



Australian Government

Australian Law Reform Commission

# Equality, Capacity and Disability in Commonwealth Laws

ISSUES PAPER

You are invited to provide a submission  
or comment on this Issues Paper

This Issues Paper reflects the law as at 30 October 2013

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Australian Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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## Making a submission

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Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 16 December 2013.

### Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: <http://www.alrc.gov.au/content/disability-ip44-make-submission>. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email [web@alrc.gov.au](mailto:web@alrc.gov.au), or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Please send any pre-prepared submissions in Word or RTF format.

As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents.

Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions. See the ALRC policy on submissions and inquiry material for more information: [www.alrc.gov.au/about/policies](http://www.alrc.gov.au/about/policies).



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# Terms of Reference

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## **Review of equal recognition before the law and legal capacity for people with disability**

I, Mark Dreyfus QC MP, Attorney-General of Australia, having regard to:

- the *United Nations Convention on the Rights of Persons with Disabilities*, to which Australia is a party and which sets out:
  - rights for people with disability to recognition before the law, to legal capacity and to access to justice on an equal basis with others, and
  - a general principle of respect for inherent dignity, individual autonomy, including freedom to make one's own choices, and independence of persons, and
- Australian Governments' commitment to the National Disability Strategy, which includes 'rights protection, justice and legislation' as a priority area for action.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the examination of laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity, and
- what if any changes could be made to Commonwealth laws and legal frameworks to address these matters.

For the purposes of the Inquiry, equal recognition before the law and legal capacity are to be understood as they are used in the Convention on the Rights of Persons with Disabilities: including to refer to the rights of people with disability to make decisions and act on their own behalf.

### **Scope of the reference**

In undertaking this reference, the ALRC should consider all relevant Commonwealth laws and legal frameworks that either directly, or indirectly, impact on the recognition of people with disability before the law and their exercise of legal capacity on an equal basis with others, including in the areas of:

- access to justice and legal assistance programs
- administrative law
- aged care
- anti-discrimination law
- board participation
- competition and consumer law

- contracts
- disability services and supports
- electoral matters
- employment
- federal offences
- financial services, including insurance
- giving evidence
- holding public office
- identification documents
- jury service
- marriage, partnerships, intimate relationships, parenthood and family law
- medical treatment
- privacy law
- restrictive practices
- social security
- superannuation, and
- supported and substituted decision-making.

The review should also have particular regard for the ways Commonwealth laws and legal frameworks affect people with disability who are also children, women, Indigenous people, older people, people in rural, remote and regional areas, people from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex people.

The purpose of this review is to ensure that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights. In considering what if any changes to Commonwealth law could be made, the ALRC should consider:

- how laws and legal frameworks are implemented and operate in practice
- the language used in laws and legal frameworks
- how decision making by people with impairment that affects their decision making can be validly and effectively supported
- presumptions about a person's ability to exercise legal capacity and whether these discriminate against people with disability
- use of appropriate communication to allow people with disability to exercise legal capacity, including alternative modes, means and formats of communication such as Easy English, sign language, Braille, and augmentative communications technology
- how a person's ability to independently make decisions is assessed, and mechanisms to review these decisions



- the role of family members and carers and paid supports such as legal or non-legal advocates in supporting people with disability to exercise legal capacity for themselves – both in relation to formal and informal decisions and how this role should be recognised by laws and legal frameworks
- safeguards—are the powers and duties of decision making supporters and substituted decision makers effective, appropriate and consistent with Australia’s international obligations
- recognition of where a person’s legal capacity and/or need for supports to exercise legal capacity is evolving or fluctuating (where a person with disability may be able to independently make decisions at some times and circumstances but not others or where their ability to make decisions may grow with time and/or support), including the evolving capacity of children with disability, and
- how maximising individual autonomy and independence could be modelled in Commonwealth laws and legal frameworks.

In conducting this inquiry, the ALRC should also have regard to:

- initiatives under the National Disability Strategy, including the National Disability Insurance Scheme and other services and supports available to people with disability, and how these should/could interact with the law to increase the realisation of people with disability’s recognition before the law and legal capacity
- how Commonwealth laws and legal frameworks interact with State and Territory laws in the areas under review, contemporaneous developments and best practice examples within the States and Territories, and
- international laws and legal frameworks that aim to ensure people with disability are accorded equal recognition before the law and legal capacity on an equal basis with others, including international work to implement the Convention on the Rights of Persons with Disability.

### **Consultation**

In undertaking this reference, the ALRC should identify and consult with relevant stakeholders, particularly people with disability and their representative, advocacy and legal organisations, including through accessible formats, but also families and carers of people with disability, relevant Government departments and agencies in the Commonwealth and States and Territories, the Australian Human Rights Commission, and other key non-government stakeholders.

### **Timeframe**

The Commission should provide its report to the Attorney-General by August 2014.

Dated 23 July 2013

Mark Dreyfus

Attorney-General



# Questions

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## **United Nations Convention on the Rights of Persons with Disabilities**

**Question 1.** Australia has an Interpretative Declaration in relation to Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities*. What impact does this have in Australia on:

- (a) provision for supported or substitute decision-making arrangements; and
- (b) the recognition of people with disability before the law and their ability to exercise legal capacity?

## **National Disability Strategy 2010–2020**

**Question 2.** What changes, if any, should be made to the *National Disability Strategy 2010–2020* to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?

## **Framing principles**

**Question 3.** The ALRC has identified as framing principles: dignity; equality; autonomy; inclusion and participation; and accountability. Are there other key principles that should inform the ALRC's work in this area?

## **A uniform approach to legal capacity?**

**Question 4.** Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the key elements?

## **The role of family, carers and supporters**

**Question 5.** How should the role of family members, carers and others in supporting people with disability to exercise legal capacity be recognised by Commonwealth laws and legal frameworks?

## **Anti-discrimination law**

**Question 6.** What issues arise in relation to Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to the *Disability Discrimination Act 1992* (Cth) to address these issues?

**General protections provisions**

**Question 7.** In what ways, if any, should the general protections provisions under the *Fair Work Act 2009* (Cth) be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 8.** There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, should this legislation be amended to improve or clarify their interaction in circumstances of disability discrimination?

**Administrative law**

**Question 9.** What issues arise in relation to review of government decisions that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to administrative law to address these issues?

**Competition and consumer law**

**Question 10.** What issues arise in relation to competition and consumer law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to competition and consumer law to address these issues?

**Privacy**

**Question 11.** What issues arise in relation to privacy that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to privacy to address these issues?

**The National Disability Insurance Scheme**

**Question 12.** What changes, if any, should be made to the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 13.** What changes, if any, should be made to the nominee or child's representative provisions under the *National Disability Insurance Scheme Act 2013* (Cth) or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 14.** What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

- (a) the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules;
- (b) social security legislation; and
- (c) state and territory systems for guardians and administrators?

### **Employment**

**Question 15.** In what ways, if any, do Commonwealth laws or legal frameworks relating to employment diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

### **Citizenship rights, public service and board participation**

**Question 16.** What changes, if any, should be made to the *Commonwealth Electoral Act 1918* (Cth) or the *Referendum (Machinery Provision) Act 1984* (Cth) to enable people with disability to be placed or retained on the Roll of Electors or to vote?

**Question 17.** What issues arise in relation to electoral matters that may affect the equal recognition before the law of people with disability or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

**Question 18.** How does the language used in Commonwealth laws and legal frameworks affect the equal recognition of people with disability before the law or their ability to exercise legal capacity?

**Question 19.** In what ways do Commonwealth laws and legal frameworks relating to holding public office diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

**Question 20.** What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure that people with disability are not automatically or inappropriately excluded from serving on a jury or being eligible for jury service?

**Question 21.** In what ways do Commonwealth laws and legal frameworks relating to membership of, or participation on, boards diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

**Question 22.** What issues arise in relation to identity documents for people with disability? In what ways, if any, should Commonwealth laws and legal frameworks relating to identity documents be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Access to justice, evidence and federal offences**

**Question 23.** What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?

**Question 24.** What issues arise in relation to evidence law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?

**Question 25.** What issues arise in relation to the law on federal offences that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to federal offences to address these issues?

**Social security, financial services and superannuation**

**Question 26.** In what ways do Commonwealth laws and legal frameworks relating to social security diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

**Question 27.** What changes, if any, should be made to the nominee provisions under the *Social Security (Administration) Act 1999* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 28.** What issues arise in relation to banking for people with disability? What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure people with disability control their own financial affairs and have equal access to bank loans, mortgages and other forms of financial credit?

**Question 29.** In what ways, if any, do Commonwealth laws or legal frameworks relating to insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity?

**Question 30.** What changes, if any, should be made to the insurance exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 31.** What additional guidance or supporting material relating to the application and operation of the insurance exemption under the *Disability Discrimination Act 1992* (Cth) would assist people with disability?

**Question 32.** What changes, if any, should be made to the superannuation exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 33.** What issues arise in relation to superannuation for people with disability that may affect their equal recognition before the law or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

### **Health care and aged care**

**Question 34.** What issues arise in relation to health care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to health care to address these issues?

**Question 35.** What issues arise in relation to aged care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to aged care to address these issues?

### **Restrictive practices**

**Question 36.** In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?

**Question 37.** What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?

### **Marriage, intimate relationships, parenthood and family law**

**Question 38.** What issues arise in relation to marriage that may affect the equal recognition before the law of people with a disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to marriage or marriage celebrants to address these issues?

**Question 39.** What issues arise in relation to people with disability and intimate relationships that may affect their equal recognition before the law or ability to exercise legal capacity? What changes, if any, should be made to Commonwealth law and legal frameworks to address these issues?

**Question 40.** What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?

**Particular disability communities**

**Question 41.** How do Commonwealth laws and legal frameworks relating to equal recognition before the law and capacity affect people with disability who are:

- (a) children;
- (b) women;
- (c) Aboriginal and Torres Strait Islander;
- (d) from culturally and linguistically diverse backgrounds;
- (e) older;
- (f) lesbian, gay, bisexual, transgender or intersex; or
- (g) living in rural, remote and regional areas?



# Equality, Capacity and Disability in Commonwealth Laws

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## **The Inquiry**

1. On 23 July 2013, the then Attorney-General of Australia, the Hon Mark Dreyfus QC MP, asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry focused on Commonwealth laws and legal frameworks that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity. The ALRC was asked to consider what if any changes could be made to Commonwealth laws and legal frameworks to address these matters.<sup>1</sup>

2. This Issues Paper is the first consultation document in the Inquiry. It introduces the range of areas covered by the Terms of Reference and asks questions to assist in the development of reform responses through submissions from stakeholders. The submissions and further consultation rounds will inform the next stages of the process before completion of the Final Report in August 2014.

### **Why the focus on disability?**

3. A number of important international and domestic developments have laid the foundation for, and prompted, this Inquiry. The first was the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). The CRPD represents the most significant international development for people with a disability. It is

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1 The full Terms of Reference are available on the ALRC website.

‘intended as a human rights instrument with an explicit, social development dimension’ and reflects

the movement from viewing persons with disabilities as ‘objects’ of charity, medical treatment and social protection towards viewing persons with disabilities as ‘subjects’ with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.<sup>2</sup>

4. Secondly, in November 2009 a National Disability Strategy was initiated through the Council of Australian Governments (COAG) as a central mechanism for implementation of the CRPD in Australia. The *National Disability Strategy 2010–2020* which resulted, sets out a ‘national policy framework for improving life for Australians with disability, their families and carers’, reflecting ‘a unified, national approach to policy and program development’.<sup>3</sup>

5. Thirdly, in July 2013 implementation of the National Disability Insurance Scheme (NDIS) began, representing ‘a new way of providing community linking and individualised support for people with permanent and significant disability, their families and carers’.<sup>4</sup> The focus of the scheme is on individual support and greater choice and control over the support received by people with disability.

### Getting involved in the Inquiry

6. You can get involved in the Inquiry in a number of ways, including by making a submission or by participating in a consultation.

7. This Issues Paper has been released to form a basis for consultation. It is intended to encourage informed community participation by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the areas listed in the Terms of Reference. The Issues Paper may be downloaded free of charge from the ALRC website, <[www.alrc.gov.au](http://www.alrc.gov.au)>. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333. An Easy English version of the Issues Paper is also available online and in hardcopy on request.

8. The Issues Paper will be followed by the publication of a Discussion Paper in April 2014. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC’s current thinking in the form of specific proposals for reform. The ALRC will then seek further submissions and undertake another round of national consultations before preparing the final Report, to be submitted by the end of August 2014.

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

3 Department of Social Services, *National Disability Strategy 2010–2020 Fact Sheet* (12 November 2013) <<http://www.dss.gov.au/>>.

4 Department of Families, Housing, Community Services and Indigenous Affairs, *One Big Difference to Lots of Lives: An Introduction to DisabilityCare Australia* (2013) 3.

9. The ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

10. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents. Submissions may be made in writing, by email or using the ALRC online submission form. Submissions made using the online submission form are preferred. Stakeholders are encouraged to answer as many—or as few—of the questions in the Issues Paper as they wish. Generally, submissions will be published on the ALRC website unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

Submissions using the ALRC's online submission form can be made at: <http://www.alrc.gov.au/content/disability-ip44-make-submission>. All submissions should reach the ALRC by **Monday 16 December 2013**.

## Defining the scope of the Inquiry

### Terms of Reference

11. The ALRC works under Terms of Reference issued by the Attorney-General. They mark out the scope of each Inquiry. The Terms of Reference for this Inquiry require an examination of Commonwealth 'laws and legal frameworks' that 'deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity'.<sup>5</sup>

12. A non-exhaustive list of specific areas is also set out alphabetically:

- access to justice and legal assistance programs;
- administrative law;
- aged care;
- anti-discrimination law;
- board participation;
- competition and consumer law;
- contracts;
- disability services and supports;

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5 In this Issues Paper, the terms 'people with disability' and 'persons with disabilities' are used to reflect the Terms of Reference and the language of the CRPD.

- electoral matters;
- employment;
- federal offences;
- financial services, including insurance;
- giving evidence;
- holding public office;
- identification documents;
- jury service;
- marriage, partnerships, intimate relationships, parenthood and family law;
- medical treatment;
- privacy law;
- restrictive practices;
- social security;
- superannuation; and
- supported and substituted decision-making.

13. The last bullet-point is one that may be seen to be relevant across all the areas where legal capacity is in issue.

14. The Inquiry is also to have particular regard for the ways Commonwealth laws and legal frameworks affect people with disability who are also children, women, Indigenous people, older people, people in rural, remote and regional areas, people from culturally and linguistically diverse (CALD) backgrounds and lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

### **Purpose**

15. The purpose of this Inquiry is to ensure that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights. The rights envisaged are those set out in the CRPD. The ALRC is directed to have regard to a number of considerations, such as:

- how laws and legal frameworks are implemented and operate in practice;
- the language used in laws and legal frameworks;
- how decision-making by people with impairment that affects their decision-making can be validly and effectively supported;
- presumptions about a person's ability to exercise legal capacity and whether these discriminate against people with disability;

- use of appropriate communication to allow people with disability to exercise legal capacity, including alternative modes, means and formats of communication such as Easy English, sign language, Braille, and augmentative communications technology;
- how a person's ability to make decisions independently is assessed, and the mechanisms to review these decisions;
- the role of family members, carers and paid supports such as legal or non-legal advocates in supporting people with disability to exercise legal capacity for themselves—both in relation to formal and informal decisions and how this role should be recognised by laws and legal frameworks;
- safeguards—whether the powers and duties of decision-making supporters and substituted decision-makers are effective, appropriate and consistent with Australia's international obligations;
- recognition of where a person's legal capacity and/or need for supports to exercise legal capacity is evolving or fluctuating (where a person with disability may be able to independently make decisions at some times and circumstances but not others or where their ability to make decisions may develop with time and/or support), including the evolving capacity of children with disability; and
- how maximising individual autonomy and independence can be modelled in Commonwealth laws and legal frameworks.

### **State and territory laws**

16. The principal focus of this Inquiry is on Commonwealth laws and legal frameworks. The Terms of Reference direct the ALRC to have regard to, or to consider how, Commonwealth laws and legal frameworks interact with state and territory laws in the areas under review. However, as the subject matter of the Inquiry is the ability of people with disability to exercise legal capacity, and as laws concerning guardianship of people are state and territory based, the Inquiry necessarily will involve a consideration of state and territory laws and practice in these areas.

