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. Persons with disability may be involved in court processes in a number of different roles, including as parties and witnesses in criminal and civil proceedings.

7.2 In this chapter, the ALRC examines a range of Commonwealth laws and legal frameworks affecting people involved in court proceedings.[1] The issues discussed affect people as:

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

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

7.3 In each of these areas there are existing tests of a person's capacity to exercise legal rights or to participate in legal processes. The ALRC recommends that these tests should be reformed consistently with the National Decision-Making Principles, based on art 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and other sources.[2]

7.4 Generally, the ALRC recommends that these tests be reformulated to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all. By providing models in Commonwealth laws, the ALRC also seeks to inform and provide a catalyst for reform of state and territory laws.

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

Access to justice issues

7.6 A range of personal and systemic issues may affect the ability of persons with disabilities to participate fully in court processes. These include:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;[3]
- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and
- misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses.[4]

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2 See Ch 3.

3 See, eg, Law Council of Australia, *Submission 142*. 'The Law Council considers that lack of appropriate funding to legal assistance services has severely undermined the capacity of legal assistance providers to meet the legal needs of specific and vulnerable target groups, particularly people with disabilities'.

4 See, eg, Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice', (2009) *Justice Issues*, Law and Justice Foundation, Paper No 10.

7.7 Article 13 of the CRPD stipulates that States Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including by:

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

7.8 In its 2014 report, *Equal Before the Law: Towards Disability Justice Strategies*,[5] the Australian Human Rights Commission (AHRC) identified the barriers people with disabilities face in achieving equality in the criminal justice system. It recommended that each jurisdiction in Australia, in addressing these barriers, should develop a Disability Justice Strategy, incorporating the following core set of principles and actions:

> - Appropriate communications—Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.
> - Early intervention and diversion—Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.
> - Increased service capacity—Increased service capacity and support should be appropriately resourced.
> - Effective training—Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.
> - Enhanced accountability and monitoring—People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.
> - Better policies and frameworks—Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.[6]

7.9 The access to justice issues addressed in the context of this ALRC Inquiry are narrower in scope. The focus of the Inquiry is on laws and legal frameworks affecting people who may need decision-making support rather than, for example, on how and by whom such support should be provided and funded.

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

6 Ibid 7.

7.10 Legal reform is likely to have limited practical impact if people do not have access to the support necessary to enable them to participate in legal processes. Further, under the CRPD, Commonwealth, state and territory governments have an obligation to provide support to people with disability to assist them in decision-making.[7]

7.11 The significance of the availability of support was emphasised by stakeholders. The Offices of the Public Advocate (South Australia and Victoria) (OPA (SA and Vic)) submitted that the 'foremost concern' in relation to access to justice is 'the lack of support available for people with cognitive impairment currently accessing and interacting with the justice system'.[8]

7.12 National Disability Services (NDS) said that reform to encourage supported decision-making makes it 'imperative for the justice system to draw on disability expertise in decision support and adjustments' such as:

- interviewing techniques that address issues associated with recall of information or a propensity to be led by authorities;
- assistive technology and techniques that addresses communication barriers; and
- support to address circumstances where there are reduced social networks and fear of retribution if experiencing carer abuse.[9]

Eligibility to stand trial

7.13 In the ALRC's view, the current legal test for unfitness to stand trial needs to be reformed to avoid unfairness and maintain the integrity of criminal trials, while ensuring that people with disability are entitled to equal recognition before the law, and to participate fully in legal processes.

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

- avoid inaccurate verdicts—forcing the defendant to be answerable for his or her actions when incapable of doing so could lead to an inaccurate verdict;
- maintain the 'moral dignity' of the trial process—requiring that a defendant is fit to stand trial recognises the importance of maintaining the moral dignity of the trial process, ensuring that the defendant is able to form a link between the alleged crime and the trial or punishment and be accountable for his or her actions; and

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7 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(3).

8 Offices of the Public Advocate (SA and Vic), *Submission 95*. 'For example, our experience is that accommodation for people with disabilities in court processes such as cross-examination is not being made'. The OPA (SA and Vic) considered a 'comprehensive Disability Justice Plan is required, that considers the needs of people with disability who are victims, witnesses and offenders, across civil and criminal law'.

9 National Disability Services, *Submission 92*.

- avoid unfairness—it would be unfair or inhumane to subject someone to the trial process who is unfit.[10]

7.15 Also, the Law Commission of England and Wales (Law Commission) has observed that it would be 'an abuse of the process of the law to subject someone to a trial when he or she is unable to play any real part in that trial'.[11]

7.16 At common law, there is a 'presumption' of fitness to stand trial. That is, if the defence raises the issue, the onus is on the defence to prove, on the balance of probabilities, that the defendant is unfit to stand trial.[12] If the issue is raised by the prosecution, and contested, then the issue must be proved beyond reasonable doubt.[13] In addition, some Australian jurisdictions have enacted express statutory presumptions of fitness.[14]

The test of unfitness

7.17 The presumption of fitness means that it is more correct to refer to a test of 'unfitness' to stand trial.[15] The test may arise as an issue before or during the trial. When the defendant is present for trial, it may appear that he or she is unfit to plead. Alternatively, he or she may enter a plea and thereafter, it may appear that he or she is unfit to be tried. All Australian jurisdictions have enacted legislation dealing with fitness to stand trial.[16]

7.18 At common law, the test of unfitness to stand trial is, simply stated, whether an accused has sufficient mental or intellectual capacity to understand the proceedings and to make an adequate defence.[17] The Victorian Supreme Court in *R v Presser* set out six factors relevant to the test:

- an understanding of the nature of the charges;
- an understanding of the nature of the court proceedings;

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

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

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

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

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

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

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

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

- the ability to challenge jurors;
- the ability to understand the evidence;
- the ability to decide what defence to offer; and
- the ability to explain his or her version of the facts to counsel and the court.[18]

7.19 The common law test of unfitness to stand trial has been criticised in a number of recent inquiries in Australia and overseas. In particular, the common law may place an undue emphasis on a person's intellectual ability to understand specific aspects of the legal proceedings and trial process,[19] and too little emphasis on a person's decision-making ability. The rules on unfitness to stand trial are characterised as 'protective'[20]—ensuring that a person cannot be tried for a crime unless capable of defending themselves.

7.20 However, in practice, the rules can lead to adverse outcomes for individuals found unfit to stand trial, who may be subject to detention, for an uncertain period, in prison or in secure hospital facilities.[21] The risk is that incentives exist for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness.

7.21 As a result of being determined unfit to stand trial, a person may 'end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts'. They 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed'.[22]

> Once a person is issued with a forensic order that follows a finding of being unfit to plead it is extremely difficult to be discharged from the order. This is due in part to a medical approach to disability and a view that if you have an illness for life, you will have an order for life.[23]

7.22 In some cases, the defendant's interests may not be served in being found unfit to stand trial if the outcome is that they are put on a supervision order, particularly for less serious offences. Such defendants may later be unable to have their supervision orders revoked because they continue to breach the conditions of the order or commit offences. Further, they remain at risk of the order being varied from non-custodial to custodial if they continue to pose a danger to the community.[24]

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18 *R v Presser* [1958] VR 45.

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

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

21 Although most jurisdictions have legislated to divert such people away from the criminal justice system: See Ibid [9.3.2010]–[9.3.2030].

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

23 Ibid.

24 Office of Public Prosecutions Victoria, Submission No 8 to Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990* (Vic), 2013.

> A person who is able to understand the process involved in a plea of guilty will often be better off being dealt with by a criminal sanction, rather than being placed on an indefinite supervision order.[25]

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

- the test, by focusing on intellectual ability, generally sets too high a threshold for unfitness and is inconsistent with the modern trial process;[26]
- the test is difficult to apply to defendants with mental illness because the criteria were not designed for them;[27]
- a defendant may not be unfit to stand trial even where the court takes the view that he or she is not incapable of making decisions in his or her own interests.[28]

7.24 The Victorian Law Reform Commission (VLRC) has conducted a review of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) (CMI Act).[29] This review included consideration of the *Presser* test, which is incorporated in the CMI Act.[30]

7.25 In relation to the criticisms highlighted above, the VLRC observed:

> An accused person with a mental illness, for example, may have no trouble having a factual or an intellectual understanding of their right to challenge a juror, but their delusional beliefs may hinder them from making decisions to exercise that right (or having a 'decision-making capacity'). On the other hand, an accused person with a cognitive impairment or intellectual disability may have more trouble than an accused person with a mental illness to understand this right. This raises the question of whether the current criteria are suitable for people with a mental illness and whether the threshold for unfitness to stand trial is currently set at the right level for these people.[31]

7.26 The VLRC asked, among other things, whether the test for unfitness to stand trial should include a consideration of a defendant's decision-making capacity, effective participation in the trial, or capacity to be rational.[32]

7.27 Similar questions are being examined by the Law Commission.[33] In its 2010 Consultation Paper, the Law Commission made provisional proposals for reform of the test of unfitness. These proposals would replace the current test with a new legal test

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25 Ibid. For such people, a higher threshold of unfitness to stand trial may therefore be advantageous.
26 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 27.
27 Rather, it was developed through experience with defendants who were deaf and mute and, by extension, defendants with an intellectual disability: Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.
28 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 28.
29 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report 28 (2014).
30 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 6.
31 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 59.
32 Ibid Questions 1–7.
33 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010); Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014). A final report is expected in 2015.

which assesses whether the defendant 'has decision-making capacity for trial' and takes into account 'all the requirements for meaningful participation in the criminal proceedings':[34]

> The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings.[35]

7.28 In determining the defendant's decision-making capacity, the court would be required to take account of the 'complexity of the particular proceedings and gravity of the outcome' and, in particular, how important any disability is likely to be in the context of the decisions the defendant must make in the proceedings.[36]

7.29 The Law Commission proposed a new test, under which a defendant would be found unfit to stand trial if he or she is unable:

> (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial,
>
> (2) to retain that information,
>
> (3) to use or weigh that information as part of decision making process, or
>
> (4) to communicate his or her decisions.[37]

7.30 In its 2014 Issues Paper, the Law Commission stated that there appeared to be 'considerable support from legal and clinical practitioners for a legal test which incorporates both effective participation and decision-making capacity'.[38] It asked a number of further questions—which serve to illustrate the complexity of law reform in this area—including whether:

- a reformed legal test for fitness to plead should incorporate a consideration of both decision-making capacity and the capacity for effective participation;
- a 'participation test … with an additional decision-making capacity limb' would represent the most appropriate formulation for such a combined legal test;
- incorporating 'an exhaustive list of decisions for which the defendant requires capacity' would assist in maintaining the threshold for unfitness at a suitable level; and

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34 Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Provisional Proposal 1.

35 Ibid Proposal 3.

36 Ibid Proposal 4.

37 Ibid 54. The Law Commission anticipated that if a person meets its proposed test, the person would also satisfy the requirements of the existing test, based on the criteria in *R v Pritchard* (1836) 173 ER 135. This is because the common law criteria set a higher threshold for unfitness to stand trial than a test based on decision-making ability: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) 62.

38 Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014) 11.

