of people to hold public office, as well as to engage in a profession, vocation or other activities.<sup>102</sup>

11.75 There are a considerable number of other provisions in Commonwealth legislation concerning public office holders that refer to the concept of ‘unsound mind’ or ‘mental incapacity’. In most cases, these provide that the appointment of a person who becomes of unsound mind or acquires a mental incapacity may be terminated.<sup>103</sup> For example:

- *Australian Law Reform Commission Act 1996* (Cth) ss 17, 18—members of the ALRC;
- *Australian Securities and Investments Commission Act 2001* (Cth) s 207—Chairperson or Deputy Chairperson of ASIC;
- *Gene Technology Act 2000* (Cth) s 119—Gene Technology Regulator;
- *Inspector-General of Taxation Act 2003* (Cth) s 35—Inspector-General of Taxation;
- *National Blood Authority Act 2003* (Cth) s 35—General Manager of the National Blood Authority; and
- *Veterans’ Entitlements Act 1986* (Cth) s 164—members of the Veterans’ Review Board.

11.76 The ALRC suggests that these provisions be replaced over time with functional tests similar to those recommended by the ALRC in other contexts, including in relation to board membership, above. That is, an appointment should be able to be terminated if the person cannot be supported to: understand the information relevant to the decisions that they will have to make in performing the role; retain that information to the extent necessary to make those decisions; use or weigh that information as part of the process of making decisions; or communicate the decisions in some way.

### **Members of Parliament**

11.77 The qualifications of members of the House of Representatives and Senators are set out in the *Australian Constitution*.<sup>104</sup> They include eligibility as an elector under the *Commonwealth Electoral Act 1918* (Cth).<sup>105</sup> As discussed in Chapter 9, the ALRC

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

102 Law Council of Australia, *Submission 83*.

103 Most of these provisions include the words ‘proved misbehaviour or physical or mental incapacity’.

104 *Australian Constitution* ss 16, 34.

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

recommends removing the ‘unsound mind’ provision contained in the *Commonwealth Electoral Act*.<sup>106</sup>

### **Judicial officers**

11.78 Under the *Australian Constitution*, a Commonwealth judicial officer may be removed on an address from both Houses of the Parliament on the ground of ‘proved misbehaviour or incapacity’.<sup>107</sup> A statutory process for assisting the Parliament to consider removal has been established by the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth). Under this Act, the Parliament may establish a commission to investigate and report on an allegation of misbehaviour or incapacity, so that the Parliament is well-informed about the decision at hand.

11.79 The *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) modified various related laws such as the *Family Law Act 1975* (Cth) and the *Federal Court of Australia Act 1976* (Cth) to provide a statutory basis for the heads of jurisdiction<sup>108</sup> to deal with complaints about judicial officers, including establishing a conduct committee.

11.80 The ALRC does not recommend any change to these laws because they appear to provide for an impartial and considered approach to the assessment of decision-making ability in their relevant contexts. At the time of writing, these 2012 laws had not yet been tested. In time, the ALRC’s National Decision-Making Principles may inform the decisions of Parliament and the heads of jurisdictions of Commonwealth courts.

## **Other issues**

### **Employment**

11.81 There are many concerns about the employment of persons with disability in Australia, including those arising from lower levels of labour force participation and higher unemployment, compared to others;<sup>109</sup> and the lowest employment participation rate for persons with disability among OECD countries.<sup>110</sup>

11.82 Stakeholders raised concerns about:

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

---

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

107 *Australian Constitution* s 72.

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

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

110 Organisation for Economic Co-Operation and Development, ‘Sickness, Disability and Work’ (Background Paper for High-Level Forum, Stockholm, 14–15 May 2009).

- the operation of the supported wage system and business service wage assessment tool (and proposed changes); and
- the declining rate of employment of persons with disability in the Commonwealth public service.<sup>111</sup>

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

### **Anti-discrimination**

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

- the individualised nature of the system;
- issues of standing;
- failure to cover intersectional discrimination;
- costs associated with proceeding past the conciliation stage of complaints;
- reliance on, and the operation of, exceptions in legislation;
- coverage of laws;
- positive duties;
- remedies and enforcement; and
- the role, powers and resourcing of the Australian Human Rights Commission.<sup>112</sup>

111 See, eg, People with Disabilities WA and Centre for Human Rights Education, *Submission 133*; Legal Aid Qld, *Submission 64*; Redfern Legal Centre, *Submission 46*; Deaf Australia, *Submission 37*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

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

11.85 These are systemic concerns about anti-discrimination law and practice and, in the light of this and the significant work that has been undertaken in this area in recent years,<sup>113</sup> the ALRC does not make recommendations in this area in this Report.

### **Insurance**

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

- the availability of, information about, and the cost of insurance;
- the operation of policy exclusions, including for example in relation to pre-existing conditions and mental illness;
- the relevance, transparency and accessibility of the actuarial and statistical data on which disability-based insurance underwriting and pricing occurs; and
- reliance on the insurance exemption under the *Disability Discrimination Act*.<sup>114</sup>

11.87 Conversely, some stakeholders submitted that ‘laws and legal frameworks concerning insurance do not reduce the equal recognition of people with disability’ and that it is unnecessary to examine the operation of the underwriting process or the exemption under the *Disability Discrimination Act*.<sup>115</sup>

11.88 Again, some of the issues highlighted by stakeholders do not relate directly to concepts of legal capacity or decision-making ability, and the ALRC does not make recommendations in these areas. This approach was endorsed by the Insurance Council of Australia, which expressed its willingness to discuss with disability organisations ways of improving access to general insurance for those with a disability.<sup>116</sup>

11.89 There have been a number of recent inquiries which have dealt with these matters. For example, in many respects the concerns mirror those expressed in the ALRC’s Age Barriers to Work Inquiry. The conclusions reached in the report, *Access All Ages—Older Workers and Commonwealth Laws*,<sup>117</sup> may also be applicable in the context of disability, including in relation to:

- the need for clear and simple information about available insurance products;

---

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

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

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

116 Insurance Council of Australia, *Submission 105*.

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

- the desirability of an agreement between the Australian Government and insurers requiring the publication of data upon which insurance offerings based on disability rely;
- review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to disability as well as the development of guidance material about the application of any insurance exception under Commonwealth anti-discrimination legislation; and
- amendment of the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct to include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including persons with disability.

### Parenthood and family law

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

11.91 Another issue raised by stakeholders was concern about the removal of children from parents with disability, particularly through the operation of the child protection system in states and territories.<sup>118</sup> However, as outlined in Chapter 1, the focus of the ALRC's work is on Commonwealth laws and legal frameworks, and the examination of the operation of state and territory child protection systems extends beyond the Terms of Reference for this Inquiry.

11.92 Some stakeholders also raised issues relating to the effect that a parent having disability may have on parenting proceedings in the Family Court.<sup>119</sup> However, the Hon Chief Justice Diana Bryant AO of the Court expressed the view that,

insofar as it is being suggested that the Act discriminates against parents with an intellectual disability, or that the presence of an intellectual disability is of itself a disqualifying factor in an application in which a parent is seeking to spend substantial time with their child, I believe those views are misconceived.<sup>120</sup>

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

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

119 See, eg, Office of the Public Advocate (Vic), above n 119. See also ADACAS, *Submission 29*; The Illawarra Forum, *Submission 19*.

120 D Bryant, *Submission 22*.