17. The recommendations that will be made in the Final Report in August 2014 will be directed principally at areas in relation to which the Commonwealth is responsible or to cooperative processes that include the Commonwealth. The ALRC has also been asked to consider solutions that could be 'modelled' at the Commonwealth level. This will necessarily involve comparison with state and territory laws.<sup>6</sup>

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<sup>6</sup> The ALRC has a number of functions in carrying out an Inquiry, including to consider proposals for: making or consolidating Commonwealth laws; uniformity between state and territory laws; and complementary Commonwealth, state and territory laws: *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(b)–(e).

## Laws and legal frameworks

18. The Terms of Reference direct the ALRC to examine ‘laws and legal frameworks within the Commonwealth jurisdiction’. There may be issues of a systemic kind about barriers for people with disability exercising legal capacity, as well as issues relating to service delivery. While this Inquiry may receive comments of a general kind, the ultimate focus of the recommendations will be on laws and legal frameworks, as required by our Terms of Reference. However, the idea of ‘frameworks’ extends beyond law in the form of legislative instruments to include policy and practice guides, codes of conduct, standards, education and training about legal rights and responsibilities, and other related matters.

## Legislative and regulatory framework

### United Nations Convention on the Rights of Persons with Disabilities

19. *The United Nations Convention on the Rights of Persons with Disabilities* (CRPD) is the first binding international human rights instrument to explicitly address disability.<sup>7</sup> The CRPD and its Optional Protocol opened for signature on 30 March 2007 and Australia became one of the original signatories. Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. The CRPD entered into force for Australia on 16 August 2008, and the Optional Protocol in 2009.<sup>8</sup>

20. The purpose of the CRPD is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.<sup>9</sup> The CRPD consolidates existing international human rights obligations and clarifies their application to people with disabilities, rather than creating ‘new’ rights.

21. In addition to the general principles and obligations contained in the CRPD,<sup>10</sup> Article 12 underpins the ability of people with disability to achieve many of the other rights under the Convention. It recognises the right of people with disability to enjoy legal capacity ‘on an equal basis with others in all aspects of life’.<sup>11</sup>

22. By ratifying the CRPD, Australia accepts the obligation to recognise that people with disability enjoy legal capacity on an equal basis with others in all aspects of life and to take appropriate measures to provide people with disability access to the support

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7 Prior to CRPD there were a number of non-binding standards specifically related to disability. See, eg: *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, UN GAOR, 3rd Comm, 26th Sess, UN Doc A/RES/2856 (20 December 1971); *Declaration on the Rights of Disabled Persons*, GA Res 3447, UN GAOR, 3rd Comm, 30th Sess, UN Doc A/RES/3447 (9 December 1975); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993).

8 The Optional Protocol to the CRPD allows for the making of individual complaints to the Committee about violations of the CRPD by States Parties.

9 *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 1.

10 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 3, 4.

11 *Ibid* art 12.

they may require in exercising their legal capacity. It also requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse.<sup>12</sup>

23. Australia has made a number of Interpretative Declarations in relation to the CRPD. Upon ratifying the Convention, Australia made the following declaration in respect of Article 12:

Australia declares its understanding that the CRPD allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.<sup>13</sup>

24. The Interpretative Declaration is intended to outline the Government's understanding of its obligations under the Article.

25. There are differing views about the effect of Australia's Interpretative Declaration, particularly in relation to the role of substitute decision-making. Some stakeholders and commentators suggest that the Article does not allow for substitute decision-making under any circumstances. Others argue it allows for substitute decision-making, but only in specific circumstances, as a measure of last resort, subject to safeguards, and when in the best interests of the person with disability. Some stakeholders have suggested that the Interpretative Declaration may potentially be limiting discussion and examination of supported decision-making models.

26. In September 2013, Australia appeared before the 10th session of the CRPD.<sup>14</sup> In its concluding observations, the Committee recommended that Australia review its Interpretative Declarations in order to withdraw them.<sup>15</sup> The Committee also made a number of comments and recommendations with respect to women and children with disability, supported decision-making, access to justice, medical intervention and restrictive practices, education, work, voting and data collection. Many of these observations are discussed in more detail later in this Issues Paper.<sup>16</sup>

**Question 1.** Australia has an Interpretative Declaration in relation to Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities*. What impact does this have in Australia on:

- (a) provision for supported or substitute decision-making arrangements; and

12 Ibid art 12(4).

13 *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

14 Office of the High Commissioner for Human Rights, *10th Session of the Committee on the Rights of Persons with Disabilities* (12 November 2013) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session10Old.aspx>>.

15 Committee on the Rights of Persons with Disability, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2–13 September 2013)' (United Nations, 4 October 2013) 9.

16 Ibid.



- (b) the recognition of people with disability before the law and their ability to exercise legal capacity?

### Other international instruments

27. In addition to the CRPD, there are other international instruments of relevance to this Inquiry.<sup>17</sup> The Universal Declaration of Human Rights enshrines the inherent dignity and the equal and inalienable rights of all people and affords the protection of these rights in law.<sup>18</sup> While the *International Covenant on Civil and Political Rights* (ICCPR) makes no specific reference to people with disability, it enshrines the right to self-determination of all people as well as rights to physical integrity, liberty and security of the person and equality before the law.<sup>19</sup> Additionally, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) protects the right to work, social security, family life, health, education and participation in cultural life.<sup>20</sup> The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (CAT)<sup>21</sup> may also be relevant, as there has been suggestion that the use of restrictive practices with respect to people with disability might contravene the CAT.<sup>22</sup>

28. There are also a number of international instruments that specifically protect the rights of women,<sup>23</sup> children<sup>24</sup> and Indigenous peoples,<sup>25</sup> which are of relevance in considering intersectional discrimination.

### Australian Constitution

29. Laws and legal frameworks affecting people with disability operate across the jurisdiction of the Commonwealth and the states and territories. The *Australian Constitution* establishes a federal system of government in which powers are distributed between the Commonwealth and the six states. It includes a list of subjects about which the Australian Parliament may make laws, including in a number of areas of relevance to this Inquiry, such as: insurance (s 51(xiv)); banking (s 51(xiii));

17 Such international instruments do not become part of Australian law until incorporated into domestic law by statute. See, eg, *Kioa v West* (1985) 159 CLR 550.

18 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

19 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976).

20 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

21 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

22 Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd Sess, UN Doc A/63/175 (28 July 2008) 9.

23 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

24 *Convention on the Rights of the Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990).

25 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

marriage, divorce and parental rights (s 51(xxi) and (xxii)); invalid and old-age pensions, and a range of allowances (s 51(xxiii) and s 51(xxiiiA). The external affairs power (s 51(xxix)) is the most significant and expanding head of Commonwealth legislative power, as the Australian Government enters into treaties and becomes a signatory to international conventions under the general executive power.<sup>26</sup> The external affairs power enables the Australian Parliament to make laws with respect to matters physically external to Australia<sup>27</sup> and matters relating to Australia's obligations under bona fide international treaties or agreements, or customary international law.<sup>28</sup> For example, the *National Disability Insurance Scheme Act 2013* (Cth) (*NDIS Act*) was enacted with the express objective of giving effect to a number of international conventions.

30. As discussed later at paragraph 104, identifying the Constitutional basis for any national or nationally consistent approach to capacity will be a key issue for this Inquiry.

### **National Disability Insurance Scheme**

31. In August 2011, the Productivity Commission (PC) released its report, *Disability Care and Support*.<sup>29</sup> The Report found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice'.<sup>30</sup> The PC recommended the establishment of a new National Disability Insurance Scheme to provide insurance cover for all Australians in the event of significant disability. It suggested that the main function of the NDIS would be to fund long-term high quality care and support for people with significant disabilities.

32. In response, the Council of Australian Governments (COAG) recognised the need for major reform of disability services through a NDIS. At a meeting of the Select Council on Disability Reform in October 2011, all Select Council Ministers agreed to lay the foundations for the NDIS by mid-2013. In December 2012, COAG signed an Intergovernmental Agreement for the NDIS launch. The Commonwealth and several states and territories also signed bilateral agreements confirming the operational and funding details for the roll-out of the NDIS.

33. In March 2013, the *NDIS Act* was enacted. The Act is supplemented by National Disability Insurance Scheme Rules, which address the more detailed operational aspects of the scheme. The scheme is administered by the National Disability Insurance Agency (NDIA) (formerly DisabilityCare Australia). The structure and operation of the NDIS is discussed in more detail later in this Issues Paper at paragraphs 144 to 148.

34. Implementation of the NDIS began in July 2013 with roll-out in four sites—South Australia, Tasmania, the Hunter Area in New South Wales, and the Barwon area

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26 *Commonwealth of Australia Constitution Act* (Cth) s 61.

27 *Horta v Commonwealth* (1994) 181 CLR 183.

28 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Horta v Commonwealth* (1994) 181 CLR 183; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

29 Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 1; Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 2.

30 Productivity Commission, 'Disability Care and Support', above n 29, Overview, 2.

of Victoria. In July 2014, the NDIS will commence in the ACT and the Barkly region of the Northern Territory.

### National Disability Strategy 2010–2020

35. The National Disability Strategy (NDS) was developed by Commonwealth, State and Territory Governments under the auspices of COAG. It draws upon the findings of the 2009 report by the National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and their Families in Australia*.<sup>31</sup>

36. The purposes of the NDS include, to:

- establish a high level policy framework to give coherence to, and guide government activity across mainstream and disability-specific areas of public policy;
- drive improved performance of mainstream services in delivering outcomes for people with disability;
- give visibility to disability issues and ensure they are included in the development and implementation of all public policy that impacts on people with disability; and
- provide national leadership toward greater inclusion of people with disability.<sup>32</sup>

37. The NDS covers six key policy areas: inclusive and accessible communities; rights protection, justice and legislation; economic security; personal and community support; learning and skills; and health and wellbeing.

38. Stakeholders have expressed general concerns about the lack of implementation of the NDS and the absence of monitoring and reporting requirements. Stakeholders have also highlighted concerns in specific areas, for example limited recognition of, or comprehensive actions to address the rights of people with disability to marry, form intimate partner relationships, have a family and be parents.

**Question 2.** What changes, if any, should be made to the *National Disability Strategy 2010–2020* to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?

### National Disability Agreement

39. The National Disability Agreement (NDA) is one of six national agreements between the Commonwealth, states and territories in place across health, education, skills and workforce development, disability services, affordable housing and Indigenous reform. The NDA provides a national framework and key areas for reform

31 National People with Disabilities and Carers Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (2009).

32 Australian Government, *National Disability Strategy 2010–2020*, 9.

of government support to services for people with disability. It specifically outlines the respective roles and responsibilities of the Commonwealth and state and territory governments.<sup>33</sup> The objective of the NDA is to provide disability support services to ensure that ‘people with disability and their carers have an enhanced quality of life and participate as valued members of the community’.<sup>34</sup>

### ***Disability Discrimination Act 1992 (Cth)***

40. The *Disability Discrimination Act 1992 (Cth)* (DDA) includes a broad definition of disability and prohibits both direct and indirect discrimination against people on the basis of disability across a range of areas. The objects of the DDA include:

- the elimination of discrimination;
- ensuring people with disability have the same rights to equality before the law as the rest of the community; and
- promoting recognition and acceptance within the community of the principle that people with disability have the same fundamental rights as the rest of the community.<sup>35</sup>

41. Amendments to the DDA were proposed in the course of the project to consolidate existing Commonwealth anti-discrimination laws into a single Act. The project formed a key component of Australia’s Human Rights Framework.<sup>36</sup> In November 2012, an exposure draft Human Rights and Anti-Discrimination Bill was released and was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Committee’s Report was released on 21 February 2013.

42. In March 2013, the Gillard Government announced that, aside from amendments to the *Sex Discrimination Act 1984 (Cth)*, the consolidation process involved a number of issues requiring ‘deeper consideration’ and that the Attorney-General’s Department would ‘continue working on this project’.<sup>37</sup> The status of the project was unclear at the time of writing this Issues Paper.

### **Other inquiries, projects and reviews**

43. In addition to the developments outlined above, there are a number of current inquiries and projects of relevance to the ALRC’s Inquiry. These include:

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<sup>33</sup> ‘National Disability Agreement’ (Council of Australian Governments, 2012) 9, cl 15–16.

<sup>34</sup> Ibid cl 19. Under the NDA, the Council of Australian Governments Reform Council is required to report annually in relation to the outcomes specified in the NDA against a number of performance indicators and benchmarks. See, ‘Disability 2011-12: Comparing Performance Across Australia’ (Report to the Council of Australian Governments, COAG Reform Council, 30 April 2013).

<sup>35</sup> *Disability Discrimination Act 1992 (Cth)* s 3.

<sup>36</sup> Australian Government Attorney-General’s Department, ‘Australia’s Human Rights Framework’ (2010).

<sup>37</sup> The Hon Mark Dreyfus QC MP (Attorney-General) and Senator The Hon Penny Wong (Minister for Finance and Deregulation) ‘New Anti-Discrimination Laws to Cover Sexual Orientation, Gender Identity and Intersex Status’ (Media Release, 20 March 2013).

- Australian Human Rights Commission (AHRC)—review of access to justice in the criminal justice system for people with disability. At the time of writing, the AHRC had not yet released its final report.
- Productivity Commission, Access to Justice Arrangements—an inquiry into Australia’s system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law. The inquiry is due to report in September 2014.
- National Reduction of Seclusion and Restraint Project—a national project which will analyse the use of seclusion and restraint in the context of mental health. It aims to identify what factors drive current practice and changes in service delivery to evaluate how these factors can lead to best practice.<sup>38</sup>
- National Mental Health Commission—the Minister for Health, the Hon Peter Dutton MP has announced a review of mental health services by the Commission. Terms of reference for the review have not been announced, however the Minister stated that the review will aim to ‘ensure services are being properly targeted, that services are not being duplicated and that programmes are not being unnecessarily burdened by red tape’.<sup>39</sup> The Minister has indicated that gaps in ‘mental health research and workforce development and training’ will be identified as part of the review.<sup>40</sup>
- NSW Supported Decision-Making Pilot Project—the pilot is a joint project between the NSW Department of Family and Community Services, Ageing Disability and Home Care, the NSW Trustee and Guardian and the Public Guardian. The pilot will develop, trial and independently evaluate a supported decision-making framework for people with disability, their families, carers, advocates and service providers in NSW.
- Review of financial services—the Treasurer, the Hon Joe Hockey MP has indicated there will be a ‘root and branch’ review of the Australian financial system. At the time of writing this Issues Paper it was unclear what the terms of reference for the review will include.

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38 The project of the National Mental Health Commission is being conducted in partnership with the Mental Health Commission of Canada and Australian partners, including the Safety and Quality Partnerships Subcommittee, Disability Discrimination Commissioner of the Australian Human Rights Commission and state mental health commissions. As part of the project, researchers from the University of Melbourne will undertake research into the extent of seclusion and restraint in Australia and comparable countries and provide examples of the reduction and elimination of these practices: National Mental Health Commission, *National Seclusion and Restraint Project* (12 November 2013) <<http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project.aspx>>.

39 The Hon Peter Dutton MP (Minister for Health and Minister for Sport) ‘Abbott Government Commitment to Mental Health’ (Media Release, 10 October 2013).

40 Ibid.

## Key concepts

44. There are several key conceptual issues that underpin this Inquiry:
- definitions of disability;
  - the meaning of ‘equal recognition’;
  - recognition as ‘persons’ before the law;
  - legal capacity; and
  - supported and substitute decision-making.

## Definitions of disability

45. ‘Disability’ may be defined in different ways and for different purposes. However, definitions of disability are not static and approaches to defining disability have shifted over time—particularly from a ‘medical’ to a ‘social’ approach. The medical model of disability ‘uses biomedical explanations which locate disability within the individual in terms of pathology’.<sup>41</sup> The social model describes disability in terms of the interaction between a person’s disability and the external world. It is evident in the Preamble of the CRPD

Disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>42</sup>

46. The CRPD does not include detailed definitions of ‘disability’ or ‘persons with disabilities’ in its definition section. Rather, article 1 states that

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

47. For the purposes of this Inquiry the ALRC will take a broad encompassing approach to definitions of disability, as reflected in the CRPD.<sup>43</sup> This definition includes: sensory, neurological, physical, intellectual, cognitive and psychosocial disability.

## Equal recognition before the law

48. The Terms of Reference state that, for the purposes of this Inquiry, equal recognition before the law and legal capacity ‘are to be understood as they are used in the CRPD: including to refer to the rights of people with disability to make decisions

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41 Piers Gooding, ‘Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law’ (2013) 20 *Psychiatry, Psychology and Law* 431, n 3.