- a 'diagnostic threshold' would be unlikely to assist in maintaining the threshold of unfitness at a suitable level.[39]

7.31 In contrast, the NSW Law Reform Commission (NSWLRC) recommended, in 2013, that the common law criteria for unfitness to stand trial[40] should not be fundamentally changed. In response to stakeholder concerns, it recommended that the standards simply be updated and incorporated into statute,[41] as in most Australian jurisdictions.[42]

7.32 However, the NSWLRC recommended that the test for unfitness to stand trial should expressly refer to a person's ability to use information as part of a 'rational' decision-making process.[43] While the criminal justice system rightly places weight on 'the right of defendants to make their own decisions (even if those decisions might appear misguided to an impartial observer)', the NSWLRC said that defendants cannot be said to be effectively participating in a trial if they are unable to make rational decisions, for example 'because they cannot distinguish between delusion and reality'.[44]

7.33 The NSWLRC also recommended that the test for unfitness to stand trial should include reference to the 'overarching principle' that the defendant must be able to have a fair trial. This was said to be the 'touchstone' for assessing whether or not the defendant's degree of incapacity is sufficient to do those things required by the test.[45]

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

> If the defendant was unable, for example, to give evidence effectively, he or she might still be fit for trial if it is possible for a fair trial to be held. Conversely, the list of considerations need not be comprehensive. If the court considers that the defendant lacks an essential capacity that is not listed in the statutory considerations, and cannot be afforded a fair trial, then the defendant can be found unfit.[46]

Assistance and support

7.35 Existing tests of unfitness to stand trial do not consider the possible role of assistance and support for defendants.

7.36 The Law Commission proposed that decision-making capacity should be assessed with a view to ascertaining whether a defendant could stand trial 'with the

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39 Ibid 12–14.
40 As represented by the *R v Presser* standards.
41 In the *Mental Health (Forensic Provisions) Act 1990* (NSW).
42 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) xv–xvi.
43 In the UK, the Law Commission considered, but rejected, the idea that it should be required that any decision made by the defendant be rational: Law Commission of England and Wales, *Unfitness to Plead*, Consultation Paper No 197 (2010) Proposal 2.
44 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) 31.
45 Ibid xvi.
46 Ibid 26.

assistance of special measures and where any other reasonable adjustments have been made'.[47] It explained:

> The inclusion of the consideration of special measures as part of the test will serve to further the development of special measures on a case by case basis and ensure that the courts adapt to the needs of a particular defendant.[48]

7.37 The Law Commission observed that, if the possibility of having 'special measures' to assist the defendant, were to be a factor in a reformed test of unfitness, this would 'presumably increase the prospects of some defendants who would currently be found unfit to plead being able to stand trial'.[49]

7.38 In its Issues Paper, the Law Commission stated that the 'incorporation of special measures into the legal test received significant support from legal practitioners, clinicians and representative groups'.[50]

7.39 In this context, issues concerning the availability and resourcing of support were highlighted. The Law Commission asked whether it would be 'desirable and practicable for defendants to have a statutory entitlement to the support of a registered intermediary' for the proceedings, where the court is of the view that such assistance is necessary to ensure that the defendant receives a fair trial.[51]

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

> (a) whether modifications to the trial process can be made or assistance provided to facilitate the person's understanding and effective participation
>
> (b) the likely length and complexity of the trial, and
>
> (c) whether the person is legally represented.[52]

Reform of the test

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

(a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;

(b) retain that information to the extent necessary to make decisions in the course of the proceedings;

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

48 Ibid.

49 Ibid 88.

50 Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014) 25.

51 Ibid 29.

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

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

(d) communicate the decisions in some way.

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

> a global concept which can be said to cover a general state, and is not context-specific or time-specific. It has tended to be construed as being about the accused's cognitive ability which is, to all intents and purposes, seen in the abstract.[53]

7.42 This comes close to requiring that a person must be considered as lacking capacity on the basis of having an (intellectual) disability—and is therefore inconsistent with the approach taken by the CRPD and the National Decision-Making Principles. Rather, any test for eligibility to stand trial should be based on a person's decision-making ability in the context of the particular criminal proceedings which he or she faces—that is, a functional approach.

7.43 It is not practicable to completely do away with functional tests of ability that have consequences for participation in some legal processes. Even where a person has clearly expressed a will and preference to be subject to a criminal trial, the integrity of the trial (and, arguably, the criminal law itself) would be prejudiced if the person does not have the ability to understand and participate in a meaningful way.

7.44 In the Discussion Paper, the ALRC proposed a test similar to that originally suggested by the Law Commission. The Law Commission's formulation was based on provisions of the *Mental Capacity Act 2005* (UK), which defines capacity for the purposes of decisions about a person's personal welfare, property and financial affairs and the appointment of substitute decision-makers.[54]

7.45 Interestingly, similar conclusions about the primary importance of decision-making ability in this context have been reached by other law reform bodies that have considered the issues—even though these bodies were not expressly informed by the approach reflected in art 12 of the CRPD. The focus of these inquiries was more on the need to ensure fair trials[55] and the effective participation of defendants.[56]

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

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

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

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

7.46 The VLRC explained the way in which such a new test might operate in practice for people with disability:[57]

> The new test would require an accused person to:
>
> - *Understand the information relevant to the decisions that they will have to make in the course of the trial*—for example, an accused person with an acquired brain injury who has very low cognitive ability and is unable to understand new or unfamiliar information would be unfit to stand trial.
> - *Retain that information*—for example, someone with Attention-Deficit Hyperactivity Disorder (ADHD) who cannot focus and finds it almost impossible to remember any new information given to them would be unfit to stand trial.
> - *Use or weigh that information as part of a decision-making process*—for example, an accused person who suffers from paranoid schizophrenia who has a factual understanding of the charge, but indicates to the court that he wants to plead guilty because he sees no point in pleading not guilty as everyone in court is part of a conspiracy, would be unfit to stand trial.
> - *Communicate their decisions*—for example, an accused person with autism who is able to understand information and process it but does not acknowledge others, may be unfit to stand trial.[58]

7.47 The general approach proposed by the ALRC received support from some stakeholders,[59] subject to reservations. The Law Council of Australia (Law Council), for example, agreed with the ALRC's proposed functional test, but considered that the term 'rationally' should be included to condition its elements. This was seen as necessary to cover the situation where, for example, a person is able to understand information and use it in a decision-making process, but the process itself is not rational. Arguably, some level of rationality is implicit in the ideas of understanding, using and weighing information. However, referring expressly to the concept of rationality may lead to a person's decision-making ability being assessed on its likely outcome, which would be inconsistent with the National Decision-Making Principles.

7.48 The Queensland Law Society submitted that the 'basic definition of capacity should remain, with any evidence of diagnosis and the impact on a person's understanding, memory and reasoning process to be used as evidence'.[60]

7.49 A formulation based on decision-making ability may operate too widely because it may have the potential to include defendants who have 'no recognised mental illness but are unable to use or weigh information as part of a decision-making process, for

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

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

59 Law Council of Australia, *Submission 142*; NACLC and PWDA, *Submission 134*; KinCare Services, *Submission 112*; National Mental Health Consumer & Carer Forum, *Submission 100*; Offices of the Public Advocate (SA and Vic), *Submission 95*.

60 Qld Law Society, *Submission 103*.

example, because of stress, overwhelming tiredness or poor education or social background'.[61]

7.50 For this reason, some commentators have suggested that the test should include some threshold requirement that, for example, impaired decision-making ability is due to 'mental or physical illness, whether temporary or permanent',[62] or some clinically recognised condition.[63]

7.51 In the Discussion Paper, the ALRC asked what other elements should be included in any new test of eligibility to stand trial—including, whether there should be some threshold requirement that unfitness be due to some clinically-recognised mental impairment.[64]

7.52 Dr Fleur Beaupert, Dr Piers Gooding and Linda Steele submitted that, if legal tests are based on decision-making ability (which they opposed) there should be no threshold requirement. Such an approach would 'negatively impact on the realisation of legal capacity because it is not focused on the needs, wishes and views of the individual'. Rather, determinations of eligibility to stand trial

> will inevitably hinge on assessments carried out by clinicians such as psychologists, psychiatrists and neuropsychologists—similar to existing approaches to assessing a person's capacity and risk level for the purposes of mental health and guardianship laws.[65]

7.53 An obvious problem with a threshold based on any concept of mental impairment is that some people who are clearly unsuitable to stand trial would not be captured by the test—for example, a person with a physical illness may not be able to follow the course of a trial, but would not necessarily have a definable mental impairment—although there are processes to postpone trials on compassionate grounds.

7.54 In the Discussion Paper, the ALRC proposed that the new test of eligibility to stand trial be implemented through rules of court. However, because rules of court generally reflect, and are consistent with, the common law, legislation seems necessary to implement this change.

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61 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper (2013) 61.

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

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

64 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 7–1.

65 F Beaupert, P Gooding and L Steele, *Submission 123*. However, clinicians might play a role in assessing a person's support needs and providing support to people with disabilities provided the provision of support is not 'narrowly focused around medical-therapeutic interventions' and includes 'measures that address social, economic, cultural and systemic barriers to the exercise of legal capacity'. Other stakeholders also expressed concern about any undue emphasis on clinical reports Vicdeaf, *Submission 125*. KinCare submitted that unfitness should 'be determined through assessment of mental (cognitive) impairment': eg KinCare Services, *Submission 112*.

The role of support

7.55 The National Association of Community Legal Centres and People with Disability Australia (NACLC and PWDA) submitted that the focus of the test should be on the adequacy of the supports available to the individual to enable them to express their will and preference and, as a result, participate in the legal process.[66]

7.56 The wording of the ALRC's recommendation concerning the test for eligibility to stand trial, as set out above, now explicitly incorporates the concept of support. It is desirable, as much as possible, to 'shift the emphasis to an assessment of the supports that are available to a person, rather than an assessment of the person'[67]—but does not remove a threshold functional requirement.

7.57 This aspect of the recommendation reflects the National Decision-Making Principles in that any assessment of decision-making ability should be considered in the context of available support.

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

> the introduction of support measures to potentially increase the level of fitness of an accused person is desirable… the provision of support and education about court processes to an accused person who falls 'just short' of meeting the test for fitness is a humane option that may ultimately enable them to participate fully in their trial.[68]

7.59 In practice, resources may be too limited to support a defendant who needs decision-making support through a criminal trial.

7.60 If the available support is taken into account in determining eligibility to stand trial, in some circumstances, this may be seen as working against equality before the law. That is, a person with support may be able to stand trial but another, with similar ability but without support, may not be tried.[69] The OPA (SA and Vic), while supporting the ALRC's proposal, anticipated that 'inequities will arise in relation to the quality of support provided and potentially inconsistent application' of determinations about decision-making ability. The Law Council also agreed with the proposal in principle, but expressed concerns that taking into account the 'support available to a person who would otherwise be determined unfit to stand trial may water down the test for unfitness' and the practical difficulties associated with avoiding undue influence.[70]

7.61 Stakeholders also recognised that, while a new test based on decision-making ability would be fairer and more principled than the existing 'status-based' test, it may

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66 NACLC and PWDA, *Submission 134*.

67 Ibid.

68 Victorian Institute of Forensic Mental Health, Submission No 19 to Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1990* (Vic), 2013.

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

70 Law Council of Australia, *Submission 142*.

be even more difficult to apply in practice—for example, experts may need to advise on a defendant's decision-making ability in the light of the nature and complexity of the particular decisions the defendant is likely to face.

7.62 The ALRC recognises that the new test of eligibility to stand trial raises many issues that may need to be resolved before implementation, including in relation to the process for determining eligibility.

7.63 As discussed below, if the matter is being heard in a state or territory court, the issue would be determined in accordance with the procedures applicable under state or territory law.[71] The VLRC final report may provide leads for law reform in this area, as it considered how the process for determining unfitness to stand trial can be improved.[72] The Law Commission of England and Wales is also continuing to examine what evidential requirements might form part of assessing unfitness to stand trial, including in relation to expert medical advice.[73]

7.64 The recommended test would introduce into the *Crimes Act 1914* (Cth) a new test of when a person is not able to stand trial. The test is consistent with the National Decision-Making Principles and associated Guidelines. There seems no need to retain the language of 'fitness' or 'unfitness', which could be considered pejorative in the current context. The question is simply whether or not a person can be required, or is entitled, to stand trial for a criminal offence.

7.65 Other provisions of the *Crimes Act* dealing with unfitness to stand trial should also be reviewed for consistency with the new test of eligibility to stand trial. For example, s 20BB sets out procedures for dealing with persons who have been found unfit to be tried, but likely to become fit within 12 months. These provisions will also need amendment to ensure that eligibility to stand trial can be re-assessed if forms of support become available that may enable the person to meet the test.

Modelling in Commonwealth law

7.66 The ALRC recommends that the reformed test of unfitness to stand trial be modelled in Commonwealth law through amendments to the existing legislative provisions in the *Crimes Act*, which set out the processes for finding federal offenders unfit to be tried, and the consequences of such a finding.[74]

7.67 The ALRC recognises that, in practice, such a provision would have limited application. First, most criminal prosecutions occurring in Australia fall within the responsibilities of the states and territories. Secondly, most federal offenders are tried in state and territory courts.[75]

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

72 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report 28 (2014).

73 Law Commission of England and Wales, *Unfitness to Plead*, Issues Paper (2014) 30–36.

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

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

7.68 The *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions.[76] The Act makes specific provision for the exercise of federal criminal jurisdiction by both state and territory courts.[77] Importantly, under the Act, state and territory laws, including those relating to 'procedure, evidence and the competency of witnesses', are applied to federal prosecutions in state and territory courts.[78]

7.69 Essentially this means that, even if the *Crimes Act* were amended to introduce a new test of eligibility to stand trial, if the matter is being heard in a state or territory court, the issue of unfitness would still be determined in accordance with the procedures applicable under state or territory law.[79]

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

Limits on detention

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

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

(b) regular periodic review of detention orders.

7.71 A wide range of concerns have been raised about the processes and outcomes of unfitness determinations. These include concerns about the availability or otherwise of appropriate accommodation, support services, and diversion from the criminal justice system.

7.72 For example, Queensland Advocacy Incorporated expressed a range of concerns about the scheme for diverting offenders to the Mental Health Court under the *Mental Health Act 2000* (Qld).[80] Many of these issues do not directly concern decision-making or were too specific to a particular jurisdiction to be considered in this Inquiry.[81]

7.73 Some outcomes of unfitness to stand trial rules have generated significant public concern, including, for example, in the cases of Marlon Noble and Rosie Anne

76 *Judiciary Act 1903* (Cth) s 39(2).
77 Ibid s 68(2).
78 Ibid ss 68(1), 79.
79 *Kesavarajah v R* (1994) 181 CLR 230.
80 Queensland Advocacy Incorporated, *Submission 45*.
81 Eg, concerns that Queensland law makes no provision for unfitness to stand trial in relation to summary offences: Qld Law Society, *Submission 53*.

Fulton.[82] These concerns have led the AHRC to call for a national audit of people held in prison after being found unfit to stand trial.[83]

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

7.75 The consequences of a determination that a federal offender is unfit are set out in the *Crimes Act*.[84] These provisions apply to federal offenders being dealt with by state or territory courts—despite the operation of the *Judiciary Act* discussed above. In relation to proceedings for federal offences, the provisions of state or territory law give way to provisions of the *Crimes Act* to the extent of any inconsistency.[85] While state or territory law regulates the mode of determination of unfitness to stand trial, the consequences flowing from the determination will be regulated by Commonwealth law.[86]

7.76 Under the *Crimes Act*, where the issue of unfitness is raised on commitment for trial, the proceedings must be referred to the court to which the proceedings would have been referred had the defendant been committed for trial. If that court finds the defendant unfit to be tried, it must determine whether a prima facie case exists. Where no prima facie case exists, the person must be discharged.[87]

7.77 If a prima face case exists, the court must dismiss the charge if satisfied that it is inappropriate to inflict any punishment, or any punishment other than nominal punishment, having regard to the defendant's 'character, antecedents, age, health or mental condition', the triviality of the offence and the extent of any mitigating circumstances.[88] Otherwise, the court must determine, after considering medical

82 Marlon Noble was charged in 2001 with sexual assault offences that were never proven. A decade after he was charged, the allegations were clearly shown to have no substance. Marlon spent most of that decade in prison, because he was found unfit to stand trial because of his intellectual disability. Rosie Anne Fulton was held in Kalgoorlie prison for 21 months after being charged with crimes related to a motor vehicle and being found unfit to stand trial due to her cognitive impairment due to foetal alcohol syndrome. She was sent to Kalgoorlie prison because no other suitable accommodation was available for her: Australian Human Rights Commission, *Send Rosie Anne Home* <www.humanrights.gov.au>. After public outcry, the WA and NT governments reached an agreement that saw Fulton released into community care in Alice Springs.

83 Australian Human Rights Commission, *Jailed without Conviction: Commissioners Call for Audit* <www.humanrights.gov.au>.

84 *Crimes Act 1914* (Cth) pt IB div 6.

85 *Australian Constitution* s 109.

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

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

88 Ibid s 20BA(2).

reports, whether, on the balance of probabilities, the person will become fit to be tried within 12 months.[89]

7.78 The court may order a person to be detained in a hospital if they are likely to become fit to be tried within 12 months. Otherwise the proceedings must resume as soon as practicable. If the court finds that the defendant is not likely to become fit, it must determine whether the defendant is 'suffering from a mental illness, or a mental condition, for which treatment is available in a hospital' and, if so, whether he or she objects to being detained in hospital.[90]

7.79 The court must order detention in hospital if the person is found to be mentally ill and does not object to being detained in hospital, or in prison or some other place. However, this period of detention must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.[91] Further, before that time, the court may order the person's release from custody, either unconditionally or subject to conditions lasting not more than three years, if in the court's opinion this is more appropriate than continuing detention.[92]

7.80 Under the *Crimes Act*, where a person is found unfit to stand trial, the Attorney-General of Australia must, at least once every six months, consider whether or not the person should be released from detention based on medical or other reports.[93] The Attorney-General must not order release unless satisfied that the person is not a threat or danger either to himself or herself or to the community.[94]

7.81 These provisions of the *Crimes Act* were inserted in 1989.[95] While the ALRC has no detailed information about how the provisions operate in practice, or the outcomes they produce for federal offenders who are found unfit to stand trial, the *Crimes Act* appears to provide safeguards that do not exist in all state and territory jurisdictions.

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

- in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial;[96]
- in the Northern Territory, the *Criminal Code* (NT) provides that supervision orders for persons found not fit to stand trial are 'for an indefinite term';[97] and

89 Ibid s 20BA(4)–(5).
90 Ibid s 20BB(2).
91 Ibid s 20BC(2).
92 Ibid s 20BC(5).
93 Ibid s 20BD.
94 Ibid s 20BE.
95 *Crimes Legislation Amendment Act (No 2) 1989* (Cth).
96 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19.
97 *Criminal Code Act 1983* (NT) sch 1, s 43ZC.

- in Victoria, custodial supervision orders are for an indefinite period,[98] although the CMI Act also requires the court to set a 'nominal term' for the purposes of review.[99]

7.83 Data from Tasmania's Forensic Tribunal is said to illustrate that, for forensic patients placed on a mental health order for offences other than murder, the period of detention under an order is substantially longer than it would have been if they had been found guilty of the offence.[100]

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

7.85 However, some jurisdictions may have inadequate review mechanisms for those detained. For example, in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not provide for review. Rather, the person is essentially detained at the 'Governor's pleasure'.[101]

7.86 Regular periodic review of detention orders is also essential. For example, in Victoria, the CMI Act provides judges with the flexibility to decide how often to review, or further review, 'custodial supervision orders'. The VLRC has recommended that legislation should require regular, automatic review of each custodial supervision order at an interval of no longer than every two years.[102]

7.87 Stakeholders said limits should be placed on the period of detention, within the criminal justice and corrective services systems, of people found unfit to stand trial.[103] The Illawarra Forum stated that, 'if a person is determined unfit to stand trial, they should not be incarcerated at all without due process'.[104]

7.88 Most jurisdictions do provide 'special hearings' as a means for determining the criminal responsibility of a person who has been found unfit to stand trial.[105] The Commonwealth *Crimes Act* provides that, where there has been a preliminary finding that a person is unfit to be tried,[106] the court must determine whether there has been established a prima facie case that the person committed the offence concerned.[107]

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98 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27.
99 Ibid s 28. The nominal terms are generally equivalent to the maximum term of imprisonment available for the offence.
100 Anti-Discrimination Commissioner (Tasmania), *Submission 71*.
101 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 35.
102 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 431.
103 NACLC and PWDA, *Submission 134*; People with Disabilities WA and Centre for Human Rights Education, *Submission 133*; Illawarra Forum, *Submission 124*; Offices of the Public Advocate (SA and Vic), *Submission 95*.
104 Illawarra Forum, *Submission 124*.
105 *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 15.
106 For a federal offence, on indictment.
107 *Crimes Act 1914* (Cth) s 20B.

Where the court determines that there is a prima facie case, the court must either dismiss the charge or finally determine the person's fitness within 12 months.[108]

7.89 People with Disabilities WA and the Centre for Human Rights Education expressed concern that 'significant numbers of Aboriginal people with cognitive impairment are indefinitely incarcerated in prisons in some Australian states, including WA'.[109] It was suggested that community based alternatives to detention should be considered as far as possible.[110]

7.90 In the Discussion Paper, the ALRC proposed that state and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention and for regular periodic review of detention orders.[111] The Law Council suggested that the period of detention should be stated as not exceeding 'the period for which a court determines the individual would have been detained if convicted, bearing in mind all the circumstances which the court would have taken into account in sentencing the individual'.[112]

7.91 The ALRC agrees that limits on the period of detention should be set by reference to the period of imprisonment likely to have been imposed, if the person had been convicted of the offence charged. If they are a threat or danger to themselves or the public at that time, they should be the responsibility of mental health authorities, not the criminal justice system.[113] The framework for detention and supervision orders should be flexible enough to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restriction of rights.