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

43 Other definitions may be found in, eg, Australian Bureau of Statistics, *Disability, Australia, 2009, Cat No 4446.0* (2011); *Disability Discrimination Act 1992* (Cth) s 4(1).

and act on their own behalf'. The concept of equality therefore emphasises independent decision-making by people with disability.

49. Professor Terry Carney states that equality, in the sense used in article 12, 'can be variously formulated'

It can be expressed as a purely *formal* concept (ie an 'opportunity') or in more substantive terms, as an achievement of distributive equity. It can be conceived as a universal right of citizenship for all, or as a special standard for particular groups (such as the disabled aged). And it also raises notoriously complex issues about respect for diversity and the right to make poor choices (the so-called 'dignity of risk').<sup>44</sup>

50. The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD)<sup>45</sup> emphasised that the idea of equality reflected in article 12 is essentially about the exercise of human rights: 'equality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights'.<sup>46</sup> Rather than providing additional rights, article 12 of the CRPD 'simply describes the specific elements required to ensure the right to equality before the law for people with disabilities on an equal basis with others'.<sup>47</sup>

51. In this Inquiry, the ALRC is considering how equal recognition of people with disability as persons before the law and their ability to exercise legal capacity is denied or diminished in laws and legal frameworks within the Commonwealth jurisdiction. This requires a consideration of the thresholds of legal capacity across the range of areas set out in the Terms of Reference. It also focuses on the exercise of decision-making. The key element in equal recognition as understood in the CRPD is the embracing of a human-rights based model of disability that involves a supported decision-making paradigm rather than a substituted decision-making one.

### **Recognition as 'persons' before the law**

52. The Terms of Reference require a consideration of recognition of people with disability 'as persons before the law'. This language reflects article 12(1) of the CRPD, that 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law'.<sup>48</sup>

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44 Terry Carney, 'Guardianship, "Social" Citizenship and Theorising Substitute Decision-Making Law' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law* (Springer, 2012) 3.

45 The UNCRPD is the treaty-monitoring body for the CRPD which monitors the Convention, primarily through the state party reporting process.

46 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [1].

47 Ibid.

48 The term 'States Parties' is used in this Issues Paper to ensure consistency with the terminology in the CRPD.

53. To be recognised ‘as persons’ is the first question in any consideration of legal capacity. Certain people may be denied recognition of their ability to act in law, or to have ‘legal standing’.<sup>49</sup> Professor Bernadette McSherry explains that

at various times in different societies, certain groups have been viewed as not having legal ‘personhood’ or standing. The extinction or suspension of legal standing, sometimes referred to as ‘civil death’, was once seen as a necessary consequence of conviction. Similarly, women, children under the age of majority and those with mental and intellectual impairments have been and continue to be viewed in some societies as not having legal standing. Paragraph (1) of Art 12 states that ‘persons with disabilities have the right to recognition everywhere as persons before the law’, thereby requiring states parties to ensure that those with disabilities are not treated differently when it comes to legal standing.<sup>50</sup>

54. In its Draft General Comment on article 12, the UNCRPD emphasised that ‘there are no circumstances permissible under international human rights law where a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited’.<sup>51</sup>

### **Legal capacity**

55. The Terms of Reference require consideration of Commonwealth laws and legal frameworks that deny or diminish the ability of people with disability to exercise ‘legal capacity’. This language reflects article 12(2) of the CRPD, that ‘States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. The Terms of Reference state that, for the purposes of this Inquiry, legal capacity is to be understood as it is used in the CRPD.

56. The concept of legal capacity in the CRPD contains two aspects: ‘legal standing’ and ‘legal agency’. Legal standing is the ability to hold rights and duties; legal agency is the ability to exercise these rights and duties to perform acts with legal effects. The UNCRPD explains that ‘legal capacity to be a holder of rights entitles the individual to the full protection of her rights by the legal system’.<sup>52</sup>

57. Legal capacity sets the threshold for undertaking certain actions that have legal consequences. For example, legal capacity to enter into a range of transactions may have an age threshold as a benchmark of when a person is regarded as being able to act

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49 For example, the early laws of marriage in the common law treated the husband and wife as one: the wife’s legal personality merged with that of her husband. When the *Statute of Wills 1540* granted the power to devise real estate, an explanatory statute was passed in 1542 to clarify that this power did not extend to married women; nor to infants and ‘lunatics’.

50 McSherry, Bernadette, ‘Legal Capacity under the Convention on the Rights of Persons with Disabilities’ (2012) 20 *Journal of Law and Medicine* 22, 23.

51 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [5].

52 The right to recognition as a legal agent is also reflected in Article 12(5) CRPD, which outlines the duty of States Parties to ‘take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit and shall ensure that persons with disabilities are not arbitrarily deprived of their property: Ibid [11]. See also McSherry, Bernadette, ‘Legal Capacity Under the Convention on the Rights of Persons with Disabilities’ (2012) 22 *Legal Issues* 23.



independently and with binding effect—to have legal ‘agency’. Legal capacity also includes cognitive abilities with respect to understanding that have been developed both through the common law and by statute.

58. There are other examples of levels of understanding for legal transactions that have been developed through the common law, such as with respect to contracts and wills.<sup>53</sup> The definitions in these contexts focus on the nature of the transaction and the level of understanding required for legal agency. They are usually invoked when a transaction is later challenged on the basis of a lack of capacity. The common law—including doctrines of equity—also includes protective doctrines for vulnerable people such as undue influence and unconscionable transactions.<sup>54</sup> These are distinct questions from formal arrangements for decision-making support.

59. The starting point at common law is a presumption of legal capacity.<sup>55</sup> This common law approach is now reflected in some guardianship legislation.<sup>56</sup> The *NDIS Act* also includes an assumption of capacity in s 17A(1)

People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.<sup>57</sup>

60. Article 12 of the CRPD reinforces the assumption of legal capacity. While legal capacity is a distinct concept from mental capacity,<sup>58</sup> the UNCRPD commented that the CRPD ‘does not permit perceived or actual deficits in mental capacity to be used as justification for denying legal capacity’.<sup>59</sup> Rather, its focus is on the support that may be needed for the exercise of legal capacity. Defining capacity for decision-making purposes in this Inquiry arises principally in the context of making formal arrangements for decision-making under state and territory guardianship laws and the question of what kind of models are appropriate in light of the CRPD.

### Supported and substituted decision-making

61. In the consideration of arrangements to assist people with disability in areas of decision-making, the principal concern in the discussion surrounding the meaning and

53 Contracts: *Blomley v Ryan* (1954) 99 CLR 362. Wills: *Banks v Goodfellow* (1870) LR 5 QB 549. See also: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 7.

54 See, eg, J D Heydon and M J Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 14.

55 For example, in the context of wills, a person is presumed to have the legal capacity to make a will and it is for those who challenge a testator’s capacity to bring evidence of incapacity: *Bull v Fulton* (1942) 66 CLR 295. The presumption of capacity arises if the will is rational on its face and is duly executed. See, eg, GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) ch 2. This was expressed in the legal maxim ‘*omnia praesumuntur rite et somniter esse acta*’: all acts are presumed to have been done rightly and regularly.

56 *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1, (WA) s 4(3).

57 See also *Mental Capacity Act 2005* (UK) addresses this explicitly by providing that individuals are assumed to have capacity to make decisions unless otherwise established: *Mental Capacity Act 2005* (UK) s 1.

58 See, eg, the distinction between medical and legal perspectives in Terry Carney, above n 44.

59 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law.

effect of article 12 of the CRPD is the distinction made between the concepts of ‘substitute’ and ‘supported’ decision-making.

62. Decision-making supports and arrangements for people with disability take many forms along a spectrum, including:

- informal arrangements—usually involving family members, friends or other supporters;
- formal pre-emptive arrangements—anticipating future loss of legal capacity through enduring powers of attorney (financial), enduring guardianships (lifestyle) and advance care directives (health); and
- formal arrangements—where a court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual’s behalf.

63. For Aboriginal and Torres Strait Islander people with disability and those from culturally and linguistically diverse backgrounds, decision-making may also have a collective quality.

64. In September 2013, the UNCRPD focused attention on the distinction made between the concepts of substitute and supported decision-making in its Draft General Comment on Article 12.

65. What is meant by the distinction? As the Committee explained, ‘support’ is a broad term—‘capable of encompassing both informal and formal support arrangements, and arrangements of varying type and intensity’.<sup>60</sup> It then spelled out its understanding of the difference between a ‘support’ model and a ‘substitute’ one.

66. A *supported* model includes ‘a cluster of various support options which give primacy to a person’s will and preferences and respect human rights norms’ and, while supported decision-making regimes ‘can take many forms’, they must incorporate key provisions to ensure compliance with article 12.<sup>61</sup> Supported decision-making processes prioritise personal autonomy and recognise that individuals should be empowered with information to make decisions—even bad ones (acknowledging the dignity of risk).<sup>62</sup>

67. A *substituted* decision-making regime has different characteristics and can also take many forms. The common defining elements, as understood by the UNCPRD, are where

- 1) legal capacity is removed from the individual, even if this is just in respect of a single decision,
- 2) a substituted decision-maker can be appointed by someone other than the individual, and this can be done against the person’s will, and
- 3) any decision made by a substitute decision-maker is bound by what is believed to be in the

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60 Ibid [15].

61 Ibid [25].

62 McSherry, Bernadette, ‘Legal Capacity Under the Convention on the Rights of Persons with Disabilities’, above n 52, 26.

objective ‘best interests’ of the individual—as opposed to the individual’s own will and preferences.<sup>63</sup>

68. In the Draft General Comment, the UNCRPD suggested that substitute decision-making regimes should be abolished and replaced by supported decision-making regimes and the development of supported decision-making alternatives. Most importantly, the Committee commented that ‘[t]he development of supported decision-making systems in parallel with the retention of substituted decision-making regimes *is not sufficient to comply with Article 12*’.<sup>64</sup> Central to the Committee’s understanding of article 12, is that support for persons with disabilities ‘must never amount to substitute decision-making’.<sup>65</sup>

69. The Draft General Comment of the UNCRPD was prompted by what it described as ‘a general misunderstanding of the exact scope of the obligations of States Parties under Article 12’.<sup>66</sup> Australia’s view, as expressed through its Interpretative Declaration in respect of article 12, is that the CRPD allows for fully supported or substituted decision-making arrangements. However, the Declaration notes that such arrangements may only be made where they are necessary, as a last resort, and subject to safeguards.<sup>67</sup> The UNCRPD commented on the Interpretative Declaration in its concluding observations on the initial report of Australia to the Committee in September 2013. The Committee noted the referral to the ALRC of this Inquiry, but expressed concern ‘about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity’.<sup>68</sup>

70. The appointment of substitute decision-makers in Australia occurs under state and territory laws. Guardians and administrators are vested with power to make decisions on behalf of people deemed unable to make decisions for themselves.<sup>69</sup> A key issue for States Parties is what amounts to a substitute decision-making regime within the understanding of the UNCRPD as expressed in the Draft General Comment. For example, would a regime that contains elements 1 and 2 in paragraph 67 above, but which has a subjective focus and not an objective lens in element 3, be regarded as an acceptable *supported* decision-making model, and not a *substituted* decision-making model as understood by the UNCRPD?

71. A subjective focus is one that takes the view of the person—what the person would have wanted—rather than an objective ‘best interests’ assessment. A subjective focus is one that reflects the autonomy of the individual; an objective focus may be seen to be paternalistic.

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63 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [23].

64 Ibid [24]. Emphasis added.

65 Ibid [15].

66 Ibid [3].

67 Australia, *Interpretative Declaration: Article 12 UN Convention on the Rights of Persons with Disabilities*, 17 July 2008. Canada made a similar declaration.

68 Committee on the Rights of Persons with Disability, above n 15, [24].

69 McSherry, Bernadette, ‘Legal Capacity Under the Convention on the Rights of Persons with Disabilities’, above n 52, 26.

72. A critical evaluation of all assisted decision-making models is called for in light of the UNCRPD's comments. This Inquiry provides an opportunity to contribute to this process and the ALRC will watch with interest the final General Comment in due course. Key issues will involve:

- the language of the model—the extent to which the terminology itself reflects older paternalistic concepts;
- the practice of the courts and tribunals in appointing guardians—the time period and scope of the appointment, and the accountability and review mechanisms with respect to any decision-making assistance given; and
- the characterisation of the duties of the appointees—are they objective ('best interests') models, or subjective (what the person wants/would have wanted)?

### **Framing principles**

73. In this Inquiry, the ALRC considers that, in defining the new policy settings in the form of specific framing principles, assistance may be derived from both the international and domestic arenas. The ALRC considers that five interlinking principles are strongly evident: dignity; equality; autonomy; inclusion and participation; and accountability.

### **Dignity**

74. The theme of 'dignity' emerges clearly in recent literature regarding people with disability. Importantly, it is seen as a 'relational concept' as it comes into play in transactions between individuals and between individuals and the State.<sup>70</sup> In the international context, dignity is one of the guiding principles of the CRPD.<sup>71</sup> The first paragraph in the Preamble recalls 'the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth' of 'all members of the human family'. Dignity is also recognised in a number of other international human rights instruments.<sup>72</sup>

75. In the domestic context, the NDS prioritises the concept of dignity in its principles.<sup>73</sup> Similarly, the PC identified human dignity as 'an inherent right' of persons with disability and suggested that dignity as a human being is linked to self-determination, decision-making and choice.<sup>74</sup>

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70 Lee Ann Bassier, 'Human Dignity' in Marcia Rioux, Lee Ann Bassier and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2010) 21.

71 *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 3(a).

72 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

73 Australian Government, *National Disability Strategy 2010–2020*, 22.

74 Productivity Commission, 'Review of the Disability Discrimination Act 1992 (Cth)' (30 Vol 1, 2004) 182.

## Equality

76. The UNCRPD commenced its Draft General Comment on article 12 of the CRPD in September 2013 by saying that '[e]quality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights'.<sup>75</sup> Similarly, article 5 prohibits all discrimination on the basis of disability and requires States to promote equality;<sup>76</sup> and articles 6 and 7 emphasise equality for women and children.

77. In the domestic context, the NDS principles emphasise equality of opportunity.<sup>77</sup> A range of Commonwealth laws also protect the equality of people and proscribe discrimination on the basis of disability—for example, the DDA. Similarly, in the ACT and Victoria, specific human rights legislation reinforces the 'right to recognition and equality before the law'.<sup>78</sup>

78. The concept of equality is also considered above at paragraphs 48 to 51 in the discussion of equal recognition before the law.

## Autonomy

79. Autonomy is a significant principle underlying the ability of persons with disabilities to exercise legal capacity. The principle of autonomy is enshrined in the general principles of the CRPD<sup>79</sup> and is a key principle of the NDS.<sup>80</sup> The objects and principles of the NDIS also reflect the notion of autonomy.<sup>81</sup>

80. Autonomy can be understood in two distinct senses. A focus on the individual emphasises ideas of self-agency. A focus on the individual in relation to others is expressed in the concept of 'relational autonomy'. This understanding of autonomy connects to respect for the family as the 'natural and fundamental unit group unit of society' that is entitled to protection by States Parties.<sup>82</sup> Such a view sits comfortably with the social model of disability and a shift in emphasis towards supported decision-making, which 'acknowledges that individuals rely to a greater or lesser extent on others to help them make and give effect to decisions'.<sup>83</sup>

75 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [1].

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

77 Australian Government, *National Disability Strategy 2010–2020*, 22.

78 *Human Rights Act 2004* (ACT) s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

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

80 Australian Government, *National Disability Strategy 2010–2020*, 22.

81 *National Disability Insurance Scheme Act 2013* (Cth) ss 3, 4.

82 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) art 23(1); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993) rule 9.

83 Gooding, above n 41, 435.

81. At times, tensions may arise between the role of the family in providing support to people with disability to build their capacity for autonomy and their often protective role, which may limit the individual autonomy of a person with disability.

### **Inclusion and participation**

82. Closely related to the principles of dignity and equality, the principles of inclusion and participation are central to many contemporary perspectives on disability, particularly to the social model. This essentially suggests that ‘whilst a person might have an impairment, their disability comes from the way society treats them, or fails to support them’.<sup>84</sup> It has been suggested that promoting inclusion, through legal and social mechanisms, is a significant way of reducing these social barriers.<sup>85</sup>

83. The inclusion and participation of people with disability is a commitment that is grounded in both international law and in Australia’s domestic policy aims.<sup>86</sup> One of the principles of the CRPD is ‘full and effective participation and inclusion in society’.<sup>87</sup> At a domestic level, the Australian Government’s social inclusion agenda specifically prioritised people with disability in the goal of reducing disadvantage.<sup>88</sup> An emphasis on inclusion has important consequences for education, workforce participation and economic security, as people with disability are seen as ‘citizens with rights, not objects of charity’.<sup>89</sup> Further, one of the objects of the *NDIS Act* is to facilitate greater community inclusion of people with a disability.<sup>90</sup>

84. In the NDS, inclusion is seen to involve a consultative and collaborative approach to law reform and policy development.<sup>91</sup> As it is ‘the principle that we are all entitled to participate fully in all aspects of society ... that we all have something to contribute’,<sup>92</sup> the NDS recognises the need to include people with disability and their carers in consultation with government to develop a ‘shared agenda’.<sup>93</sup> Thus, inclusion is also linked with civic participation, voting and public office.