Conducting civil litigation

7.92 At common law, the capacity test for a person to participate in civil proceedings is the same as the test for a person to enter into legal transactions.[114] There is a presumption of capacity 'unless and until the contrary is proved'.[115]

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108 Ibid s 20BA.

109 PWDA/CHRE observed that the Declared Places (Mentally Impaired Accused) Bill 2013 (WA), which remains before the WA Parliament, provides for the establishment of 'declared places' other than prison where people found unfit to plead can be detained: People with Disabilities WA and Centre for Human Rights Education, *Submission 133*.

110 Ibid. As recommended in a 2014 report by the WA Office of the Inspector of Custodial Services: 'Mentally Impaired Accused on "Custody Orders": Not Guilty, but Incarcerated Indefinitely' (Government of Western Australia, Office of the Inspector of Custodial Services, 2014).

111 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 7–3.

112 Law Council of Australia, *Submission 142*.

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

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

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

7.93 The focus of the test is on the capacity of the person to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given.[116]

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

> The civil test takes a functional approach to capacity in that it assesses a person's ability to make a particular decision at a particular moment in time, and not a person's ability to make decisions more generally.[117]

7.95 The test is able to take into account the level of legal representation. In particular, the level of capacity required to be a litigant in person is higher than where the person is required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation. Therefore, 'a person who does not have the mental capacity to represent themselves may have sufficient capacity to be able to give instructions to a lawyer to represent them'.[118]

Litigation representatives

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

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

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

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

(d) communicate the decisions in some way.

7.96 Where a person does not have capacity to conduct litigation, a litigation representative may be appointed. A litigation representative may also be known as a litigation guardian, case guardian, guardian ad litem, next friend, tutor or special representative.[119] The ALRC chose to use the term 'litigation representative', which is also used by the Federal Court, because the current duties of people acting in this role are consistent with the use of the term 'representative' elsewhere in this Report—notably, in relation to 'supporters' and 'representatives' in Chapter 4.

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

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

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

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

7.97 In broad terms, a litigation representative acts in the place of the person and is responsible for the conduct of the proceedings.[120] The circumstances in which a litigation representative must be appointed are established at common law. The rules of federal courts make express provision for litigation representatives. Under these rules, a person may be assessed as needing a litigation representative if the person:

- is 'under disability' (High Court);[121]
- is 'under a legal incapacity' because of being a 'mentally disabled person' and 'not capable of managing the person's own affairs in a proceeding' (Federal Court);[122]
- is 'with a disability' and 'does not understand the nature or possible consequences of the case; or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case' (Family Court);[123]
- 'does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding' (Federal Circuit Court).[124]

7.98 The rules of federal courts make provision for the appointment, removal and conduct of litigation representatives. In general, a litigation representative is appointed by the court, on the application of a party or an interested person, such as a parent or guardian or, sometimes, the person's own lawyer.

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

7.100 The ALRC recommends that—as with the new test in relation to criminal proceedings—the law concerning the appointment of litigation representatives should be consistent with the National Decision-Making Principles and associated Guidelines.

7.101 Leaving aside the question of support, there is little difference between this recommendation and the position that applies at common law in determining whether a person has capacity to conduct civil litigation.[125]

7.102 However, the way in which some federal court rules are drafted appears inappropriate and does not fit with contemporary conceptualisations of capacity and

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120 The Law Council supported this 'harmonisation of terminology': Law Council of Australia, *Submission 142*.

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

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

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

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

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

disability. In particular, some rules seem to adopt elements of a 'status-based' approach that is inconsistent with the CRPD, and references to incapacity and disability should be removed. The rules should reflect a focus on a person's ability to conduct litigation in the particular proceedings, rather than whether they have a 'disability'.

7.103 The Support Guidelines recognise that ability should be assessed by reference to the decision to be made, and that ability may evolve or fluctuate over time. Consistently, orders appointing a litigation representative may be varied—for example, where the court has evidence that a person originally assessed as needing a representative due to mental illness is found to have recovered sufficiently to be able to give instructions.[126]

7.104 Some stakeholders expressed concern at the similar test proposed in the Discussion Paper. The Federal Court of Australia observed that 'greater participation in proceedings before the Court by litigants with impaired decision-making ability would impose an additional burden on the Court'. The Court stated that:

> This could quickly become unmanageable, particularly in an environment of increased participation of self-represented litigants generally, diminishing resources and increasing workload and complexity of litigation.[127]

7.105 The Law Council submitted that the proposed test focused 'too narrowly on the disabled person's direct engagement with the legal process, and does not address the capability or otherwise of the disabled person to instruct legal practitioners'.[128] It is implicit that the decisions a person 'will have to make in the course of the proceedings' would include decisions about how to instruct legal practitioners, the recommendation now expressly incorporates this element.

7.106 Other stakeholders supported reform along the lines proposed. Justice Connect and Seniors Rights Victoria (Justice Connect), for example, stated that they supported a 'move away from a status based approach to incapacity which is inconsistent with the CRPD towards a decision specific approach'. However, they counselled that it is important to retain an objective element in the test—that is, it should be necessary for there to be 'some sort of cognitive or mental impairment' because otherwise

> there is a very real risk that the appointment of a substitute decision maker will be made in circumstances where a person is perceived to be making risky or unwise decisions. It can be difficult to divorce the 'quality' of a decision from the process of making the decision, which can have the effect of denying an older person the dignity of risk. This is particularly relevant for older people who receive formal care. In our experience, service providers are often concerned about breaching their duty of care owed to the older person when the older person makes decisions that may be deemed unsafe or unwise.[129]

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126 Federal Circuit Court of Australia, *Submission 140*.

127 Federal Court of Australia, *Submission 138*.

128 Law Council of Australia, *Submission 142*. Noting that the test for assessing a person's need for a litigation representative, in the rules of the Family Court and the Federal Circuit Court, refers to a person's ability to 'conduct' the proceeding, and 'give adequate instruction for the conduct' of the proceeding.

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

7.107 The Law Institute of Victoria (LIV) considered that the requirement for evidence of cognitive impairment is an important safeguard, because evidence of a causal link between decision-making ability and some form of cognitive impairment is 'important to protect the right of individuals with capacity to make unwise or risky decisions'.[130] The ALRC is not convinced that such a threshold is desirable and is concerned that it would leave open a return to status-based approaches to decision-making ability.

7.108 The Federal Circuit Court of Australia suggested that an understanding of the 'possible consequences' of the proceedings should be included in the test [131] but, in the ALRC's view, this is encompassed adequately by the reference to using or weighing information 'as part of a decision-making process'.

The role of support

7.109 A more significant change than the new test of decision-making ability is to require courts to consider the available decision-making support in determining whether a person needs a litigation representative. The wording of the ALRC's recommendation concerning the test for eligibility to stand trial now explicitly incorporates the concept of support.

7.110 Existing law does not expressly enable the availability of support to be taken into account in assessing whether a litigation representative should be appointed. However, in some ways this concept can be seen as a manifestation of the current common law approach of assessing capacity in the context of the particular transaction or proceedings.[132]

7.111 Implementation of this recommendation would more likely than not result in more people being involved in civil litigation without having a litigation representative formally appointed—assuming support is available.

7.112 The Law Council's Family Law Section advised that the requirement to consider available support is 'likely to result in more protracted and costly litigation for all parties, particularly in family law matters'. The Law Council expressed concern that 'limited court resourcing, chronic underfunding of legal aid and rising costs of litigation present serious practical barriers to the implementation' of the recommendation.[133]

7.113 An overarching purpose of federal civil practice and procedure provisions is to facilitate the just resolution of disputes, according to law, and 'as quickly, inexpensively and efficiently as possible'.[134] From some perspectives this reform may be seen as making the resolution of some disputes less 'efficient'.

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130 Law Institute of Victoria, *Submission 129*.
131 Federal Circuit Court of Australia, *Submission 140*.
132 In the Discussion Paper, the ALRC proposed that the new test for the appointment of a litigation representative be implemented through rules of court. Again, however, because rules of court generally reflect and are consistent with the common law, legislation seems necessary to implement this change.
133 Law Council of Australia, *Submission 142*.
134 *Federal Court of Australia Act 1976* (Cth) s 37M.

7.114 Arguably, lawyers and courts need to know from whom they should take instructions and applications—that is, for the interests of a party to be represented by one voice. Facilitating and ensuring the participation of litigants with impaired decision-making ability may be considered too complex for lawyers and courts to manage. For example, the Federal Circuit Court observed that, in courts where there is an emphasis on negotiation and the use of alternative dispute resolution,

> representatives of other parties may have difficulty in dealing with a person who is unable to understand the nature and possible consequences of the proceeding or any offer of compromise that might be had.[135]

7.115 Another relevant factor is that, under an adversarial system, courts are not easily able to facilitate the participation of persons with impaired decision-making ability in legal proceedings. In this context, there are parallels with the well-documented problems faced by unrepresented litigants in civil justice settings; and the challenges for courts in dealing with such litigants.[136]

7.116 In the ALRC's view, concerns about efficiency are outweighed by the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings. As discussed below, additional resources may be needed to enable supported decision-making to operate.

The role of litigation representatives

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

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

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

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

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

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

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135 Federal Circuit Court of Australia, *Submission 140*.

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

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

- 'A person under disability shall commence or defend a proceeding by litigation guardian' (High Court);[137]
- 'A person under a legal incapacity may start, or defend, a proceeding only by the person's litigation representative' (Federal Court);[138]
- 'A person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian' (Family Court);[139]
- 'A person who needs a litigation guardian may start, continue, respond to or seek to be included as a party to a proceeding only by his or her litigation guardian' (Federal Circuit Court).[140]

7.118 There is no obligation under common law or court rules for a litigation representative to make decisions that reflect the will, preferences and rights of the person represented. Rather, at common law, a litigation representative has a 'duty to see that every proper and legitimate step for that person's representation is taken'[141]—which seems akin to a 'best interests' test.

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

7.120 The Hon Chief Justice Diana Bryant AO of the Family Court of Australia observed that the role of a litigation representative has been described as

> an invidious one in the sense that the person is taking on the decision-making responsibilities of the litigant whilst having to ensure that their own interests do not conflict with those of the litigant. *That means that the case guardian has to make decisions which are often unpalatable to the individual litigant*.[142]

7.121 Clearly, this is a departure from the preferred will and preferences approach to supported decision-making recommended by the ALRC. Further, case law makes it clear that the role of a litigation representative is not only to 'protect' the person represented. The Full Court of the Federal Court has held that the purpose of the power to appoint a litigation representative is 'to protect plaintiffs and defendants who would otherwise be at a disadvantage, as well as to protect the processes of the court'.[143]

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137 *High Court Rules 2004* (Cth) r 21.08.1.
138 *Federal Court Rules 2011* (Cth) r 9.61.
139 *Family Law Rules 2004* (Cth) r 11.09.
140 *Federal Circuit Court Rules 2001* (Cth) r 6.08.
141 *Read v Read* [1944] SASR 26, 28.
142 Quoting *Anton & Malitsa* [2009] FamCA 623, [2]: D Bryant, *Submission 22* (emphasis added).
143 *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, [25].

7.122 Case law also emphasises concerns about protecting the rights of the other parties in the litigation. It has been said that requiring a litigation representative to conduct litigation helps to ensure, in some cases, that 'parties to litigation are not pestered by other parties who should be to some extent restrained' and that a 'defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend'.[144]

7.123 In the ALRC's view, litigation representatives should be required to act, so far as is practicable, in accordance with the National Decision-Making Principles.[145] To this end, legislation should provide that, in making decisions, litigation representatives have a duty to consider the will, preferences and rights of the person represented; and to promote their personal, social and financial wellbeing.

7.124 A number of stakeholders expressly supported the ALRC's proposal concerning the duties of litigation representatives.[146] NACLC and PWDA observed that the proposal would work to encourage supported decision-making and the shift from 'best interests' to 'will, preferences and rights' decision-making. The Law Council recognised that the duties promote the optimal participation of represented persons in litigation, but expressed concern that additional duties and responsibilities may act as a disincentive to potential litigation representatives.[147]

7.125 The Federal Circuit Court observed that, in the context of parenting matters, where the best interests of the child are the paramount consideration, 'it places a considerable burden on the litigation guardian should the wishes of the litigant be clearly contrary' to those best interests.[148]

7.126 The Law Council agreed that court practice notes explaining the duties of litigation representatives would be desirable, because there is 'a real likelihood of conflict of interest arising between a lay representative and the person they represent, particularly where they are related to the person they represent'.[149] In particular, in family law proceedings, the likelihood that a litigation representative is also a family member of the person represented means that possible conflicts of interest may arise.

7.127 The Federal Court expressed concern that the proposal may not give adequate weight to the important role litigation representatives have in 'protecting both other parties to the litigation and the process of the court'.[150] A practice note, as recommended above, could help address issues concerning litigation representatives' duties to the court.

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

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

146 NACLC and PWDA, *Submission 134*; Australian Research Network on Law and Ageing, *Submission 102*.

147 Law Council of Australia, *Submission 142*.

148 Federal Circuit Court of Australia, *Submission 140*.

149 Law Council of Australia, *Submission 142*.

150 Federal Court of Australia, *Submission 138*.

7.128 The LIV supported clarification of the scope of the role and duties of litigation representatives, noting the 'complexity arising from numerous court rules which establish different requirements and processes'.[151] At a roundtable hosted by the LIV, participants suggested that guidelines should be developed to assist litigation representatives, with a focus on:

- What the role of litigation guardian involves;
- The extent to which the litigation guardian should actively participate in the development of the represented person's case;
- Setting out activities which a litigation guardian may undertake, for example, obtaining reports to assist with the case or making contact with service providers;
- The ability of litigation guardians to challenge their lawyer in ways that any litigant may challenge their lawyer;
- The authority of a litigation guardian to change their lawyer;
- Whether the litigation guardian needs to act through a lawyer when the litigation guardian is a lawyer; and
- Whether settlement or consent orders need to be approved by the presiding Court.[152]

Appointing litigation representatives

7.129 In the ALRC's view, the availability of support (and supporters and representatives) is central to the aim of encouraging more supported decision-making. Litigation representatives play an important role in providing people with the support necessary to enable them to bring or defend legal proceedings, facilitating their access to the justice system on an equal basis with others.[153]

7.130 In practice, problems relating to the appointment and availability of litigation representatives may be of equal or greater significance than the applicable legal rules and duties which are the focus of the Inquiry. Submissions raised concerns about:

- the cost and availability of litigation representatives for people who are unable to instruct legal counsel;[154]
- the lack of funding to meet the legal costs of case guardians in Family Court proceedings;[155]

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151 Law Institute of Victoria, *Submission 129*. NACLC and PWDA also highlighted the need for courts to issue practice notes or other guidance material to explain the role and duties of litigation representatives, including clarifying the duties owed to any client and to the court and providing information on the activities a litigation representative might undertake, for example, contact with third parties and service providers: NACLC and PWDA, *Submission 134*.

152 Law Institute of Victoria, *Submission 129*.

153 NACLC and PWDA, *Submission 134*.

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

155 Law Council of Australia, *Submission 142*; D Bryant, *Submission 22*.

- the difficulties in securing the nomination by the Attorney-General of case guardians in Family Court proceedings where another suitable person is not available;[156] and
- the availability of legal representatives who are independent of guardians appointed by state tribunals.[157]

7.131 A related problem mentioned by a number of stakeholders is the potential legal costs implications for those acting as litigation representatives.[158] Exposure to costs orders may have a deterrent effect on the willingness of individuals and organisations to act as litigation representatives. NACLC and PWDA observed that while a litigation representative should be personally liable for the costs of litigation if they do not act within the scope of their powers, or conduct the litigation appropriately, it is not otherwise in the interests of justice for litigation representatives to bear personal liability in this way.[159]

7.132 Chief Justice Bryant submitted that, given funding and access are acknowledged to be of considerable importance in 'advancing autonomy and respect in decision-making by people with disabilities', it was 'unfortunate' that the opportunity to make recommendations with respect to the 'funding and appointment of case guardians was not seized' by the ALRC.[160]

7.133 The Federal Circuit Court stated that it is not equipped to incorporate the 'participatory model' of decision-making proposed by the ALRC; and 'significant resources' would need to be made available to overcome existing problems in the availability of litigation representatives.[161]

7.134 There are similar concerns about the adequacy of legal aid funding. The Federal Circuit Court stated that it was 'disappointing that little weight is given to the significant access to justice impediments currently being encountered by persons with impaired decision making ability when seeking to proceed in the courts'. These difficulties, it said, are 'compounded in the context of current limitations on the availability of legal aid with litigants who might otherwise have sufficient capacity to instruct a lawyer facing additional impediments'.[162]

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156 Law Council of Australia, *Submission 142*; D Bryant, *Submission 22*.

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

158 Law Council of Australia, *Submission 142*; NACLC and PWDA, *Submission 134*; Qld Law Society, *Submission 103*. The Queensland Law Society referred to recommendations made by the Queensland Law Reform Commission, including that the *Uniform Civil Procedure Rules 1999* (Qld) be amended to the effect that a litigation guardian is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct: Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67, 2010 rec 28–4.

159 NACLC and PWDA, *Submission 134*.

160 D Bryant, *Submission 22*.

161 Federal Circuit Court of Australia, *Submission 140*.

162 Ibid. See also Law Council of Australia, *Submission 142*.

7.135 In this context, legal aid funding guidelines could facilitate the provision of litigation representatives, where necessary. The OPA (SA and Vic) also suggested that courts should be under an obligation to seek support for litigants and that, if funding is available to provide litigation representatives, as it currently is by application for some matters, then it should also be extended to the provision of more informal support.[163]

7.136 Some stakeholders commented on the appointment mechanisms for litigation representatives. The LIV noted that, at present, litigation representatives are appointed under court rules for the relevant court in which proceedings take place. Suggestions have been made that, while courts should retain the ability to appoint litigation representatives, they should also have the ability to refer that decision to specialist bodies, such as the Victorian Civil and Administrative Tribunal.[164] Better liaison between courts and guardianship boards and tribunals might enable litigation representatives to be more readily available.

7.137 National Decision-Making Principle 2 (the Support Principle) provides that 'Persons who may require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives'.

7.138 Problems concerning the availability of appropriate support have been a recurring theme during the course of the Inquiry—and not just in the context of litigation representatives. While it was appropriate to draw attention to the valid and urgent concerns of leading stakeholders, it was not practicable to address these in any detail within the scope of an inquiry that required a primary focus on laws and legal frameworks.

Solicitors' duties

Recommendation 7–6 The Law Council of Australia should consider whether the Australian Solicitors' Conduct Rules and Commentary should be amended to provide for a new exception to solicitors' duties of confidentiality where:

(a) the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and

(b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative.

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

164 Law Institute of Victoria, *Submission 129*. Justice Connect observed that the ability of Victorian courts, pursuant to s 66 of the *Guardianship and Administration Act 1986* (Vic) to refer the issue of whether a party before the court requires a guardian or administrator appointed means appointments are 'subject to appeal and regular review and can be tailored to the requirements of the litigation': Justice Connect and Seniors Rights Victoria, *Submission 120*.

7.139 In some circumstances, the barriers to obtaining support necessary to conduct litigation, including the appointment of a litigation representative, may include the duties solicitors owe to their clients.[165]

7.140 Solicitors have a duty to act in the best interests of their clients,[166] and to follow a client's lawful, proper and competent instructions.[167] A solicitor who has concerns about his or her client's decision-making ability may be unwilling to act for a client who refuses, or is unable to agree to, investigations in relation to their ability or an application for the appointment of a litigation representative.

7.141 Solicitors must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement, subject to limited exceptions—which do not include seeking decision-making support.[168] However, the duty of solicitors to the court and the administration of justice is paramount.[169] Once proceedings are commenced, solicitors have a clear and unambiguous duty to raise with the court any concerns about a client's capacity to conduct litigation.[170]

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

> the solicitor's concern for the interest of the client, so long as it is reasonably based and so long as it results in no greater disclosure of confidential information than absolutely necessary, can justify the bringing of proceedings and such disclosure of confidential information as is absolutely necessary for the purpose of such proceedings.[171]

7.143 The Court also stated that the bringing of such actions is extremely undesirable because it involves the solicitor in a conflict between the duty to do what the solicitor considers in the client's best interests and the duty to follow the client's instructions (and maintain confidentiality).[172]

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165 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) [7.96]. Citing Lauren Adamson, Mary-Anne El-Hage and Julianna Marshall, 'Incapacity and the Justice System in Victoria' (Discussion Paper, Public Interest Law Clearing House, 2013).

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

167 Ibid r 8.1.

168 Ibid r 9.

169 Ibid r 3.1.

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

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

172 *R v P* [2001] NSWCA 473, [64]. 'It is therefore preferable, if possible, if a family or health care professional makes the application [for the appointment of a substitute decision-maker]': 'When a Client's Capacity Is in Doubt: A Practical Guide for Solicitors', above n 171, 9.

7.144 It has been suggested that, if there is no clear exception to solicitors' duties of confidentiality, they may 'cease acting for disadvantaged clients' resulting in clients 'moving from lawyer to lawyer or worse, being left unrepresented'.[173]

7.145 However, there are also arguments against reform, including on the basis that, if a statutory exception were to be introduced,

> there may be a risk that lawyers would more readily make applications for the appointment of a substitute decision maker. Applications could potentially be made without the lawyer first trying to adequately support the client to enable the client to provide instructions themselves.[174]

Solicitors' conduct rules

7.146 One option for reform would be new legal professional rules to make it clear that solicitors may disclose information when there is reason to believe the client lacks the ability to instruct. This would at least ensure that disclosure is not a ground for professional disciplinary action, but would not remove doubts about liability for breach of confidence or other liability under the general law.

7.147 One model is provided by the American Bar Association's (ABA) Model Rules for Professional Conduct. These rules provide that,

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities … and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.[175]

7.148 The Queensland Law Society submitted that such rules could 'provide greater clarity for practitioners along with professional certainty of being able to act to protect client's interests'.[176] Other stakeholders also supported changes to solicitors' conduct rules along the lines proposed by the ALRC.[177]

7.149 Legal Aid NSW, for example, submitted 'amendments of this type could provide some much needed clarification and guidance to solicitors trying to assist clients who have some degree of diminished capacity'.