85. The concept of inclusion refers both to the inclusion of persons with disability in social and public life and inclusion within the community of people with disability. Accordingly, the NDS expressly notes the importance of recognising diversity within the community of persons with disability, particularly due to the intersection of multiple disadvantage.<sup>94</sup> Age, sex, sexuality, ethnicity, socio-economic status and

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84 Productivity Commission, ‘Disability Care and Support’, above n 29, 98.

85 Ibid.

86 Ibid 203.

87 *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 3(c).

88 Australian Government Department of the Prime Minister and Cabinet, *Social Inclusion Policy* (2010).

89 Australian Government, *National Disability Strategy 2010–2020*, 16.

90 *National Disability Insurance Scheme Act 2013* (Cth) s 3.

91 Australian Government, *National Disability Strategy 2010–2020*, 16.

92 Melinda Jones, ‘Inclusion, Social Inclusion and Participation’ in Lee Ann Bassier, Marcia Rioux and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2012) 57.

93 Australian Government, *National Disability Strategy 2010–2020*, 15.

94 Ibid 14.

location are all factors that also shape a person's lived experience.<sup>95</sup> Therefore, particular emphasis is placed on the need to address the variety of needs and perspectives that exist.

### Accountability

86. The concept of accountability has a number of key components. The first is the need for systemic and specific accountability mechanisms and safeguards associated with measures that relate to arrangements for the exercise of legal capacity.<sup>96</sup>

87. One important consequence of the shift towards empowering persons with disability to exercise their full legal capacity, is the need to ensure that any 'supporters' who fulfil a supportive or assisted decision-making role are properly accountable. Article 16(1) of the CRPD stresses the need for States Parties to take

all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

88. Consequently, an important focus of any reform relating to decision-making schemes is to ensure the inclusion of effective accountability mechanisms, both at a systemic and practical level.

89. Another important component is the accountability and responsibility of people with disability for their decisions, recognising that with rights come responsibilities.

**Question 3.** The ALRC has identified as framing principles: dignity; equality; autonomy; inclusion and participation; and accountability. Are there other key principles that should inform the ALRC's work in this area?

### Capacity and decision-making

90. The meaning of legal capacity and a broader conceptual discussion of equal recognition before the law, capacity, and substitute and supported decision-making is included above in paragraphs 61 to 72 of this Issues Paper.

91. To determine whether an individual has capacity to make a particular decision at a particular point in time, it is necessary to consider the:

- meaning of legal capacity;
- relevant standard of capacity; and
- means of assessing whether the person can meet the required standard.<sup>97</sup>

<sup>95</sup> Ibid.

<sup>96</sup> Discussed below at paragraph 113.

<sup>97</sup> See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 98–99.

92. Relevant to an assessment of whether a person is able to meet the relevant capacity standard is consideration of what decision-making arrangements might need to be put in place to assist them to exercise legal capacity.

93. At a practical level, it may also be necessary to identify the circumstances, or the triggers that might lead to questions about whether an individual can meet the relevant capacity standard, and to ensure appropriate safeguards and review of decisions about capacity.

### **What is the relevant standard of capacity?**

94. The CRPD does not contain a particular capacity standard. Rather, it requires States Parties to ensure that people with disability ‘enjoy legal capacity on an equal basis with others in all aspects of life’.<sup>98</sup> However, a number of overseas jurisdictions have incorporated detailed incapacity standards and a presumption of capacity—for example, under the *Mental Capacity Act 2005* (UK).

95. In Australia, there is no uniform standard for capacity. Each area of the law has developed a standard of capacity generally relevant to the transaction in question. For example, in some contexts the relevant standard is that the person be of ‘sound mind, memory and understanding’,<sup>99</sup> in others there is a need to understand the nature and significance of the particular transaction or activity.<sup>100</sup>

96. The question of capacity and the need for a capacity standard arises in a range of contexts, particularly in the context of guardianship laws. However, there is significant variation across jurisdictions. For example, in Victoria there are a number of standards, including that the person must be unable to make reasonable judgments or understand the nature and effect of a document.<sup>101</sup> In NSW, the standard is where a person is totally or partially incapable of managing his or her person.<sup>102</sup>

97. The assessment of capacity may lead to particular outcomes, including decision-making arrangements being put in place.

### **How do you assess capacity?**

98. Once it is determined that a person’s capacity needs to be assessed, the key issue is then how such an assessment should occur and what impact that assessment has on determining an individual’s legal capacity.

99. There are a number of approaches to assessing capacity for the purposes of assisted decision-making arrangements. The two traditional approaches are the ‘status’ approach and the ‘cognitive’ approach.<sup>103</sup> Broadly, the status approach automatically

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98 *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(2).

99 For example, for testamentary capacity in the context of wills.

100 For example, voting or marriage.

101 *Guardianship and Administration Act 1986* (Vic).

102 *Guardianship Act 1987* (NSW).

103 This is conceptually similar to a medical model of disability, as distinct from the social model of disability.



equates certain characteristics or impairments with the loss of legal capacity. The UNCRPD has expressed the view that status-based approaches and systems violate article 12 of the CRPD ‘because they are facially discriminatory, as they permit the imposition of a substituted decision-maker solely on the basis of an individual having a particular diagnosis’.<sup>104</sup>

100. The cognitive approach focuses on the decision-making capacity of an individual in relation to specific decisions and encompasses the concept of mental capacity.<sup>105</sup> This approach tends to be favoured under guardianship legislation. As Bernadette McSherry explains, the cognitive approach can be divided into two assessment approaches:

- the outcome approach, which examines the reasonableness of a decision made by a person by the extent to which it deviates from past decisions or social norms; and
- the functional approach which focuses on decision-making capacities specific to particular issues and is recognised by various legislative regimes including the *Mental Capacity Act*.<sup>106</sup>

101. However, the CRPD suggests that functional and outcome-based tests of capacity that lead to the denial of legal capacity may contravene article 12 if they ‘are either discriminatory or disproportionately affect the right of persons with disabilities to equality before the law’.<sup>107</sup>

102. At a practical level, the means of assessing capacity occurs in various ways. One of the key approaches involves capacity assessment principles. For example, the assessment of capacity in NSW is guided by the use of capacity assessment principles under the NSW *Capacity Toolkit*. The assessment principles included in the Toolkit are:

- always presume a person has capacity;
- capacity is decision specific;
- don’t assume a person lacks capacity based on appearances;
- assess the person’s decision-making ability not the decisions they make;
- respect a person’s privacy; and
- substitute decision-making is a last resort.<sup>108</sup>

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104 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [5].

105 McSherry, Bernadette, ‘Legal Capacity Under the Convention on the Rights of Persons with Disabilities’, above n 52, 24.

106 Ibid.

107 United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [5].

108 New South Wales, Attorney General’s Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008) 27.

103. In its 2012 report, the Victorian Law Reform Commission recommended that Victorian guardianship legislation should contain similar capacity assessment principles.<sup>109</sup>

### **A uniform approach to legal capacity?**

104. As outlined above at paragraphs 16 to 18, in this Inquiry the ALRC is directed to have regard to, or to consider: the interaction of Commonwealth, state and territory laws, modelling in Commonwealth laws and legal frameworks, and uniformity between as well as complementary Commonwealth, state and territory laws.<sup>110</sup>

105. Against this backdrop, as definitions of capacity and approaches to assessing capacity vary across jurisdictions, the ALRC considers it may be useful to develop a national, or nationally consistent, approach to capacity. The ALRC is interested in stakeholder comments on the need for, and viability of, developing such an approach and what the most appropriate mechanism might be. For example, there appear to be a number of potential regulatory options for achieving this, including through:

- enactment by the Commonwealth of national legislation, as under the *Mental Capacity Act 2005* (UK);<sup>111</sup>
- the adoption of mirror legislation across jurisdictions, where one jurisdiction enacts capacity legislation which is then enacted in similar terms in the other jurisdictions—such as the uniform Evidence Acts;
- a complementary applied law scheme, which would involve one jurisdiction enacting capacity legislation which would then be applied by other jurisdictions—such as the Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth);
- a combined scheme, combining mirror legislation and applied law approaches under which some jurisdictions would enact their own mirror legislation and other jurisdictions apply Commonwealth law as a law of the state—such as the regulation of gene technology;
- a principles-based regulatory approach, involving development of a set of principles which could then be applied across a range of areas and contexts as appropriate, favouring reliance on high level principles rather than detailed prescriptive rules; or
- consideration of the matter by a whole of government or cross-jurisdictional body or forum.

106. Some of the key issues to consider in developing any national or nationally consistent approach will include: the Constitutional basis of the scheme; the interaction

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109 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27.

110 *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(b)–(e).

111 See discussion of Constitutional issues at paragraphs 29 and 30.

between Commonwealth, state and territory legislation; administrative law issues; scope and processes for amendment; and the jurisdiction of the courts.

107. The ALRC welcomes stakeholder submissions on whether there should be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity. The ALRC is particularly interested in what any such mechanism should look like, the key elements, and its interaction with existing state and territory legislative regimes.

**Question 4.** Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the key elements?

## The role of family, carers and supporters

108. Family, carers and other informal supporters play a central role in caring for, and supporting, people with disability in Australia. Their involvement affects the ability of people with disability to access and engage with a range of systems and services, as well as more broadly, their ability to exercise legal capacity.

109. There are a number of legal and policy frameworks which recognise the important role of people in caring and supporting roles in the lives of people with disability.<sup>112</sup> At a Commonwealth level, there is a National Carer Recognition Framework which encompasses the *Carer Recognition Act 2010* (Cth) and the National Carer Strategy.<sup>113</sup> The *Carer Recognition Act* aims to increase recognition and awareness of the role carers play in providing daily care and support to people with disability.<sup>114</sup> The Act includes a definition of carer, establishes the Statement for Australia's Carers, outlines different parties' responsibilities in respect of the Statement and sets up reporting and consultation arrangements for certain Australian Public Service agencies.<sup>115</sup> The National Carer Strategy gives effect to the *Carer Recognition Act* and complements the NDS.<sup>116</sup> It contains six priority areas for action and is supported by an implementation plan and annual progress reports.<sup>117</sup>

110. Family members, carers and other supporters are involved across a range of aspects of the daily life of people with disability. Their involvement in the context of decision-making varies depending on the nature of the person's disability and the decision, and may range from informal support, to appointment as a nominee for the

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112 Australian Government, *National Disability Strategy 2010–2020*, 47.

113 The Framework was developed in response to 'Who Cares...? Report on the Inquiry into Better Support for Carers' (Standing Committee on Family, Community, Housing and Youth, 2009).

114 There is also carer recognition legislation in place in some states and territories.

115 *Carer Recognition Act 2010* (Cth). See also: Department of Social Services, *Carer Recognition Act 2010 Guidelines*.

116 Australian Government, *National Carer Strategy* (2011).

117 Ibid.

purposes of Centrelink or the NDIS, or formal appointment as a guardian or administrator. In the course of this Inquiry it will be necessary to consider the appropriate mechanisms for recognising, and if necessary regulating, these roles.

111. It will also be important to recognise the challenges faced by family, carers and supporters of people with disability. Such challenges may include: access to information, services and supports; financial difficulties; barriers to participation in education, training and employment; and the social and emotional difficulties that may arise from caring for a person with disability.<sup>118</sup>

112. As a result, the ALRC is interested in stakeholder comments on how the role of family, carers and other supporters of people with disability should be recognised in law.

**Question 5.** How should the role of family members, carers and others in supporting people with disability to exercise legal capacity be recognised by Commonwealth laws and legal frameworks?

### **Accountability, safeguards, review and complaint**

113. Article 12 of the CRPD provides that States Parties shall ensure that ‘all measures that relate to the exercise of legal capacity provide for proportionate, appropriate and effective safeguards to prevent abuse’. Such safeguards should ensure that measures relating to the exercise of legal capacity:

- respect the rights, will and preferences of the person with disability;
- are free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;
- apply for the shortest time possible; and
- are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>119</sup>

114. In addition to ensuring compliance with these elements, there is a need to ensure there are broader safeguards in the form of appropriate monitoring and audit mechanisms as well as avenues for review and the making of complaints in each of the legislative areas under review. There are also a number of relevant system-wide safeguards. These include anti-discrimination law, the general protections provisions under the *Fair Work Act 2009* (Cth), competition and consumer protection law, and administrative law. These legislative safeguards all provide frameworks within which

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118 See, eg, National People with Disabilities and Carers Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (2009); Australian Government, *National Carer Strategy* (2011).

119 *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(4).

people with disability can challenge actions and decisions that may deny or diminish their equal recognition before the law or their ability to exercise legal capacity.

### Anti-discrimination law

115. Anti-discrimination legislation exists at Commonwealth, state and territory levels. It prohibits both direct and indirect discrimination against people on the basis of their disability across a range of areas.<sup>120</sup>

116. At the Commonwealth level, the DDA and the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) are the key pieces of legislation relevant to this Inquiry. The operation of the DDA is outlined at paragraphs 40 to 42 above. The AHRC Act establishes the AHRC, and outlines its functions as well as a number of procedural matters.<sup>121</sup>

117. There appear to be range of systemic issues relating to the nature and operation of the anti-discrimination system which may limit the ability of people with disability to access the system. Broadly, these include:

- the individualised nature of the complaint system;
- failure to cover intersectional discrimination;<sup>122</sup>
- costs associated with proceeding past conciliation;
- reliance on, and the operation of, exceptions;<sup>123</sup>
- coverage; and
- the role and powers of the AHRC.<sup>124</sup>

118. The UNCRPD has expressed its concern that ‘the scope of protected rights and grounds of discrimination in the [DDA] is narrower than under the [CRPD] and does not provide the same level of legal protection to all persons with disabilities’.<sup>125</sup> In

120 *Disability Discrimination Act 1992* (Cth). See also: *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act* (NT); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1984* (WA).

121 In addition, the Regulations list additional grounds which will constitute discrimination under the AHRC Act, including mental, intellectual or psychiatric, or physical disability: *Australian Human Rights Commission Regulations 1989* (Cth) reg 4.

122 Intersectional discrimination refers to circumstances where an individual is discriminated against on the basis of more than one (or a combination of) grounds/protected attributes. For example, a woman with disability may experience discrimination because of both her sex and disability.

123 There are a number of exceptions to the DDA including in relation to special measures, superannuation and insurance, acts done under statutory authority, infectious diseases, pensions and allowances and migration: *Disability Discrimination Act 1992* (Cth) ss 45–58. The insurance and superannuation exceptions are discussed in more detail later in this Issues Paper.

124 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 40.

125 Committee on the Rights of Persons with Disability, above n 15 [14].

particular, the Committee noted the need to strengthen the DDA to address intersectional discrimination.<sup>126</sup>

119. In the context of the DDA, there appear to be uncertainty and concerns about concepts such as ‘reasonable adjustments’<sup>127</sup> and ‘unjustifiable hardship’<sup>128</sup> and their operation in practice.

120. The ALRC is interested in stakeholder comments on necessary changes to the DDA to ensure it provides an accessible and appropriate avenue of complaint for people with disability who experience discrimination.

**Question 6.** What issues arise in relation to Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to the *Disability Discrimination Act 1992* (Cth) to address these issues?

### General protections provisions

121. The general protections provisions under the *Fair Work Act* provide statutory protection for people with disability seeking to challenge discriminatory treatment in the employment context.

122. Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections.<sup>129</sup> These general protections, among other things, prohibit an employer from taking ‘adverse action’ against an employee or prospective employee on the basis of a ‘workplace right’.<sup>130</sup> Measures that may constitute ‘adverse action’ taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer,<sup>131</sup> as well as threatening any of the above.

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<sup>126</sup> Ibid [15].

<sup>127</sup> *Disability Discrimination Act 1992* (Cth) ss 5, 6. Note the term ‘reasonable accommodation’ is used in the CRPD: *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 2, 5(3).

<sup>128</sup> *Disability Discrimination Act 1992* (Cth) s 11.

<sup>129</sup> *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

<sup>130</sup> A ‘workplace right’ exists where a person: is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body; is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or has the capacity under a workplace law to make a complaint or inquiry to a person or body to seek compliance with that workplace law or instrument, or in the case of an employee, in relation to their employment: Ibid s 341.

<sup>131</sup> Ibid s 342(1).

123. The *Fair Work Act* prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons and outlines a number of grounds of discrimination.<sup>132</sup> Disability is a specific protected attribute. As a result, people with disability may be able to pursue a claim of discrimination in the context of employment under the general protections provisions.<sup>133</sup>

124. Stakeholders and commentators have identified a range of general difficulties with the current general protections provisions. The ALRC is interested in stakeholder comments on how the provisions are operating in practice and whether they require amendment to ensure they are useful for people with disability and contribute to the equal recognition of people with disability before the law and their ability to exercise legal capacity.

125. In addition, while the general protections provisions only apply in the context of employment, there is substantial overlap between the provisions and Commonwealth anti-discrimination legislation. The introduction of general protections provisions provides employees with an additional choice of forum for complaints of discrimination; although that choice ‘can be a complex exercise’.<sup>134</sup> As a result, the ALRC also seeks comments on what ways, if any, Commonwealth anti-discrimination legislation or the *Fair Work Act* could be amended to improve or clarify their interaction in circumstances of disability discrimination.

**Question 7.** In what ways, if any, should the general protections provisions under the *Fair Work Act 2009* (Cth) be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 8.** There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, should this legislation be amended to improve or clarify their interaction in circumstances of disability discrimination?

### Administrative law

126. Administrative decisions may affect people with disability across many areas. Such decisions include, for example, those made by Centrelink in relation to the

132 Ibid s 351(1). Similarly, s 772(1)(f), which extends coverage to non-national system employees, prohibits termination of an employee’s employment on the basis of the same discriminatory grounds. However, s 772(1)(f) is more limited than s 351(1) as it only applies to termination of employment, rather than ‘adverse action’ more generally.

133 Ibid ss 351(1), 772(1)(f).

134 C Andreas, *Intersections Between ‘General Protections’ under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries*, Working Paper No 47 (2009), Centre for Employment Law and Labour Relations 11.

Disability Support Pension,<sup>135</sup> decisions made in relation to Medicare services and decisions on income tax.<sup>136</sup>

127. Administrative law regulates government decision-making to ensure decisions affecting people are fair, efficient and effective. There are a range of potential avenues for review of government decisions in the Commonwealth system:<sup>137</sup>

- a request for reasons to be given;<sup>138</sup>
- an internal review by officers in the agency;
- merits review of the decision by an independent tribunal such as the Administrative Appeals Tribunal (AAT);<sup>139</sup>
- judicial review of the lawfulness of most statutory administrative decisions<sup>140</sup> as well as the actions of Commonwealth officers;<sup>141</sup> and
- Ombudsman investigation of complaints of government maladministration.<sup>142</sup>

128. Difficulties experienced by people with disability in pursuing review of government decisions may include:

- lack of knowledge about the avenues of review;
- navigating complex processes; and
- concerns about not wanting to ‘rock the boat’ or challenging government authority where it may result in a loss of services or payment.

129. There may be particular problems for young people with disability, Aboriginal and Torres Strait Islander people with disability and people with disability from culturally and linguistically diverse (CALD) backgrounds in navigating the administrative law system.

130. Within the administrative law framework, there have been a number of developments to improve accessibility of information for people with disability. For example, in response to the commencement of the NDIS, the AAT established a disability division and appointed new members to review decisions by the NDIA.<sup>143</sup>

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135 *Social Security (Administration) Act 1999* (Cth).

136 *Income Tax Assessment Act 1997* (Cth); *Income Tax Assessment Regulations 1997* (Cth).

137 Administrative Review Council, *Australian Administrative Law Policy Guide* 2011 [1.2].

138 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 28.

139 *Administrative Appeals Tribunal Act 1975* (Cth). Other federal tribunals are: the Social Security Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal and the Veterans’ Review Board.

140 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 25.

141 By the High Court of Australia under the *Commonwealth of Australia Constitution Act* (Cth) s 75(v); the Federal Court of Australia under *Judiciary Act 1903* (Cth) s 39B.

142 *Ombudsman Act 1976* (Cth) s 5.

143 *National Disability Insurance Scheme Act 2013* (Cth) s 103. The new members of the AAT are Professor Ronald McCallum AO in NSW, Lynne Coulson Barr in Victoria, Sandra Taglieri in Tasmania, and Ian Thompson in South Australia.



Other initiatives that may facilitate the participation of people with disability in administrative review at the AAT include:

- an Easy English guide to the AAT;<sup>144</sup>
- a video message about the AAT review process;<sup>145</sup>
- a Practice Direction for decisions relating to NDIA decisions;<sup>146</sup> and
- disability awareness training of staff and members.

131. Administrative law is an important mechanism through which citizens may hold the government accountable for their decisions. People with disability are users of a range of government services, including health, disability services and social security. The ALRC is interested in the experiences of people with disability seeking review of government decisions, particularly the aspects of the law or legal frameworks which assisted or hindered their exercise of rights.

**Question 9.** What issues arise in relation to review of government decisions that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to administrative law to address these issues?

### Competition and consumer law

132. People with disability face a variety of issues relating to competition and consumer law, ranging from being unable to access housing that does not accommodate their needs to having difficulty understanding consumer contracts. Consumer complaints are among the most common legal problems facing Australians,<sup>147</sup> including for people with disability.<sup>148</sup>

133. A range of consumer law issues may arise for people with disability, such as:

- in relation to consumer guarantees on aids, equipment and assistive technologies, where required;<sup>149</sup>

144 National Disability Insurance Agency Australia, *About the Administrative Appeals Tribunal* (11 November 2013) <<http://www.ndis.gov.au/>>.

145 Administrative Appeals Tribunal Australia, *Video about the AAT Review Process—Information for DisabilityCare Australia Applicants* (11 November 2013) <<http://www.aat.gov.au/>>.

146 Administrative Appeals Tribunal, *Review of DisabilityCare Australia Decisions*, Practice Direction (1 July 2013).

147 Christine Coumarelos et al, 'Legal Australia-Wide Survey Legal Need in Australia' (Law and Justice Foundation of NSW, 2012), xiv.

148 Ibid 19.

149 Faulty hearing aids, electric beds and wheelchairs which are not replaced or fixed promptly are likely to result in, respectively, sustained loss of hearing, discomfort or loss of mobility and even injury.

- understanding contract terms for people with cognitive disability, for example, contracts with credit reporting agencies to conduct and correct credit reports; and
- complaint and dispute resolution.<sup>150</sup>

134. The object of the *Competition and Consumer Act 2010* (Cth) is to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.<sup>151</sup> The first limb of the *Competition and Consumer Act* relates to competition. As the regulator, the Australian Competition and Consumer Commission (ACCC) must apply rules to make sure that businesses compete fairly with each other, resulting in greater choice for consumers, reduced prices and improved quality of goods and services.<sup>152</sup> The test for anti-competitive conduct is whether or not it has ‘a purpose, effect or likely effect’ of substantially lessening competition.<sup>153</sup> People with disability are affected by ‘substantially lessened competition’<sup>154</sup> in the market if, for example, there are only two suppliers of a specialist service like making vehicle modifications in a state and they agree with each other to set the same high price for the service.<sup>155</sup>

135. The second limb of the *Competition and Consumer Act* relates to fair trading and consumer protection. The Australian Consumer Law (ACL) is a single, national consumer law, introduced in 2011.<sup>156</sup> The ACL covers unfair contract terms, consumer rights protection, product safety law, unsolicited consumer agreements covering door to door and telephone sales and lay-by agreements.<sup>157</sup> The ACL is enforced by the ACCC and each state and territory’s consumer agency. The Australian Securities and Investments Commission (ASIC) enforces aspects of the ACL relating to financial services.

136. The *National Consumer Credit Protection Act 2009* (Cth) and related legislation and regulations prescribe responsible lending practices.<sup>158</sup> Responsible lending obligations apply to licensed lenders such as banks, credit unions and finance companies and lessors for consumer leases and credit assistance providers such as

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150 The Telecommunications Industry Ombudsman provides free dispute resolution services under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

151 *Competition and Consumer Act 2010* (Cth) s 2.

152 European Commission, *Benefits of Competition Policy* (11 November 2013) <<http://ec.europa.eu/>>.

153 *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38; (2000) ATPR 41-752, French J.

154 *Competition and Consumer Act 2010* (Cth) ss 44ZZRS, 44ZZX, 45, 45B, 45C, 46, 49, 50.

155 Australian Competition and Consumer Commission, *Cartels* (5 August 2013) <<http://www.accc.gov.au/>>.

156 The Australian Consumer Law (ACL) commenced on 1 January 2011. The ACL applies nationally and in all states and territories, and to all Australian businesses. For transactions that occurred prior to 1 January 2011, the previous national, state and territory consumer laws continue to apply. See, Council of Australian Governments, *The Intergovernmental Agreement for the Australian Consumer Law* 2 July 2009.

157 *Competition and Consumer Act 2010* (Cth), sch 2.

158 *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth); *National Consumer Credit Protection (Fees) Act 2009* (Cth); *National Consumer Credit Protection Regulations 2010* (Cth); *National Consumer Credit Protection (Fees) Regulations 2010* (Cth).

mortgage and finance brokers.<sup>159</sup> The *National Credit Consumer Protection Act* stipulates that a credit service must be not ‘unsuitable’ for the consumer. The assessment of suitability must be undertaken by the business with regard to the circumstances of the consumer by making all reasonable enquiries.<sup>160</sup> This may provide a useful model for other laws in protecting the rights of people with disability, in particular because the onus of proof is reversed and it allows accommodation of the various circumstances of people with disability as consumers. The ALRC is interested in stakeholder comments on the appropriateness of this model and other competition and consumer law issues that affect the equal recognition and legal capacity of people with disability.

**Question 10.** What issues arise in relation to competition and consumer law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to competition and consumer law to address these issues?

## Privacy

137. Privacy is an overarching issue across the Inquiry. It also requires consideration in the specific legislative areas and systems under review. Respect for the privacy of people with disability is inextricably linked to their dignity and autonomy. Article 22 of the CRPD protects the privacy of personal and health information of people with disability.

138. Some of the key privacy issues for people with disability may arise from:

- information sharing between government departments and agencies, for example, between Centrelink and the Australian Taxation Office;
- information sharing among health practitioners for medical treatment; and
- living with family, in shared accommodation or residential care facilities and the affect of such arrangements on intimate relationships.

139. The *Privacy Act 1988* (Cth) is the principal piece of Commonwealth legislation that regulates privacy and sets out an individual’s right to protection of their personal information.<sup>161</sup> Ten National Privacy Principles contained in the *Privacy Act* regulate the collection, storage and use of personal information by Australian Government

159 Australian Securities and Investments Commission, *Credit Licensing: Responsible Lending Conduct*, Regulatory Guide 209, September 2013.

160 Ibid.

161 Other privacy-related legislation includes: *Telecommunications Act 1997* (Cth); *Telecommunications (Interception and Access) Act 1979* (Cth); *National Health Act 1953* (Cth); *Data-matching Program (Assistance and Tax) Act 1990* (Cth); *Crimes Act 1914* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *Personally Controlled Electronic Health Records Act 2012* (Cth); *Personal Property Securities Act 2009* (Cth).

agencies, large private sector organisations and certain small businesses.<sup>162</sup> The Office of the Australian Information Commissioner (OAIC) protects an individual's personal information under the *Privacy Act* and other privacy-related legislation, among other functions.<sup>163</sup> The OAIC receives complaints about breaches of privacy, may initiate an own-motion investigation regarding an interference with privacy and can conduct privacy audits of Australian and ACT government agencies.<sup>164</sup> Various state and territory laws and legal frameworks also regulate privacy.<sup>165</sup>

140. Privacy of health information may be a significant concern for people with disability. Health and genetic information is 'sensitive information' that warrants stronger protections under the current and proposed Privacy Principles.<sup>166</sup> Separate Commonwealth legislation protects healthcare identifiers<sup>167</sup> and electronic health records.<sup>168</sup>

141. From July 2012, Australians have been able to choose to register for their own eHealth record.<sup>169</sup> An eHealth record is 'an electronic summary of an individual's key health information'.<sup>170</sup> Initially, it contains basic patient information. As the eHealth record system develops, it will contain health information such as treatments, medications and allergies,<sup>171</sup> which will allow the patient and doctors, hospitals and other healthcare providers to view and share information.<sup>172</sup>

142. People with disability may be particularly wary of the possible mishandling of their health information. For example, people with psychosocial disability are

162 *Privacy Act 1988* (Cth) sch 3. Australian Government agencies and large private sector organisations as well as certain small businesses—like those that provide health services—are also required to abide by the National Privacy Principles (NPPs). From 12 March 2014, 13 Australian Privacy Principles will replace the NPPs.

163 The OAIC is an independent government agency that oversees privacy, freedom of information and government information policy: *Australian Information Commissioner Act 2010* (Cth).

164 Office of the Australian Information Commissioner, *What We Do* (11 November 2013) <<http://www.oaic.gov.au/>>.

165 The OAIC and the ACT Human Rights Commission regulate privacy in the ACT; in NSW, the Information and Privacy Commission oversees the *Privacy and Personal Information Protection Act 1998* (NSW) and *Health Records and Information Privacy Act 2002* (NSW); the Office of the Information Commissioner undertakes freedom of information and privacy functions under the *Information Act 2002* (NT) in the Northern Territory; in Queensland, the Office of the Information Commissioner protects personal information held by the public sector under the *Information Privacy Act 2009* (Qld); the *Information Privacy Principles Instruction* which applies to government agencies is overseen by the Privacy Committee of South Australia; the Tasmanian Ombudsman investigates complaints against public and local government sectors under the *Personal Information and Protection Act 2004* (Tas); and in Western Australia, there is no legislative privacy regime except for confidentiality provisions covering government agencies and some privacy principles in the *Freedom of Information Act 1992* (WA).

166 *Privacy Act 1988* (Cth) s 6(1).

167 *Healthcare Identifiers Act 2010* (Cth).

168 *Personally Controlled Electronic Health Records Act 2012* (Cth).

169 Office for the Australian Information Commissioner, *EHealth Record System*, OAIC Enforcement Guidelines Consultation Paper, August 2012.

170 Department of Health, *EHealth-General Consumer FAQs* (11 November 2013) <<http://www.ehealth.gov.au/>>.

171 Office for the Australian Information Commissioner, *EHealth Record System*, OAIC Enforcement Guidelines Consultation Paper, August 2012.

172 Department of Health, above n 170.

reportedly apprehensive about disclosing their health conditions and treatment due to the stigma attached to their conditions.<sup>173</sup> Under the existing legislative framework for eHealth,<sup>174</sup> there are protections against the mishandling of information. Individuals can control their own eHealth record, including by choosing to restrict which healthcare providers can access it and what information is included.<sup>175</sup> Unauthorised collection, use or disclosure of eHealth record information is both a contravention of the *Personally Controlled Electronic Health Records Act 2012* (Cth) and an interference with privacy under the *Privacy Act*.<sup>176</sup> In November 2013, a review of the Personally Controlled Electronic Health Record program was announced to identify issues with implementation, including key clinician and patient usability concerns.<sup>177</sup>

143. The ALRC invites comment on how the privacy concerns of people with disability, as applicable in each of the specific legislative areas under review, could be addressed by changes to Commonwealth laws and legal frameworks.

**Question 11.** What issues arise in relation to privacy that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to privacy to address these issues?

## The National Disability Insurance Scheme

144. The introduction of the NDIS followed long-term concern about the inefficiency and inequitable nature of disability support arrangements in Australia and calls for the introduction of a new mechanism for funding support for people with disability. The NDIS represents a significant new area of Commonwealth responsibility and expenditure.

145. The *NDIS Act* establishes the framework for the scheme, including: the objects and principles under which the scheme will operate; criteria for access; participant plans; nominees; administration; privacy; and review.

146. The *NDIS Act* is supplemented by National Disability Insurance Scheme Rules covering areas such as becoming a participant, nominees, children, plan management,

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173 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 149.

174 *Personally Controlled Electronic Health Records Act Personally Controlled Electronic Health Records Act 2012* (Cth); *Personally Controlled Electronic Health Records Regulation 2012* (Cth).

175 Office for the Australian Information Commissioner, *EHealth Record System*, OAIC Enforcement Guidelines Consultation Paper, August 2012.