> The adoption of the proposed rule would provide guidance and encourage solicitors to explore a variety of options prior to making an application to have a substitute decision maker appointed. In the event that it was necessary for the solicitor to make

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173 Adamson, El-Hage and Marshall, above n 165, 3.

174 Ibid.

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

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

177 Legal Aid NSW, *Submission 137*; Law Institute of Victoria, *Submission 129*; Vicdeaf, *Submission 125*. Vicdeaf supported the proposal providing that solicitors are obliged to first 'utilise all supports available to provide the client with access and the ability to be involved in decision making, providing instructions etc': Ibid.

> such an application, the proposed amendments to the Rule would make clear that such action is permissible and ethically responsible.[178]

7.150 The LIV advised that, at least in Victoria, while the courts have confirmed that, where proceedings are on foot, lawyers may have a duty to 'raise the issue of the client's capacity',[179] the position is not clear when proceedings have not yet commenced.[180] If a person's lawyer decides to make an application for the appointment of a substitute decision maker and the client objects, the lawyers may have no choice but to cease to act—leaving 'the client vulnerable and without a means of meaningfully engaging with the justice system'.[181]

7.151 The LIV suggested amending r 9.2 of the Australian Solicitors' Conduct Rules to include a further exception based on the ABA rules. That is, so that 'where the lawyer reasonably believes the client has diminished capacity and is at risk of substantial physical, financial or other harm and the lawyer discloses confidential client information for the purpose of taking reasonably necessary protective action':

> Phrased in this way, the amendment would not prescribe a set approach, but affords the solicitor the discretion to choose the most appropriate course of action in the circumstances. The commentary to the Rules should provide direction as to what protective action might be contemplated.[182]

7.152 The LIV also submitted that the commentary to r 9.2 should be amended to provide that: the new exception should only be used as a last resort where no member of the client's family is available or willing to act and alternatives have been explored; and in determining what protective action to take, the solicitor should be guided by the wishes and values of the client, the client's best interests, with the goals of least intrusion, maximizing client capacities and respecting the family and social connections.[183]

7.153 Other stakeholders questioned the necessity or desirability of amendments to the Australian Solicitors' Conduct Rules. The Law Council advised that, while its Professional Ethics Committee would give further consideration to this issue, 'at the present time the Law Council would not support weakening the lawyer's duty of client confidentiality to disabled clients'.[184] The National Mental Health Consumer and Carer Forum expressed concern that the proposed amendments may undermine the relationship between client and solicitor and encourage 'paternalistic second-guessing', which is not an 'appropriate basis for the professional relationship and is not best practice'.[185]

7.154 Similarly, the Australian Research Network on Law and Ageing considered that 'lawyers might too readily raise capacity issues without the requisite consideration of

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178 Legal Aid NSW, *Submission 137*.
179 Citing *Pistorino v Connell & Ors* [2012] VSC 438.
180 Law Institute of Victoria, *Submission 129*.
181 Ibid.
182 Ibid.
183 Ibid.
184 Law Council of Australia, *Submission 142*.
185 National Mental Health Consumer & Carer Forum, *Submission 100*.

the supports necessary for a person to exercise their decision making rights'.[186] The Illawarra Forum stated that a new rule 'could be open to interpretation and possible abuse and seems in conflict with the National Decision-Making Principles'.[187] NACLC and PWDA cautioned that, in the light of the importance and complexity of this issue, further consultation and consideration should occur prior to any ALRC recommendation.

7.155 The ALRC agrees that further, more detailed, consideration of this issue is required, especially given the reservations expressed by stakeholders. It would be appropriate for the Law Council to take the matter forward as part of ongoing review of the Australian Solicitors' Conduct Rules and associated commentary.

Witnesses

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

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

> People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.[188]

7.158 In 2012, Disability Rights Now reported to the United Nations that, in Australia, the 'capacity of people with cognitive impairments to participate as witnesses in court proceedings is not supported and this has led to serious assault, sexual assault and abuse crimes going unprosecuted'.[189]

7.159 In particular, it was said that people with cognitive disability face barriers to establishing credibility when interacting with the justice system because of the assumptions 'constantly made by police and court officers, such as prosecutors, judges and magistrates'.[190] In this Inquiry, the Anti-Discrimination Commissioner (Tasmania) submitted:

> The perception that a person with disability lacks credibility as a witness to or victim of crime often leads to the decision not to prosecute alleged perpetrators. This heightens the vulnerability of people with disability to further harm because the

186 Australian Research Network on Law and Ageing, *Submission 102*.
187 Illawarra Forum, *Submission 124*.
188 'Equality before the Law Bench Book' (Judicial Commission of New South Wales, 2006) [5.3.1].
189 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [190].
190 Ibid 78.

> perpetrator is aware that charges are less likely to be brought or prosecuted than if the victim were a person without disability.[191]

7.160 Similarly, NACLC and PWDA reported that, in 'the experience of our members and members' clients, allegations made by people with disability are not always investigated, or criminal charges pursued, in part due to perceptions of people with disability not being competent to give evidence as a witness to criminal proceedings, or not being considered to be a credible witness'.[192]

Competence

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

(a) understand a question about the fact; or

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

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

7.161 At common law, as a general rule, all witnesses who are able to comply with testimonial formalities—such as the giving of oaths—are competent to give evidence. There is no other common law test of physical or psychological competence, but a judge has discretion, in exceptional cases, to refuse to permit a witness to testify where the evidence is likely to be unreliable. Otherwise, matters of competence are relevant only to the witness's credibility and the weight that may be placed on the evidence given.[193]

7.162 The AHRC has observed that people with disabilities frequently experience prejudicial assessments of their competency to give evidence as a witness to criminal proceedings.[194] This is despite research suggesting that, 'contrary to public perception, most people with intellectual disabilities are no different from the general population in

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

192 NACLC and PWDA, *Submission 134*. See also Queenslanders with Disability Network, *Submission 119*. QDN stated that a 'common theme from QDN members is the lack of weight given to their evidence or account of an event, starting at the police and finishing in the court'.

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

194 'Equal Before the Law: Towards Disability Justice Strategies', above n 5, 21.

their ability to give reliable evidence' (as long as communication techniques are used that are appropriate for the particular person).[195]

7.163 In Commonwealth law, the *Evidence Act 1995* (Cth) deals with the competence of witnesses. Similar or identical provisions apply in the other jurisdictions that have adopted the Uniform Evidence Acts.[196] Section 13 of the *Evidence Act* provides:

> (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
>
> (a) the person does not have the capacity to understand a question about the fact; or
>
> (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;
>
> and that incapacity cannot be overcome.
>
> Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

7.164 Section 13(1) provides a test of general competence. Section 13(3) provides a test of competence to give sworn evidence. A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact, if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.[197] The test for competence to give sworn evidence amounts to the capacity to understand the obligation to give truthful evidence.[198]

7.165 Under s 13(4), the person may give unsworn evidence after being informed by the court about the importance of telling the truth (and certain other matters set out in the Act).[199] The probative value of an unsworn statement will be assessed and the court may refuse to admit evidence that may be unfairly prejudicial to a party, misleading or confusing, or result in undue delays.[200]

7.166 The wording of s 13(1) implies that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence. The Explanatory Memorandum to the *Evidence Amendment Bill 2008* (Cth) states that, when 'considering whether incapacity can be overcome, the court should consider alternative communication methods or support depending on the needs of the

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195 'Equality before the Law Bench Book', above n 188, [5.3.1]. The Bench Book cites Mark Kebbell, Christopher Hatton and Shane Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' (2004) 9 *Legal and Criminological Psychology* 23.

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

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

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

199 *Evidence Act 1995* (Cth) ss 13(4)–(5).

200 Ibid s 135.

individual witness', and the note makes a cross-reference to ss 30 and 31 of the Act (discussed below).

7.167 In the Discussion Paper, the ALRC proposed that the *Evidence Act*—consistently with the National Decision-Making Principles—should expressly provide that competence must be determined in the context of the available support.[201]

7.168 This proposal received some support from stakeholders.[202] Others suggested that the proposal did not go far enough in reflecting the National Decision-Making Principles. Advocacy for Inclusion, for example, considered that in assessing competence,

> scrutiny should be upon whether the person is being adequately supported to understand the question, including whether the question was delivered in formats most appropriate to the person's understanding, rather than upon determining the person's capacity to understand.[203]

7.169 In contrast, the Attorney-General's Department submitted that, read as a whole, general competency must already be determined in the context of the available support or assistance. In the Department's view, s 13 of the *Evidence Act*, as currently drafted, is 'sufficiently broad' to address the ALRC's concerns.[204]

7.170 In the ALRC's view, the test of general competence and competence to give sworn evidence under the *Evidence Act* should more explicitly incorporate the concept of support. This would be consistent with the ALRC's recommendations in other access to justice contexts and with the National Decision-Making Principles.

7.171 However, without some obligation being placed on courts to provide support, and the resources to enable this, reform may have little practical effect. Even at present, it is not entirely clear whether the people with disability are being determined to be not competent to give evidence, or sworn evidence, because of legal rules of evidence or because 'administrative systems are unable to deliver, by reason of lack of knowledge, poor resources or attitudinal barriers, services to people with disabilities'.[205]

Assistance in giving evidence

Recommendation 7–9 The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers.

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201 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 7–8.

202 Illawarra Forum, *Submission 124*; Queenslanders with Disability Network, *Submission 119*.

203 Advocacy for Inclusion, *Submission 126*. See also NACLC/PWDA—'the focus of any test should be on the adequacy of supports available to the individual to support them to give sworn evidence': NACLC and PWDA, *Submission 134*.

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

205 'Equal Before the Law: Towards Disability Justice Strategies', above n 5, 24.

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

7.172 Stakeholders expressed concerns about the extent to which existing laws and legal frameworks facilitate support for witnesses. The Office of the Public Advocate (Qld) submitted that the Australian and Queensland governments should consider implementing new practices to facilitate the giving of evidence by people with disability, 'by allowing questions to be explained and assistance to be given in communicating the answers'.[206] The Office of the Public Advocate (Vic) considered that greater 'witness support' should be provided to assist people with cognitive impairments and mental illness to navigate the justice system.[207]

7.173 Sections 30 and 31 of the *Evidence Act* provide examples of the assistance that may currently be provided 'to enable witnesses to overcome disabilities'.[208] Section 30 provides that a witness may give evidence about a fact through an interpreter and s 31 relates to 'deaf and mute witnesses'. Section 31 states that a witness who cannot hear adequately may be questioned in 'any appropriate way'; and that a witness who cannot speak adequately may give evidence by 'any appropriate means' and the court may give directions concerning this.

7.174 Deaf Australia expressed concerns about the dated language[209] and drafting of s 31 and observed that the phrase 'may be questioned in any appropriate way' is open to interpretation and does not specify that the person's communication needs must be taken into consideration. It also suggested that use of the term 'communication support' should be considered, so as to include modes of support such as live-captioning and hearing loops.[210]

7.175 The Anti-Discrimination Commissioner (Tas) stated that the *Evidence Act 2001* (Tas) does not make adequate 'provision for regulating or adjusting court processes to accommodate people with disability'. For example, 'communication by way of gestures is not viewed as a witness statement, despite this being the only way some people can communicate'. The Commissioner observed that the existing provisions, including ss 30–31, 'highlight that it is not easy for people with disability to have the process modified to increase their participation'.[211]

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

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

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

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

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

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

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

7.177 More broadly, witnesses who need support in order to give evidence should be entitled to the assistance of a supporter. At the Commonwealth level, the *Crimes Act* does provide an extensive range of provisions protecting 'vulnerable persons' in their interactions with the justice system.[212] These include provisions allowing vulnerable persons to choose someone to accompany them while giving evidence in a proceeding.[213] In relation to adults, the right applies only to 'vulnerable adult complainants'[214] and 'special witnesses'. A special witness includes a person who is 'unlikely to be able to satisfactorily give evidence in the ordinary manner', including 'because of a disability'.[215]

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

7.179 Some state and territory criminal procedure legislation makes broader provision for supporting witnesses. For example, in New South Wales, under the *Criminal Procedure Act 1986* (NSW), vulnerable persons have a right to the presence of another person while giving evidence. A vulnerable person for the purposes of these provisions means 'a child or a cognitively impaired person'.[216]

7.180 The *Criminal Procedure Act* states that, in criminal and certain other proceedings, a vulnerable person 'is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence'.[217] The supporter 'may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with an impairment or a disability, or for the purpose of providing the vulnerable person with other support'.[218]

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212 *Crimes Act 1914* (Cth) pt IAD.
213 Ibid s 15YO.
214 A vulnerable adult complainant is a person who is a victim of slavery or human trafficking: Ibid s 15YAA.
215 Ibid s 15YAB(1).
216 *Criminal Procedure Act 1986* (NSW) s 306M. 'Cognitive impairment' is defined to include: (a) an intellectual disability; (b) a developmental disorder (including an autistic spectrum disorder); (c) a neurological disorder; (d) dementia; (e) a severe mental illness; (f) a brain injury.
217 Ibid s 306ZK(2).
218 Ibid s 306ZK(3).

7.181 The ALRC recommends that the *Crimes Act* be amended to include more comprehensive provisions giving witnesses who need support the right to have a support person present while giving evidence. It should be made clear that such a person may act as a communication assistant, assisting the person with any difficulty in giving evidence associated with a disability. Again, courts should be empowered to give directions with regard to the provision of support.

7.182 Proposals to provide more support for witnesses with disability met with approval.[219] The Illawarra Forum, for example, submitted that such changes would allow people with disability to fully participate in giving evidence 'in a manner that best suits the individual', allow a support person to assist and 'acknowledge the ability of a person with disability in being able to provide accurate and valuable evidence'.[220]

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

7.184 The ALRC acknowledges that the recommendation does nothing to ensure that support is actually available. In South Australia, the Attorney-General has proposed that the *Evidence Act 1929* (SA) be amended to 'give people with complex communication needs a general entitlement to have a Communication Assistant present for any contact with the criminal justice system'; and to 'increase access to appropriate support persons for vulnerable witnesses'. For these purposes, a service, available throughout the criminal justice process, is proposed to be established in the non-government sector.[221]

7.185 In its 2013 report on the justice system and people with intellectual disability, the Parliament of Victoria's Law Reform Committee[222] highlighted the witness intermediary scheme in the United Kingdom, established under the *Youth Justice and Criminal Evidence Act 1999* (UK). Under this scheme, the function of an intermediary is to assist intellectually disabled and other vulnerable witnesses by effectively acting as a 'go-between' to facilitate communication between the witness and the court. An Intermediary Registration Board oversees registration and standards for intermediaries.[223]

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219 Advocacy for Inclusion, *Submission 126*; Illawarra Forum, *Submission 124*; National Disability Services, *Submission 92*.

220 Illawarra Forum, *Submission 124*.

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

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

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

Guidance for judicial officers

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

7.186 The *Evidence Act* and *Crimes Act* contain a range of other provisions that may be used to assist people who need support in giving evidence. In addition to those discussed above, the *Evidence Act* includes provisions protecting witnesses from improper questioning, and allowing the giving of evidence in narrative form.[224]

7.187 The *Crimes Act* also contains protective provisions that, among other things, may disallow inappropriate or aggressive cross-examination of vulnerable and special witnesses;[225] allow for the use of alternative arrangements for giving evidence, such as closed-circuit television[226] and the exclusion of members of the public from the courtroom;[227] and ensure vulnerable persons are not compelled to give further evidence unless it is necessary in the interests of justice.[228]

7.188 Legislative provisions are, however, only part of the solution to facilitating the participation of persons with disability in the justice system. Flexibility should be encouraged in Commonwealth court and tribunal proceedings to adapt procedures:

> It is important for courts and tribunals to recognise and be sensitive to the challenges that people with disabilities face when interacting with the justice system. Procedural breaches by a person with an intellectual disability should be met with inquiry into the circumstances behind that breach. Registry staff, judicial officers and tribunal members should be educated about the difficulties facing those with a disability and encouraged to exercise discretion in excusing trivial breaches and dispensing with standard protocols where appropriate.[229]

7.189 The law may be flexible enough to allow support to be provided but, in practice, the willingness or ability of courts to respond is likely to be circumscribed by limited resources and lack of awareness in the court and community about available options.[230]

7.190 Greater awareness of the measures that courts and judicial officers may take to support witnesses who need support giving evidence may be desirable. One model is the *Equality before the Law Bench Book* developed by the Judicial Commission of NSW.[231] This publication contains a section on people with disability and, among other things, discusses the implications of different types of disability for people involved in

224 *Evidence Act 1995* (Cth) ss 41, 29(2).
225 *Crimes Act 1914* (Cth) s 15YE.
226 Ibid ss 15YI, 15YL.
227 Ibid s 15YP.
228 Ibid s 15YNC.
229 Legal Aid Victoria, *Submission 65*.
230 'Equal Before the Law: Towards Disability Justice Strategies', above n 5, 23.
231 'Equality before the Law Bench Book', above n 188.

court proceedings, examples of the barriers for people with disabilities in relation to court proceedings, and making adjustments for people with disability.[232]

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

7.192 The ALRC recommends that federal courts develop bench books to provide judicial officers with guidance about how courts may support people with disability in giving evidence. This will mainly apply to civil matters because, as discussed earlier in relation to eligibility to stand trial, most federal offenders are tried in state and territory courts.

7.193 The Federal Court acknowledged that bench books can assist to ensure that the judiciary, lawyers and all other relevant agencies and organisations are aware of existing communication facilities and techniques.[233] NACLC and PWDA strongly supported the further development of guidance for judicial officers about how courts may support people with disability in giving evidence, in consultation with people with disability and their representatives.[234]

Forensic procedures

7.194 Barriers to obtaining consent for the taking of DNA and other forensic samples under Commonwealth, state and territory forensic procedures legislation,[235] may prejudice the investigation and prosecution of crimes against persons with disability.

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

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

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

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

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232 Ibid s 5.
233 Federal Court of Australia, *Submission 138*.
234 NACLC and PWDA, *Submission 134*. See also Queenslanders with Disability Network, *Submission 119*.
235 Eg, *Crimes Act 1914* (Cth) pt ID; *Police Powers and Responsibilities Act 2000* (Qld) ch 17; *Forensic Procedures Act 2000* (Tas).

7.198 At a Commonwealth level, forensic procedures are regulated by pt ID of the *Crimes Act*. Under the *Crimes Act*, a magistrate may order the carrying out of a forensic procedure on an 'incapable person'[236] if the consent of a guardian cannot reasonably be obtained; or the guardian refuses consent and the magistrate is satisfied that there are reasonable grounds to believe that the parent or guardian is a suspect and the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence.[237] In determining whether to make the order, the magistrate must take into account, among other things, the seriousness of the alleged offence; the 'best interests' of the incapable person; and 'so far as they can be ascertained, any wishes' of the incapable person with respect to the forensic procedure.[238]

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

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

- forensic procedures legislation to adopt a hierarchy of decision-makers similar to that found in some guardianship legislation dealing with medical treatment;[239] or
- guardianship legislation dealing with consent to medical treatment to include reference to the taking of forensic samples.

7.201 In the Discussion Paper, the ALRC asked whether Commonwealth, state and territory laws should be amended to avoid delays in obtaining consent to the taking of forensic samples from people who are incapable of giving consent, and who have been victims of crime.[240]

7.202 In response, some stakeholders expressed concern that avoiding delay might be used as a rationale for not making full efforts to obtain consent, for example, by determining how a person communicates and providing the support they require to do so.[241]

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

237 Ibid s 23XWU(1).

238 Ibid s 23XWU(2).

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

240 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Question 7–3.

241 Vicdeaf, *Submission 125*; KinCare Services, *Submission 112*.

7.203 In the absence of any firm indication that Commonwealth forensic procedures legislation is responsible for undue delay in obtaining forensic samples, the ALRC makes no recommendation for reform.

Jury service

7.204 Trial by jury is an important element of the justice system in Australia. Juries are made up of citizens randomly chosen from the electoral roll.[242] They serve as a means for members of the community to participate in the administration of justice, and to ensure that the application of the law is fair and consistent with community standards.

7.205 An essential characteristic of juries, as an institution, is that they be representative of the wider community.[243] Their representative nature depends on all those capable of serving, whatever their individual characteristics, having an opportunity to serve, unless there are defensible reasons for excluding them from jury membership.[244] There are longstanding concerns that, in practice, persons with disability are prevented from serving on juries in Australia without sufficient reason:

> The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian community. This means that the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.[245]

7.206 For example, in May 2014, the Supreme Court of Queensland ruled that a woman with a hearing impairment, who can lip-read but needed an Auslan interpreter, was 'incapable of effectively performing the functions of a juror and therefore ineligible for jury service'.[246]

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

7.208 These legislative and other barriers to jury service have been examined as part of a number of inquiries, including by the NSWLRC, the Law Reform Commission of Western Australia (LRCWA), and the Queensland Law Reform Commission

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242 In Ch 9, the ALRC recommends that the 'unsound mind' provisions of the *Commonwealth Electoral Act 1918* (Cth), which relate to disqualification for enrolment and voting on the basis that a person is of 'unsound mind', be repealed.

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

244 See Ibid 9–10.

245 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [223].

246 *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113. Earlier in 2014, another hearing impaired woman, Gaye Lyons, lost a discrimination case against the Queensland Government over being excluded from jury service at Ipswich District Court in 2012: *Lyons v State of Queensland (No 2)* [2014] QCAT 731.