176 *Ibid.*

177 The Hon Peter Dutton MP (Minister for Health and Minister for Sport) 'Federal Government to Review Electronic Health Records' (Media Release, 3 November 2013).

and protection and disclosure of information.<sup>178</sup> There are also Operational Guidelines, including about nominees and supporting participant's decision-making.<sup>179</sup>

147. While the *NDIS Act* contains a number of principles, including a presumption of capacity and a focus on providing people with disability support to exercise capacity,<sup>180</sup> this Inquiry provides an opportunity to ask whether the Act and the mechanisms and processes established under the Act appropriately reflect equal recognition before the law and legal capacity.

148. Some of the potential issues relevant to this Inquiry include:

- the interaction between the NDIS and NDIS nominees with nominees under other Commonwealth systems as well as existing state and territory guardians and administrators;
- the powers of the CEO of the NDIA;
- management of individual packages<sup>181</sup> and the potential for fraud and financial abuse;
- service provider regulation and registration processes;
- the need for appropriate safeguards and monitoring; and
- the interaction between the NDIS and other systems—such as health, education and housing—and determining issues of funding responsibility and access to supports.

149. While the NDIS is still in its roll-out phase, and many of these issues are likely to become clearer in time, the ALRC welcomes stakeholder feedback on these issues.

**Question 12.** What changes, if any, should be made to the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

178 See, eg, *National Disability Insurance Scheme (Children) Rules 2013* (Cth); *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth); *National Disability Insurance Scheme (Plan Management) Rules 2013* (Cth); *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (Cth); *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013* (Cth); *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (Cth).

179 National Disability Insurance Agency, *Nominees-Overview*, Operational Guideline (2013); National Disability Insurance Agency, *Nominees-Whether a Nominee Is Necessary*, Operational Guideline (2013); National Disability Insurance Agency, *General Conduct-Supporting Participant's Decision-Making*, Operational Guideline (2013).

180 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) ss 4–6, 17A.

181 Individual packages may be self-managed, managed using a Plan Management Provider, or managed by the National Disability Insurance Agency.

## Nominees and children's representatives

### *Nominees*

150. The *NDIS Act* makes provision for the appointment of two types of nominees—plan nominees and correspondence nominees. A plan nominee may be appointed to prepare, review or replace the participant's plan, or manage the funding for supports under the participant's plan. A correspondence nominee may be appointed to do any other act that may be done by a participant under, or for the purposes of, the *NDIS Act*.<sup>182</sup>

151. The *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) (*Nominee Rules*) concern whether a nominee should be appointed, who should be appointed as a nominee, duties of nominees, and cancellation and suspension of nominees.<sup>183</sup> Aspects of a number of other rules are also relevant to the appointment, role and responsibilities of nominees.<sup>184</sup>

152. There appear to be a number of potential issues with respect to nominees under the *NDIS*. In addition to the intersection issues discussed below at paragraph 157, the *Nominee Rules* provide, for example, that nominees may be appointed on the initiative of a delegate, as distinct from at the request of the participant. While this is only to occur in rare and exceptional circumstances and as a last resort,<sup>185</sup> the ALRC is interested in stakeholder comments on this or any other nominee-related issues arising under the *NDIS Act* and Rules.

### *Children's representatives*

153. The person responsible for engaging with the *NDIS* on behalf of a child is known as a child's representative. A child's representative has a duty to determine the wishes of the child and act in their best interests.<sup>186</sup> Under the *NDIS Act*, the person or persons with parental responsibility for the child will usually be the child's representative, unless a delegate is satisfied that this is not appropriate and makes a written determination that another person is to be the child's representative.<sup>187</sup>

154. In deciding who, other than those with parental responsibility, should be a child's representative, an *NDIA* delegate must have regard to a range of factors including:

- the preferences of the child;
- the desirability of preserving family relationships and informal support networks;

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182 *National Disability Insurance Scheme Act 2013* (Cth) s 79.

183 A number of other rules are also relevant, including for example, *National Disability Insurance Scheme (Children) Rules 2013* (Cth).

184 See, eg, *Ibid*.

185 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.4, pt 3.14.

186 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 76.

187 *Ibid* s 74(1).

- existing arrangements in place between the person and the child; and
- the ability of the person to work in conjunction with other representatives and supporters of the child in the child's best interests.<sup>188</sup>

155. The child's representative has a duty to consult, wherever practicable, the guardian of the child and any other person with parental responsibility as well as 'any other person who assists the child to manage their day-to-day activities and make decisions'.<sup>189</sup>

156. The ALRC is interested in stakeholder comments on the *NDIS Act* and Rules in relation to determining a child's representative and whether any changes are necessary to ensure children with disability are able to exercise legal capacity in the context of the NDIS, and that there are appropriate safeguards with respect to children's representatives.

### ***Interaction with state and territory systems***

157. The interaction between NDIS nominees, children's representatives and existing support networks, guardians and administrators, is a source of potential uncertainty and tension. The NDIA's Nominee Overview Operational Guidelines state that

Most participants who need a nominee already have some kind of formal or informal arrangement in place to help them live their lives. DisabilityCare Australia staff should be sensitive to and respectful of these pre-existing support networks. There is no intention for DisabilityCare Australia to override these support networks, the focus should be on strengthening and, where necessary, formalising the support networks of the participant.<sup>190</sup>

158. The ALRC is interested in hearing from stakeholders about whether changes need be made to the nominee or child's representative provisions under the *NDIS Act* or Rules as well as social security legislation and state and territory guardianship and administration systems to clarify or address these interaction issues.

**Question 13.** What changes, if any, should be made to the nominee or child's representative provisions under the *National Disability Insurance Scheme Act 2013* (Cth) or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 14.** What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

- (a) the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules;

<sup>188</sup> *National Disability Insurance Scheme (Children) Rules 2013* (Cth) r 3.4.

<sup>189</sup> *Ibid* r 6.4.

<sup>190</sup> National Disability Insurance Agency, *Nominees—Overview*, Operational Guideline (2013). See also: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 3.14. Note, DisabilityCare Australia is now known as the National Disability Insurance Scheme Agency.



- (b) social security legislation; and
- (c) state and territory systems for guardians and administrators?

## Specific legislative areas

### Employment

159. The CRPD recognises the right of persons with disabilities to work on an equal basis with others. This includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that is open, inclusive and accessible.<sup>191</sup> The CRPD also outlines a range of measures States Parties must take to give effect to the right to work.

160. Australia has among the lowest rates of employment of people with disability in the OECD.<sup>192</sup> Against this backdrop, there are a range of issues with respect to people with disability and employment. However, many of the issues do not necessarily relate to capacity or decision-making, which is the focus of this Inquiry, including for example:

- low levels of employment participation by people with disability and the relationship between employment and social security systems;
- the operation of the Job Services Australia and Disability Employment Services system, including the conduct of employment services assessments;
- the operation of Australian Disability Enterprises;
- the operation of the supported wage system and business service wage assessment tool;<sup>193</sup>
- declining employment of people with disability in the Commonwealth public service; and
- whether positive duties with respect to the employment of people with disability, should be imposed, for example, through quotas or targets.

161. While acknowledging these issues, the ALRC is particularly interested in stakeholder comments on ways in which Commonwealth laws and legal frameworks related to employment either diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity.

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191 *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 27.

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

193 See also, Committee on the Rights of Persons with Disability, above n 15, [49], [50].

**Question 15.** In what ways, if any, do Commonwealth laws or legal frameworks relating to employment diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

### **Citizenship rights, public service and board participation**

162. Australia has obligations under international law to guarantee that people with disability can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity to vote and be elected.<sup>194</sup> Accordingly, it is necessary to examine legislation and legal frameworks that restrict the right of people with disability to exercise citizenship rights and fully participate in society.

163. There are a number of areas relating to citizenship and participation in society in which people with disability may not be recognised as equal before the law, and face difficulties exercising their legal capacity. These areas include: electoral matters, holding public office; jury service; participating on boards; and identification documents.

#### ***Electoral matters***

164. There are two key issues in relation to electoral matters that potentially deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity. The first relates to being placed or retained on the Electoral Roll and the right to vote. The second issue relates to the manner in which people with disability are able to exercise their right to vote.

165. The *Commonwealth Electoral Act 1918* (Cth) provides that people are not entitled to have their name placed or retained on the Electoral Roll, or to vote, where they are incapable of understanding the nature and significance of enrolment and voting by reason of 'unsound mind'.<sup>195</sup> An elector may object to the enrolment of another person on the basis of the unsound mind provisions. However, the Electoral Commissioner may dismiss an objection if it is not accompanied by evidence from a medical practitioner, and in determining the objection the Australian Electoral Commission requires evidence from a medical practitioner prior to removing any

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194 *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 29. See also right to vote under *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) art 25; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 21.

195 *Commonwealth Electoral Act 1918* (Cth) s 93(8). There are similar provisions in state and territory electoral legislation. See also *Roach v Electoral Commissioner* [2007] HCA 43.

elector from the Roll.<sup>196</sup> There are a variety of avenues to challenge a decision to remove a person's name from the Roll.<sup>197</sup>

166. In addition to concerns about the eligibility to vote and inclusion on the Roll, other issues affecting people with disability include:

- the lack of easily understood information about candidates, voting and preferences;
- difficulties enrolling;
- access to voting (though noting this has improved somewhat with wheelchair accessible polling stations, telephone voting and postal voting);
- lack of secrecy for people with disability casting a vote; and
- fines associated with not voting where people with disability are not assisted to vote.

167. The UNCRPD has recommended that Australia 'enact legislation restoring the presumption of the capacity of persons with disabilities to vote and exercise choice; and to ensure that all aspects of voting in an election are made accessible to all citizens with a disability'.<sup>198</sup>

168. The ALRC welcomes comments from stakeholders about the unsound mind provisions, as well as other aspects of electoral laws and legal frameworks to ensure people with disability are recognised as equal before the law and able to exercise legal capacity.

169. A related point which arises from the use of terminology and concepts such as 'unsound mind' is the use of particular language in laws and legal frameworks and its impact on the equal recognition of people with disability before the law or their ability to exercise legal capacity. The ALRC is interested in stakeholder comments on these issues.

**Question 16.** What changes, if any, should be made to the *Commonwealth Electoral Act 1918* (Cth) or the *Referendum (Machinery Provision) Act 1984* (Cth) to enable people with disability to be placed or retained on the Roll of Electors or to vote?

**Question 17.** What issues arise in relation to electoral matters that may affect the equal recognition before the law of people with disability or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

196 *Commonwealth Electoral Act 1918* (Cth) ss 116(4), 118(4).

197 Including under the *Commonwealth Electoral Act 1918* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and by the Ombudsman.

198 Committee on the Rights of Persons with Disability, above n 15, 52.

**Question 18.** How does the language used in Commonwealth laws and legal frameworks affect the equal recognition of people with disability before the law or their ability to exercise legal capacity?

### ***Public office***

170. Under some legislation, a person can be removed from public office if it is decided that he or she cannot or may not be able to fulfil the responsibilities of that office, or due to incapacity. For example, s 72 of the *Australian Constitution* provides that Justices of the High Court of Australia

shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.<sup>199</sup>

171. Each jurisdiction has differing requirements prior to the removal of a person from public office and a range of reforms to the process have been recommended, including through a more interventionist approach by Parliament, or through relevant oversight bodies such as the Judicial Commission.<sup>200</sup>

172. There is a need to balance ensuring those people holding public office have the capacity to do so—to maintain public confidence in the office or system—with ensuring people with disability are able to hold public office if they wish to do so and they are able to perform the function of that office. As a result, the ALRC is interested in stakeholder comments on the ways in which Commonwealth laws and legal frameworks relating to holding public office diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity.

173. A related issue is the significant under-representation of people with disability holding public office. It may be that this under-representation arises as a result of the combination of cultural attitudes and stereotypes, cost and selection or pre-selection processes. While the ALRC welcomes stakeholder comment on this issue, the changes required to address these types of issues may require reform going beyond the focus of this Inquiry, that of laws and legal frameworks.

**Question 19.** In what ways do Commonwealth laws and legal frameworks relating to holding public office diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

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199 *Commonwealth of Australia Constitution Act* (Cth) s 72. In NSW, judicial officers may be removed from office under the *Constitution Act 1902* (NSW) and the *Judicial Officers Act 1986* (NSW) by a resolution of both Houses of Parliament that a request be made and presented to the Governor requesting the judicial officer's removal.

200 New South Wales, *Parliamentary Debates*, Legislative Council, 13 October 2011, 6149-6177 (David Shoebridge, Peter Phelps, Adam Searle and Matthew Mason-Cox).

### *Jury service*

174. Jury service is a fundamental aspect of citizenship and a key dimension of the legal capacity of adults in Australia. Article 29 of the CRPD provides in part that States Parties must actively promote an ‘environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs’.<sup>201</sup> However, some people with disability in Australia may be ineligible for jury service on the basis of their disability.

175. Under the *Federal Court of Australia Act 1976* (Cth), the Sheriff must remove a person’s name from the jury list<sup>202</sup> if satisfied that: the person is not qualified to be a juror; or the Sheriff would excuse the person from serving on the jury if the person were a potential juror.<sup>203</sup> The Sheriff may, either on application or on his or her own initiative, excuse a potential juror from serving on the jury if satisfied that they are ‘in all the circumstances, unable to perform the duties of a juror to a reasonable standard’.<sup>204</sup> 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 DDA.<sup>205</sup> People with a disability may therefore be prevented from serving on a jury, depending upon the Sheriff’s interpretation of the duties of a juror and the meaning and factors considered in assessing a reasonable standard.

176. However, in the Commonwealth context, the usual mode of trial is by judge alone, and trial by jury is only provided for in exceptional cases. Consequently, potential issues relating to people with disability and jury service primarily arise in a state and territory context. By way of example, under the *Jury Act 1977* (NSW) a number of categories of people are ineligible to serve as jurors, including ‘a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror’.<sup>206</sup> To determine whether a person is unable to discharge such duties, the Sheriff sends a notice to each person included on the supplementary jury roll containing a questionnaire. The respondent’s answers to the questionnaire are then used, among other things, to determine whether or not the person is ineligible to serve as a juror. The current practice appears to be that information indicating a potential juror is deaf or blind is considered sufficient to ground a determination that a person is ineligible to

201 *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 29. The jury system is a component of the public administration of justice and an aspect of the conduct of public affairs for the purposes of this article. See also: *Ibid* arts 12, 13, 21.

202 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.

203 *Ibid* s 23DO.

204 *Ibid* ss 23DQ, 23DR.

205 *Ibid* s 23DQ (Note).

206 *Jury Act 1977* (NSW) s 6(b), sch 2. See also: New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006).

serve as a juror.<sup>207</sup> In particular, blind and deaf jurors appear to have been excluded from serving on juries on the basis of a number of concerns, including about comprehension and the presence of a 13th person in the jury room where an interpreter is used.<sup>208</sup>

177. The ALRC is interested in stakeholder comments on ways to ensure people with disability are not automatically excluded from jury service on the basis of their disability alone. The ALRC also welcomes feedback on the way in which issues relating to the provision of support and reasonable accommodation could be addressed,<sup>209</sup> and what amendments may be needed to Commonwealth, state and territory laws or legal frameworks to give effect to these ideas.

178. The ALRC is aware that individual communications have been made to the UN Committee on this issue pursuant to the Optional Protocol to the CRPD.<sup>210</sup> The ALRC will consider any outcome arising from these communications in the course of the Inquiry.

**Question 20.** What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure that people with disability are not automatically or inappropriately excluded from serving on a jury or being eligible for jury service?

### **Board participation**

179. Two key issues arise with respect to the participation of people with disability on boards, management committees and in similar roles. The first relates directly to the capacity of an individual to fulfil the obligations of the relevant position. The second issue is a broader one with respect to the representation of people with disability on Australian boards.

180. Under the *Corporations Act 2001* (Cth), a person with disability can be disqualified from holding the office of director. For example, a personal representative or trustee may be appointed to administer a person's estate or property if he or she is the only director and shareholder of a proprietary company and cannot manage the

207 New South Wales 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.

208 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.

209 See, eg, New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Final Report No 114 (2006).

210 *Optional Protocol to United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008). See also 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.

company ‘because of mental incapacity’. In turn, that personal representative or trustee may appoint another person as the director of the company.<sup>211</sup>

181. Under state and territory associations legislation and model rules, such as the Model Constitution under the *Associations Incorporation Act 2009* (NSW), a casual vacancy of the relevant board or management committee occurs if a member becomes a ‘mentally incapacitated person’.<sup>212</sup>

182. These provisions primarily relate to circumstances in which a person’s capacity is fluctuating or diminishing and reveal a key tension between the need to ensure people in such positions are able to fulfil their role and comply with relevant duties and obligations; and considerations of capacity, in particular the appropriate way to determine and describe capacity in this context. The terminology used in such provisions also reflects broader concerns relating to the appropriateness of terminology used in legislation and legal frameworks.

183. The ALRC is interested in stakeholder comments on how to balance these issues, and in particular on the ways in which Commonwealth laws and legal frameworks relating to membership of, or participation on, boards diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity.

**Question 21.** In what ways do Commonwealth laws and legal frameworks relating to membership of, or participation on, boards diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

### ***Identity documents***

184. In a range of circumstances, individuals are required to prove their identity by providing original documents, often from an approved list. In some circumstances, people with disability may have difficulty obtaining the primary legally recognised forms of identification, such as a driver’s licence or other forms of identification which have the same level of integrity.

185. Many of the potential issues relating to identity documents arise under state and territory legislation. However, to the extent that difficulties obtaining nationally recognised identification documents deny or diminish the equal recognition before the law of people with disability, or their ability to exercise legal capacity, there may need to be a nationally consistent approach to this issue.

186. The ALRC is interested in stakeholder comments on the contexts in which the issue of identification documents may arise for people with disability and the types of

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211 See, eg, *Corporations Act 2001* (Cth) s 201F.

212 *Associations Incorporation Act 2009* (NSW) Model Constitution cl 18(2)(f).

identity documents required, as well as the changes which could be made to address such issues for people with disability.

**Question 22.** What issues arise in relation to identity documents for people with disability? In what ways, if any, should Commonwealth laws and legal frameworks relating to identity documents be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

### **Access to justice, evidence and federal offences**

187. The ALRC seeks submissions on the experiences of people with disability in accessing justice in a number of areas discussed below, as well as more broadly about circumstances in which people with disability may not be recognised as equal before the law, or are unable to exercise their legal capacity on an equal basis with others.

#### ***Access to justice***

188. Access to justice is ‘access to information, support and opportunities’ to enjoy and exercise one’s rights in law.<sup>213</sup> 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 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.<sup>214</sup>

189. People with disability may be involved in court processes in a number of different roles. Regardless of the capacity in which a person with disability engages with the justice system, a number of personal and systemic issues may affect their ability to attain access to justice, for example:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;
- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and

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213 Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009).

214 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 12 and 15 are also related to access to justice.



- misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses.<sup>215</sup>

### ***Communication***

190. Appropriate communication is key to people with disability knowing about their rights and exercising them in all areas of life. There are a number of aspects relevant to communication and accessibility in the context of access to justice. For example, improving access to justice for people with disability may require: changes to the language used in legislation; the provision of legal information in alternative formats; and the availability and use of augmentative and alternative communication or interpreters. The ALRC is interested in hearing about communication and accessibility issues which may limit the ability of people with disability to participate meaningfully in the justice system, as well as examples of best practice approaches to addressing such issues.

### ***Capacity to give instructions and participate in litigation***

191. A person's capacity affects their ability to engage with the justice system at a broad level, but also to start or defend proceedings, to give instructions, or to settle a matter. As a result, in considering the ability of people to access justice a number of issues arise, including:

- the relevant standard of capacity;<sup>216</sup>
- the appropriate approach in circumstances where capacity is an issue in the course of proceedings and the role of legal practitioners representing a client who may lack capacity, as well as opponents in circumstances where the person is self-represented;
- the appointment of litigation or case guardians, including the involvement of Public Guardians and Trustees and associated costs implications; and
- capacity and authority to give instructions to legal representatives.

### ***Criminal law***

192. Despite under-reporting,<sup>217</sup> people with disability are over-represented as victims of crime, especially violence, fraud, sexual assault of women and abuse and neglect of children.<sup>218</sup> The reasons underlying such under-reporting may include: lack of understanding that what happened is a crime or willingness of others to consider it a crime; difficulties communicating with police and officers of the court; and dependence on others to take legal action.<sup>219</sup>

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215 Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice' [2009] *Justice Issues* 10 Law and Justice Foundation of NSW.

216 See discussion of relevant standards of capacity at paragraphs 94 to 97.

217 Jim Simpson and Linda Rogers, 'Intellectual Disability and Criminal Law' 19.

218 See, eg, 'A Question of Justice: Access to Participation for People with Disabilities in Contact with the Justice System' (Disability Council of NSW, 2003) 28.

219 Gray, Forell and Clarke, above n 215.

193. As defendants, people with disability may face difficulties obtaining legal representation or other assistance from the police or the courts that is appropriate to their needs. People with cognitive impairment and psychosocial disability are over-represented in the criminal justice system and studies indicate they are not receiving appropriate or adequate support in detention for their disability.<sup>220</sup> Aboriginal and Torres Strait Islander people with a cognitive or intellectual impairment and mental illness may be particularly vulnerable to a range of legal issues.<sup>221</sup>

**Question 23.** What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?

### *Evidence*

194. People with disability may not be afforded equal recognition before the law when they are witnesses in the justice system. Studies show that certain cultural perceptions of people with intellectual disability, for example, that they do not make credible witnesses, reduce the likelihood of charges actually being laid.<sup>222</sup> Victims or witnesses with an intellectual disability may be seen as ‘unintelligent, untruthful and inconsistent’ in their recounting of events.<sup>223</sup>

195. A witness in court must be competent to give evidence. The *Evidence Act 1995* (Cth) recognises that a person with a mental, intellectual or physical disability may not be competent to give evidence.<sup>224</sup> Competence is defined as ‘the capacity to understand a question about the fact and the capacity to give an answer that can be understood to a question about fact’.<sup>225</sup> Instead of giving sworn evidence, a person who the court finds lacks capacity to give evidence can present an unsworn statement.<sup>226</sup> In this way, the test for competence to give evidence amounts to the capacity to understand the obligation to give truthful evidence.<sup>227</sup> The probative value of the unsworn statement

220 Two major reports on NSW are: ‘People with an Intellectual Disability and the Criminal Justice System’ (80, NSW Law Reform Commission, 1996); Jim Simpson, Meredith Martin and Jenny Green, ‘The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending’ (NSW Council for Intellectual Disability, 2001).

221 The case of Marlon Noble highlighted the issue of people with intellectually disability who are deemed ‘unfit to plead’ being subject to indefinite custody orders. The facts of the case are outlined in legal advice provided by the Special Counsel to the WA Premier, Robert Cock, ‘Report to the Minister for Corrective Services on Mr Marlon Noble’ (WA Parliament, 7 June 2011).

222 Louis Schetzer and Judith Henderson, ‘A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW—Stage 1: Public Consultations’ (Law and Justice Foundation of NSW, August 2003) 218–219.

223 Submission from the NSW Council of Intellectual Disability: *Ibid.*

224 *Evidence Act 1995* (Cth) s 13.

225 *Ibid.*

226 *Ibid.*

227 ‘People with an Intellectual Disability and the Criminal Justice System’, above n 220, ch 7.

will be assessed and the court may refuse to admit evidence that may be unfairly prejudicial to a party, misleading or confusing, or result in undue delays.<sup>228</sup>

196. There is a concern that people with disability are discouraged from participating in the justice system as witnesses because of the test for competence and because courts will not compel people with disability to give evidence if they are satisfied that:

- ‘substantial cost or delay’ would be incurred in ensuring the person would have capacity to understand a question about the matter or to give an answer that can be understood; and
- if there is adequate evidence on the matter at hand, or will be able to be given, from one or more other persons or sources.<sup>229</sup>

197. A number of evidence-related issues arise as a result of language and communication issues. For example, under the *Evidence Act*, interpreter assistance is available ‘unless the witness can understand and speak the English language’ sufficiently to understand and reply to questions put about the fact.<sup>230</sup> A specific provision is made for questioning ‘deaf and mute witnesses’ in ‘any appropriate way’ in the *Evidence Act*.<sup>231</sup> The right of these witnesses to have an interpreter is not affected by the provision.<sup>232</sup> However, there are concerns that the Australian Sign Language (Auslan) and Braille are not recognised as official languages in courts, that the description of ‘deaf and mute witnesses’ is outmoded and the specification of only people with hearing and speech impairment as potential witnesses may be too limited.

198. In relation to federal offences, the *Criminal Code Act 1995* (Cth) obliges the police to provide special assistance in arranging interpreter and legal services for people with an ‘inadequate knowledge of the English language’ and for people with disability.<sup>233</sup> The *Crimes Act 1914* (Cth) also provides for protection of particular categories of persons such as children, people with disability and Aboriginal and Torres Strait Islander people.<sup>234</sup> These provisions allow for:

- the use of alternative arrangements such as closed-circuit television;<sup>235</sup>
- the presence of one or more persons accompanying the ‘vulnerable person’.<sup>236</sup> Vulnerable persons include children, vulnerable adult complainants and special witnesses;<sup>237</sup>
- the exclusion of members of the public from the courtroom;<sup>238</sup>

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

229 *Ibid* s 14.

230 *Ibid* s 30.

231 *Ibid* s 31.

232 *Ibid* s 31(4).

233 *Criminal Code Act 1995* (Cth) ss 105.5A, 105.31.

234 *Crimes Act 1914* (Cth) Pt IAD Protecting vulnerable persons; ss 23H, 23WG, 23XR relate to Aboriginal and Torres Strait Islander people.

235 *Ibid* ss 15YI, 15YL.

236 *Ibid* s 15YO.

237 *Ibid* ss 15YA, 15YAB(1), 15YAA.

238 *Ibid* s 15YP.

- disallowing inappropriate or aggressive cross-examination;<sup>239</sup>
- ensuring vulnerable persons are not compelled to give further evidence unless it is necessary in the interests of justice;<sup>240</sup>
- ensuring warnings are not given to juries about giving lesser or greater weight to the evidence given by alternate means;<sup>241</sup>
- ensuring officials not interview Aboriginal and Torres Strait Islander people unless an ‘interview friend’ is present or the person has waived that right.<sup>242</sup> An interview friend can be a relative, lawyer, a representative of an Aboriginal legal aid organisation or any other person chosen; and
- in relation to forensic procedures such as taking of fingerprints and blood samples, the presence of parents or lawyers of ‘incapable persons’,<sup>243</sup> who are suspects, offenders or volunteers to act as their interview friends to make requests or objections on behalf of the incapable person.<sup>244</sup> Where the incapable person must be informed of matters, the interview friends must also be informed in a language in which they can communicate with reasonable fluency.<sup>245</sup>

199. The ALRC is interested in stakeholder comments on the effect of these current provisions and whether they are useful for people with disability in giving evidence as witnesses in the justice system on an equal basis with others.

**Question 24.** What issues arise in relation to evidence law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?

### *Federal offences*

200. A federal offence is ‘an offence against the law of the Commonwealth’,<sup>246</sup> and the general principles of criminal responsibility outlined in the *Criminal Code Act* apply to those offences. Issues facing people with disability in relation to federal offences may concern the language used in legislation, the operation of the law, as well as concerns about access to justice<sup>247</sup> and giving evidence.<sup>248</sup>

239 Ibid s 15YE.

240 Ibid s 15YNC.

241 Ibid s 15YQ.

242 Ibid s 23H.

243 Ibid s 23WA. An ‘incapable person’ is defined as an adult who (a) is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

244 Ibid s 23WB.

245 Ibid s 23YE. This includes Auslan and Braille.

246 Ibid s 15A(5).

247 Access to justice is discussed above at paragraphs 188 to 193.

201. The ‘mental impairment’ of a defendant is a defence to criminal responsibility.<sup>249</sup> Mental impairment includes ‘senility, intellectual disability, mental illness, brain damage and severe personality disorder’.<sup>250</sup> Where a person with an intellectual disability is convicted in a state or territory of a federal offence, the court may order a person be released to undertake a specified program or treatment.<sup>251</sup> The ALRC seeks stakeholder comments on the experience of people with disability relating to the assessment by the police, lawyers and the judiciary of their ‘mental impairment’.

202. Decisions by the Commonwealth Director of Public Prosecutions (CDPP) on the prosecution of federal offences may potentially affect people with disability as alleged offenders, defendants, witnesses or victims. The test for the CDPP in deciding to commence or continue a prosecution is if there is ‘a reasonable prospect of a conviction being secured’.<sup>252</sup> The *Prosecution Policy of the Commonwealth* states that, when applying this test, the CDPP should have regard to a number of matters, including the credibility of the witness, the perception of which may be affected by a physical or mental disability.<sup>253</sup>

203. If the CDPP is satisfied there is sufficient evidence to institute or continue a prosecution, the CDPP then determines whether or not there is public interest in pursuing the prosecution.<sup>254</sup> The ‘special vulnerability’ of the alleged offender is taken into account when establishing the public interest and it includes ‘the youth, age, intelligence, physical health and mental health’ of the alleged offender, witness or victim.<sup>255</sup> However, there are many other public interest considerations that may affect cases involving people with disability, such as the attitude of the victim towards prosecution<sup>256</sup> the availability of alternatives to prosecution<sup>257</sup> and the likely length and expense of a trial.<sup>258</sup> The ALRC is interested in stakeholder comments on the application of the law on federal offences, including the impact of prosecutorial discretion on people with disability.

**Question 25.** What issues arise in relation to the law on federal offences that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to federal offences to address these issues?

248 Evidence is discussed above at paragraphs 194 to 199.

249 *Criminal Code Act 1995* (Cth) s 7.3.

250 *Ibid.*

251 *Crimes Act 1914* (Cth) s 20BY.

252 Office of the Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* cl 2.7(f).

253 *Ibid.*

254 *Ibid* cl 2.8.

255 *Ibid* cl 2.10(c).

256 *Ibid* cl 2.10(o).

257 *Ibid* cl 2.10(j).

258 *Ibid* cl 2.10(q).

## Social security, financial services and superannuation

### *Social security*

204. People with disability are ‘less likely to be employed, more likely to be dependent on income support and more likely to live below the poverty line’.<sup>259</sup> Accordingly, the interaction between people with disability, their carers and supporters, and the social security system is central to the lives of many people with disability.

205. The *Social Security Act 1991* (Cth) (the *Social Security Act*) and the *Social Security (Administration) Act 1999* (Cth) form the legislative basis for the social security system in Australia. The *Guide to Social Security Law*, produced by the Department of Social Services (DSS) provides guidance to decision makers in implementing this legislation.<sup>260</sup> Social security law is administered by the Department of Human Services (DHS) through Centrelink. A range of avenues of internal and external review are available for social security-related decisions.<sup>261</sup>

206. The key income support payments of relevance to this Inquiry include: Disability Support Pension and Carer Payment—both pensions; as well as allowances such as Sickness Allowance, Mobility Allowance, Newstart and a range of carer-related allowances. In relation to income support payments, adequacy aside, potential areas of concern for people with disability in this context relate to:

- navigating the social security system, including accessing and understanding relevant information and forms;
- eligibility, including issues associated with obtaining necessary medical evidence and the assessment of capacity;
- participation requirements;<sup>262</sup>
- the consequences of breach of certain requirements;<sup>263</sup> and
- appeals mechanisms.

207. The ALRC is aware of a range of systemic, adequacy and service delivery issues in the context of social security for people with disability, including the complexity of

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259 National People with Disabilities and Carers Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (2009) 34.

260 Department of Social Services, *Guide to Social Security Law* (2013).

261 Administrative law is discussed above at paragraphs 126 to 131.

262 Pensions have historically not included a participation requirement and have been provided on the basis that recipients were not expected to undertake paid work. Allowances are generally paid on the basis that recipients are willing and able to work and as a result have included participation requirements. However, the shift towards a social model of disability has seen greater emphasis on the capacity of people with disability to work. In light of low rates of employment participation by people with disability, this question of participation has come under increased scrutiny. For example, in 2009 the Pension Review stated that pensions paid to those below Age Pension age should actively support people to participate in employment; and in 2012 amendments were made to the rules around hours of work for DSP. See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, *Pension Review Report* (2009).

263 See, eg, National People with Disabilities and Carers Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (2009).

the social security system and difficulties people with disability face navigating the system, issues identified by previous inquiries and reviews. However, the ALRC is particularly interested in stakeholder feedback on issues arising under legislation or legal frameworks (such as policy guides) that affect the equal recognition of people with disability before the law and their ability to exercise legal capacity.

**Question 26.** In what ways do Commonwealth laws and legal frameworks relating to social security diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

### *Nominees*

208. One area of particular relevance to people with disability relates to social security nominees. It engages issues of capacity and raises the interaction of nominee arrangements under social security law, with the NDIS and state and territory appointed guardians and administrators.