(QLRC).[247] In South Australia, the Attorney-General has proposed 'further research and investigation on identifying and overcoming barriers to jury duty for people with disability'.[248]

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

- The NSWLRC recommended that people who are blind or deaf should be qualified to serve on juries, and not prevented from doing so on the basis of that physical disability alone; but that the Court should have power to stand aside a blind or deaf person if the person is unable to discharge the duties of a juror notwithstanding provision of reasonable adjustments.[249]
- The LRCWA recommended that a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability; but a physical disability that renders a person unable to discharge the duties of a juror should constitute a sufficient reason to be excused under the *Juries Act 1957* (WA).[250]
- The QLRC recommended that the *Jury Act 1995* (Qld) should be amended to remove the ineligibility of persons with a physical disability, and should instead provide that prospective jurors should inform the Sheriff of any physical disabilities and special needs that they have; but that a person who has an intellectual, psychiatric, cognitive, or neurological impairment that makes the person incapable of effectively performing the functions of a juror is ineligible for jury service.[251]

7.210 More recently, Disability Rights Now has recommended to the United Nations that, in Australia, 'all people with disability be made eligible for jury service'[252] and an Individual Communication has claimed that law and practice concerning jury qualification constitutes a violation of rights guaranteed under the CRPD, including rights to equal recognition under the law and access to justice.[253]

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

248 'Draft Disability Justice Plan 2014-2016', above n 221, Priority Action 1.5.

249 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006) rec 1(a)–(c). At the time of writing, these recommendations had not been implemented.

250 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Report No 99 (2010) rec 56.1. This recommendation was implemented: see *Juries Act 1957* (WA) s 5.

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

252 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities* (2012) [223].

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

7.211 Submissions have highlighted this issue as being of continuing concern,[254] and expressed support for earlier law reform commission recommendations for change.[255] The Disability Discrimination Legal Service, for example, stated that

> current national and state jury laws should be reformed to avoid exclusion of people with disabilities from participating in jury duty … the law should allow potential jurors with disabilities to participate in jury duty where such disabilities can be reasonably accommodated. This should replace the current legal position where prospective jurors with auditory and visual disabilities are readily challenged or stood down from a panel.[256]

Juries in the Federal Court

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

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

7.214 This position changed, however, with the criminalisation of 'serious cartel conduct' in 2009,[257] when jurisdiction to try indictable cartel offences by jury was conferred on the Federal Court. A procedural framework for the Federal Court to exercise jurisdiction over indictable offences—including jury provisions—was enacted.[258]

7.215 The Federal Court also has the power, in civil proceedings to direct trial of issues with a jury.[259] Because the ordinary mode of trial is by judge alone,[260] this would only occur in an exceptional case and, in any event, state or territory law relating to the qualification of jurors would generally apply in Federal Court civil proceedings.[261]

7.216 Even though juries remain 'extremely rare' in Federal Court proceedings,[262] the ALRC recommends that reform of jury qualification provisions be modelled in Commonwealth law through amendments to the *Federal Court of Australia Act*.

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

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

256 Disability Discrimination Legal Service, *Submission 55*.

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

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

259 Ibid s 40.

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

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

262 Federal Court of Australia, *Submission 138*.

Qualification to serve on a jury

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

(a) understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;

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

(c) use or weigh that information as part of the jury's decision-making process; or

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

7.217 Under the *Federal Court of Australia Act*, the Sheriff must remove a person's name from the jury list[263] if satisfied that: the person is not qualified to be a juror; or the Sheriff would excuse the person from serving on the jury if the person were a potential juror.[264]

7.218 The Sheriff may, either on application or on his or her own initiative, excuse a potential juror from serving on the jury, if satisfied that they are, 'in all the circumstances, unable to perform the duties of a juror to a reasonable standard'.[265] In coming to a conclusion about a person's ability to perform the duties of a juror, the Act requires that the Sheriff must have regard to the *Disability Discrimination Act 1992* (Cth).[266]

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

7.220 For example, the *Juries Act 2000* (Vic) disqualifies people who are unable to 'communicate in or understand the English language adequately' or who have a 'physical disability that renders the person incapable of performing the duties of jury service'.[267] The Disability Discrimination Legal Service observed that, while 'this is

263 A jury list is prepared for particular proceedings and contains the names and addresses of persons that the Sheriff selects from the jury roll for the applicable jury district, see, eg *Federal Court of Australia Act 1976* (Cth) s 23DM.
264 Ibid s 23DO.
265 Ibid ss 23DQ, 23DR.
266 Ibid s 23DQ (Note). See, in particular, *Disability Discrimination Act 1992* (Cth) s 29 (Administration of Commonwealth laws and programs).
267 *Juries Act 2000* (Vic) sch 2, cl 3(a),(f).

not an express exclusion of persons with sensory disabilities', there have been no instances of blind or deaf jurors in the history of the Victorian justice system.[268]

7.221 Similarly, under the *Jury Act 1977* (NSW), persons who are ineligible to serve as jurors include 'a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror'.[269] The practice appears to be that information indicating a potential juror is blind or deaf is considered sufficient to ground a determination that a person is ineligible to serve as a juror.[270] In particular, blind and deaf jurors may be excluded from serving on juries because of concerns about comprehension and the presence of a '13th person' in the jury room where an interpreter is used.[271]

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

7.223 The ALRC recognises there is likely to be 'some difficulty establishing a more specific objective standard' for determining juror qualification.[272] However, an approach consistent with the National Decision-Making Principles may facilitate a more inclusive approach to jury service, and help ensure that people with disability are not automatically or inappropriately excluded from serving on a jury. That is, the qualification of jurors should be assessed by reference to a person's actual decision-making ability. Clearly, there should be no presumption that any particular physical or mental disability should be a disqualifying factor.

7.224 In particular, people who require communication devices or communication supporters to 'expressively communicate' may be subject to assumptions about their ability to serve on juries.[273] The Disability Discrimination Legal Service observed:

> With today's technology and continuing product development that addresses or alleviates sensory limitations, it is neither reasonable nor necessary to permit arbitrary exclusion from jury service on grounds of disability, English incapacity, or an imputed inability to discharge their duties as a juror, or satisfaction of the Sheriff.[274]

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268 Disability Discrimination Legal Service, *Submission 55*.
269 *Jury Act 1977* (NSW) s 6(b), sch 2.
270 NSW Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006); Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013.
271 See, eg, Alastair McEwin, Individual Communication under the United Nations Convention on the Rights of Persons with Disabilities, Communication to Committee on the Rights of Persons with Disabilities in *McEwin v Australia* G/SO 214/48 AUS (1) 12/2013.
272 Law Council of Australia, *Submission 83*.
273 Disability Discrimination Legal Service, *Submission 55*.
274 Ibid.

7.225 At present, the fact that a person may be supported in performing the duties of a juror does not seem able to be taken into account in determining whether a person is eligible to serve.

7.226 The ALRC recommends that the *Federal Court of Australia Act* should explicitly incorporate the concept of support into the test for serving as a juror. The test is consistent with the National Decision-Making Principles and associated Guidelines. The ALRC's proposal for reform of the test for qualifying to serve as a juror[275] received support from a number of stakeholders.[276]

7.227 Again, the recommendation may be criticised on the basis that, unless support is actually available, there will be no change in jury selection practices. Nor does the recommendation deal with jury challenges on the basis of perceived disability (that is, peremptory challenges and challenges for cause). No reason need be stated for peremptory challenges, and where a person with a disability is challenged because of that disability, this will be subject to a ruling from the judge, who would have regard to the legislative provisions concerning qualification.

Assistance for jurors

Recommendation 7–13 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations.

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

7.229 The 2006 recommendations of the NSWLRC referred to 'interpreters and stenographers' being allowed to assist a blind or deaf juror, including in the jury room during jury deliberations.[277] 'Interpreter' in this context was intended to extend to sign languages, such as Auslan, and other communication support, and 'stenographer' to include a person providing 'computer-aided real time transcription'.[278]

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

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275 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) Proposal 7–12.

276 NACLC and PWDA, *Submission 134*; Vicdeaf, *Submission 125*; Queenslanders with Disability Network, *Submission 119*.

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

278 Ibid 17–18.

7.231 There is research suggesting that communication assistants would be able to effectively facilitate the participation of some deaf jurors. The NSWLRC and Macquarie University jointly funded a short pilot study to investigate whether people who are deaf could access court proceedings through sign language interpreters.[279] The 2007 report of the study concluded that it had demonstrated that:

- legal facts and concepts can be translated into Auslan;
- Auslan interpreting can provide effective access to court proceedings for a deaf juror;
- hearing people misunderstand court proceedings without being disadvantaged by hearing loss; and
- deaf people are willing and able to serve as jurors.[280]

7.232 The practicality of allowing deaf people to serve as jurors with the assistance of Auslan interpreters in the court and during deliberations continues to be investigated by researchers, most recently at the University of NSW.[281]

7.233 NACLC and PWDA expressed strong support for the ALRC proposal to introduce communication assistants. This suggestion, they said, 'recognises the centrality of supports in ensuring that people with disability who require such support are able to serve as a juror'.[282] Vicdeaf observed that it should also be the court's responsibility to ensure supports are provided so that the person can communicate their decisions to the other members of the jury and to the court.[283]

Jury secrecy

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

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

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

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

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

281 Ignorantia Juris, *Deaf Jurors in Mock Trial Experiment* <http://ignorantiajuris.com>.

282 NACLC and PWDA, *Submission 134*.

283 Vicdeaf, *Submission 125*.

Recommendation 7–15 The *Federal Court of Australia Act 1976* (Cth) should provide for offences, in similar terms to those under ss 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

7.234 A common reason given for excluding people who require support from jury service is that an assistant may be seen as an 'additional' or 'thirteenth' member of the jury, in breach of the secrecy of jury deliberations.[284]

7.235 The rule of jury secrecy, also known as the exclusionary rule, prohibits a juror from discussing the deliberations in the jury room, based on public policy considerations requiring that the verdict of the jury should be final, ensuring that jurors are not subjected to pressure or harassment. The rule is a convention or rule of conduct rather than a rule of law,[285] and it is reinforced by statutory provisions that make it an offence to disclose or solicit information about jury deliberations.[286]

7.236 In 2014, Douglas J in the Queensland Supreme Court noted that even if 'deafness as a disability' can be overcome by the use of interpreters to assist jurors, further potential difficulties arise in respect of deliberations by the jury during and after the hearing:

> Communication or discussion between jurors has been emphasised as an integral part of the jury system because of their collective duty to pool their experience and wisdom in coming to a verdict … In the absence of legislative provision, it is clear that the jury is bound to deliberate in private[287]

7.237 Douglas J observed that it was not clear under the *Jury Act 1995* (Qld) that a judge is able to give leave to permit the presence of an interpreter in the jury room during the jurors' deliberations—and there is no explicit power to require such an interpreter to swear an oath or to make an affirmation to maintain the secrecy of the jury's deliberations.[288] He held that,

> while it may be possible to assist this individual to participate in the trial itself, by the use of an Auslan interpreter, and, for example, written jury directions, it would not be appropriate to permit such an interpreter to perform a similar role in the jury room as

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

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

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

287 *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113, [3].

288 Ibid [4]–[5].

> a '13th juror' in the absence of specific legislative provision, including the power to require the interpreter to swear or affirm to keep the jury's deliberations secret.[289]

7.238 In the ALRC's view, concerns about maintaining the secrecy of the jury room and allowing a communication assistant can be addressed, and this suggestion was supported by stakeholders.[290]

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

289 Ibid [6].

290 NACLC and PWDA, *Submission 134*; Illawarra Forum, *Submission 124*; Public Interest Advocacy Centre, *Submission 41*.