209. The *Social Security (Administration) Act* makes provision for a ‘principal’<sup>264</sup> to authorise another person or organisation to enquire or act on the person’s behalf when dealing with DHS. There are four types of arrangements:

- enquiries only;
- correspondence nominees—a person or organisation authorised to act and make changes on the principal’s behalf;<sup>265</sup>
- payment nominees—a person or organisation authorised to receive a principal’s payment into an account maintained by the nominee;<sup>266</sup> and
- a combined payment/correspondence nominee which authorises a person or organisation to enquire, act, and make changes as well as receive payments on behalf of the client.<sup>267</sup>

210. The *Guide to Social Security Law* provides that where a question arises in relation to a principal’s capacity to consent to the appointment of a nominee, or any concerns arise in relation to an existing arrangement, DHS must ‘investigate the situation’.<sup>268</sup> The Guide goes on to provide:

There may be times where a principal is not capable, for example, due to an intellectual/physical constraint or in some cases because the principal is a young child,

264 A ‘principal’ for the purposes of the nominee provisions is a social security payment recipient who has had a nominee appointed to receive either correspondence and/or payments on their behalf: *Social Security (Administration) Act 1999* (Cth) s 123A.

265 Ibid ss 123C, 123H. See also: Department of Social Services, *Guide to Social Security Law* (2013) [8.5.1], [8.5.2].

266 *Social Security (Administration) Act 1999* (Cth) s 123B. See also: Department of Social Services, *Guide to Social Security Law* (2013) [8.5.1], [8.5.2].

267 *Social Security (Administration) Act 1999* (Cth) s 123D(1).

268 Department of Social Services, *Guide to Social Security Law* (2013) [8.5.1], [8.5.2].

of consenting to the appointment of a nominee. In these cases, a delegate may appoint a nominee on behalf of the principal, with attention to supporting evidence, and where the delegate is fully satisfied that the nominee is required and will act in the principal's best interests. The decision made by the delegate to appoint a nominee in these circumstances must be fully documented.

Where a principal has a psychiatric disability, a nominee can be appointed in these instances where there is a court-appointed arrangement such as a Guardianship Order.<sup>269</sup>

211. Nominees have a range of functions and responsibilities, including a duty to act in the best interests of the principal.<sup>270</sup> There are also a number of important safeguards around nominees. For example, nominees are required to advise DHS of any matter that affects their ability to act as a nominee,<sup>271</sup> and DHS may require provision of a statement from payment nominees outlining expenditure of the principal's payments by the nominee.<sup>272</sup>

212. While there is a need to encourage people to act as nominees, given the vital role nominees play in assisting people with disability to engage with the social security system, some aspects of the nominee regime may leave people with disability vulnerable. For example, there does not appear to be legislative provision for a principal to request cancellation of a nominee arrangement.<sup>273</sup> Further, if a correspondence nominee fails to satisfy a particular requirement, the principal is taken to have failed to comply with the requirement which may then have adverse consequences in terms of compliance and payments.<sup>274</sup>

213. The other key issue in the social security context is the interaction of social security nominees with nominees under the NDIS, state and territory appointed guardians and administrators, or powers of attorney.<sup>275</sup>

214. The ALRC is interested in stakeholder comments on the operation of the nominee provisions, including whether there are sufficient and appropriate safeguards in place to protect people with disability from potential exploitation or abuse as well as in relation to the interaction issues highlighted above.

**Question 27.** What changes, if any, should be made to the nominee provisions under the *Social Security (Administration) Act 1999* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

269 Ibid.

270 *Social Security (Administration) Act 1999* (Cth) s 123O.

271 Ibid s 123K.

272 Ibid s 123L. It is a strict liability offence not to comply which attracts a penalty of 60 penalty units. See also Department of Social Services, *Guide to Social Security Law* (2013) [8.5.3].

273 Section 123E of the *Social Security (Administration) Act 1999* (Cth) outlines the specific power to revoke a nominee appointment, but does not appear to make provision for a request by a principal.

274 See, eg, *Social Security (Administration) Act 1999* (Cth) s 123J.

275 See Question 14 following paragraph 158.



### **Banking**

215. Article 12(5) of the CRPD requires States Parties to take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and to ensure that persons with disabilities are not arbitrarily deprived of their property.<sup>276</sup> In practice, a tension emerges between such rights to control and access with the need to protect people with disability from financial abuse and manipulation in conducting their banking and financial activities. There is also a need to ensure the legal validity of financial transactions.

216. The legislative and regulatory framework in relation to banking in Australia is complex and multifaceted.<sup>277</sup> The prudential regulator is the Australian Prudential Regulation Authority (APRA)<sup>278</sup> and the corporate regulator is ASIC.<sup>279</sup> The Financial Ombudsman Service provides independent dispute resolution for consumers and financial institutions.<sup>280</sup> There are also a range of non-binding industry guidelines that may be relevant to the ability of people with disability to engage with the banking industry and to exercise legal capacity in that context. For example, the Australian Bankers' Association (ABA) has developed industry guidelines to assist banks and their employees to protect vulnerable customers from potential fraud or manipulation,<sup>281</sup> and to explain the operation of powers of attorney and administrator arrangements.<sup>282</sup>

217. One of the key issues emerging in this Inquiry in relation to banking is the refusal of some banks to allow people with disability to access or operate a bank account independently, and hesitancy in recognising informal supporters. Such refusal may reflect bank concerns about capacity or financial exploitation.<sup>283</sup> The ABA commented that

Financial exploitation of a vulnerable person is a deeply challenging area for banks. Every customer's situation is unique and banks have an obligation to protect their customers' privacy, maintain the bank's duty of confidentiality, and to not unnecessarily intrude into their customers' lives. To intervene or question a customer inappropriately, or without due consideration and sensitivity, may cause embarrassment for the customer, or possibly damage the customer-banker

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276 *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.

277 See, eg, *Banking Act 1959* (Cth); *Competition and Consumer Act 2010* (Cth) sch 2.

278 *Australian Prudential Regulation Authority Act 1998* (Cth).

279 *Australian Securities and Investments Commission Act 2001* (Cth).

280 An independent review of the FOS is ongoing at the time of writing and is due to report to the FOS Board in December 2013.

281 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013.

282 Australian Bankers' Association Industry Guideline, *Responding to Requests from a Power of Attorney or Court-Appointed Administrator*, June 2013.

283 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 190.

relationship, or even result in greater vulnerability for the customer. Consequently, in cases of suspected financial abuse, it's important to be both vigilant and cautious.<sup>284</sup>

218. Some ABA industry guidelines provide assistance to banks in recognising financial abuse, advocate raising awareness among bank employees, and outline strategies for dealing with a situation of potential financial abuse.<sup>285</sup> Other industry guidelines note that where the capacity of a customer is at issue, it is not the role of the bank to determine capacity,<sup>286</sup> but outline the roles of administrators and guardians, how to recognise their authority, and consider the issue of inconsistency across jurisdictions.<sup>287</sup> The Australian Consumer Law also provides some avenues for protection of people with disability in these instances.<sup>288</sup>

219. Advancements in technology have significantly altered the banking landscape. While some electronic networks and authentication technologies may not be accessible to people with disability, similarly face-to-face services may also be inaccessible or inconvenient.<sup>289</sup>

220. The ALRC is seeking comments on changes to Commonwealth laws and legal frameworks that would address some of these concerns in the context of banking and give effect to article 12(5), while balancing the right of people with disability to exercise legal capacity with the concerns of financial institutions and others around financial abuse and manipulation.

**Question 28.** What issues arise in relation to banking for people with disability? What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure people with disability control their own financial affairs and have equal access to bank loans, mortgages and other forms of financial credit?

### Insurance

221. There are a number of issues of concern with respect to people with disability and insurance. These concerns primarily relate to the availability of insurance products for people with disability; the operation of the insurance exemption under the DDA; and the transparency and accessibility of the actuarial and statistical data upon which insurance underwriting and pricing occurs in relation to people with disability.

284 Australian Bankers' Association, *Financial Abuse Prevention* (12 November 2013) <<http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>>.

285 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013.

286 Australian Bankers' Association Industry Guideline, *Responding to Requests from a Power of Attorney or Court-Appointed Administrator*, June 2013, 2.

287 Ibid 4.

288 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 20, 22–24.

289 The ABA has developed *Guiding Principles for Accessible Authentication* which aim to ensure that all customers, including people with disability, are able to independently access and manage their finances in the context of changing technology: Australian Bankers' Association, *Guiding Principles for Accessible Authentication* (2007).

222. There are particular concerns relating to access to insurance products by people with psychosocial disability, including in relation to ‘life insurance, income protection and disability protection insurance’.<sup>290</sup> The ALRC is interested in submissions which address these potential concerns and ways in which Commonwealth laws or legal frameworks for insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity.

223. There are a range of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation. The exemption under s 46 of the DDA allows insurers, providing certain conditions are satisfied, to:

- refuse to offer a person with disability an annuity or an insurance policy; and
- discriminate on the terms and conditions on which any insurance policy is provided.

224. The conditions are satisfied if the discrimination is:

- based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- reasonable having regard to the matter of the data and other relevant factors; or
- in a case where no such actuarial or statistical data is available, and cannot reasonably be obtained, reasonable having regard to any other relevant factors.<sup>291</sup>

225. The operation of the insurance exemption may potentially raise concerns for people with disability, in particular about:

- the accuracy, relevance and currency of data relied upon by insurers in making decisions about insurance on the basis of disability; and
- what constitutes ‘any other relevant factors’ for the purposes of the exemption, and the interpretation of this phrase with respect to reliance on the exemption.

226. In an insurance context, the difficulty arises in balancing mechanisms that might facilitate access to insurance for people with disability with the need to recognise the purpose and nature of insurance and for insurers to reasonably differentiate on the basis of risk. The ALRC welcomes stakeholder feedback on what changes, if any, should be made to the insurance exemption under the DDA and what additional guidance or supporting material in relation to the application and operation of the insurance exemption would assist people with disability.

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290 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 173.

291 *Disability Discrimination Act 1992* (Cth) s 46.

**Question 29.** In what ways, if any, do Commonwealth laws or legal frameworks relating to insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity?

**Question 30.** What changes, if any, should be made to the insurance exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 31.** What additional guidance or supporting material relating to the application and operation of the insurance exemption under the *Disability Discrimination Act 1992* (Cth) would assist people with disability?

### ***Superannuation***

227. Superannuation, as a form of long-term saving for retirement, serves an important role and, for many Australians, is one of the most significant forms of wealth. The key areas of potential difficulty for people with disability with respect to superannuation, aside from adequacy of superannuation balances, relate to early access to superannuation and the superannuation exemption under the DDA.

228. Generally, superannuation funds cannot be accessed before the member reaches the required ‘preservation age’. However, s 79B of the *Superannuation Act 1976* (Cth) provides limited grounds for the early release of preserved or restricted non-preserved benefits, on the basis of severe financial hardship or compassionate grounds. These grounds are defined in the *Superannuation Industry (Supervision) Regulations 1994* (Cth).<sup>292</sup>

229. The grounds for early release are limited to reflect the policy balance sought: on the one hand, the overriding policy objective that superannuation benefits are to be preserved to provide income for retirement; and, on the other, the recognition that certain exceptional circumstances may justify the early release of benefits to a member.

230. The ALRC is interested in stakeholder comments on the early release provisions and their relevance and operation in practice for people with disability.

231. As outlined above, the DDA contains an exemption relating to insurance and superannuation. The exemption in s 46 allows superannuation funds, providing certain conditions are satisfied, to:

- refuse to offer a person with disability membership of a superannuation or provident fund or scheme; and

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<sup>292</sup> *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01.

- discriminate on the terms and conditions on which membership of a superannuation or provident fund or scheme is provided or offered.<sup>293</sup>

232. The circumstances in which the conditions are satisfied are outlined above at paragraph 224.

233. The ALRC welcomes stakeholder feedback on what changes, if any, should be made to the superannuation exemption under the DDA or to the early release provisions of the *Superannuation Act*, as well as more broadly to Commonwealth laws and legal frameworks relating to superannuation, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity.

**Question 32.** What changes, if any, should be made to the superannuation exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

**Question 33.** What issues arise in relation to superannuation for people with disability that may affect their equal recognition before the law or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

## Health care and aged care

### *Health care*

234. While people with disability have universal health care needs, they may require more specialised health care than others. As disability is ‘extremely diverse’,<sup>294</sup> some health conditions associated with disability demand extensive health care and others do not.<sup>295</sup>

235. For the purposes of this Inquiry, health care is broadly defined. It includes a range of health services provided either as a public or private service, such as:

- services provided by registered health practitioners, including dental treatment;
- hospital and ambulance services;
- mental health services;
- pharmaceutical services;
- community health services;
- health education and welfare services;

293 *Disability Discrimination Act 1992* (Cth) s 46.

294 *World Health Organization, Disability and Health* (12 November 2013) <<http://www.who.int/mediacentre/factsheets/fs352/en/>>.

295 *Ibid.*

- services provided by dietitians, masseurs, naturopaths, social workers, speech pathologists and audiologists; and
- pathology services.<sup>296</sup>

236. Articles 25 and 26 of the CRPD oblige States Parties to provide health services, including rehabilitation, to people with disability without discrimination on the basis of disability. The Commonwealth Government provides funding for health services,<sup>297</sup> however, the management of health services through nationally set standards remains largely with the states and territories.<sup>298</sup> Disability services managed under the NDIS interact with the state and territory health systems, for example, in the provision of hospital treatment and psychiatric rehabilitation services.<sup>299</sup>

237. The *National Health Reform Act 2011* (Cth) established the Australian Commission on Safety and Quality in Health Care (ACSQHC) as an independent statutory authority to implement the *National Health Reform Agreement*.<sup>300 301</sup> The ACSQHC monitors the National Safety and Quality Health Service (NSQHS) Standards that apply to all health service organisations. The ACSQHC reports to the COAG's Standing Council on Health, which includes the Australian Health Ministers' Advisory Council. Ten standards were endorsed by all Australian health ministers.<sup>302</sup> They cover, among others, governance arrangements for the safety and quality in health service organisations, medication safety and patient identification.<sup>303</sup>

238. The conduct of health practitioners is regulated under the *Health Practitioner Regulation National Law 2009* (Qld) (the *National Law*).<sup>304</sup> The *National Law* established a national agency to implement the law.<sup>305</sup> The Australian Health Practitioner Regulatory Authority also oversees 14 national boards, one for each health profession.<sup>306</sup>

296 *Health Practitioner Regulation National Law Act 2009* (Qld) s 5. The National Law was passed first in Queensland and then adopted in each state and territory.

297 Council of Australian Governments, *National Health Reform Agreement*, August 2011. Under the National Health Reform Agreement, the Commonwealth provides funding for eight streams of health. The streams are: public hospitals; primary care; aged care; mental health; standards and performance; workforce; prevention; and e-health.

298 Australian Commission on Safety and Quality in Health Care, 'National Safety and Quality Health Service Standards, September 2012'.

299 The NDIS is discussed above at paragraphs 144 to 148.

300 Council of Australian Governments, *National Health Reform Agreement*, August 2011.

301 COAG, 'National Health Reform Agreement'.

302 Australian Commission on Safety and Quality in Health Care, above n 298.

303 Australian Commission on Safety and Quality in Health Care, above n 298.

304 The *Health Practitioner Regulation National Law 2009* (Qld) was passed first in Queensland and then adopted in each State and Territory.

305 The functions of the Australian Health Practitioner Regulatory Authority (AHPRA) include the establishment of procedures for the development of accreditation standards, registration standards and codes and guidelines; *Health Practitioner Regulation National Law Act 2009* (Qld) s 25.

306 Ian Kerridge, Michael Lowe and Cameron Stewart, *Ethics and Law for the Health Professions* (The Federation Press, 4th ed, 2013) 112. The 14 national boards are the: Aboriginal and Torres Strait Islander Health Practice Board of Australia; Chinese Medicine Board of Australia; Chiropractic Board of Australia; Dental Board of Australia; Medical Board of Australia; Medical Radiation Practice Board of Australia; Nursing and Midwifery Board of Australia; Occupational Therapy Board of Australia;

239. Difficulties in health care experienced by people with disability largely relate to service delivery and consent to medical treatment. As this Inquiry is focused on laws and legal frameworks, service delivery issues will not be examined in depth, except where they affect the equal recognition before the law of people with disability and their ability to exercise legal capacity.

240. A significant legal issue for people with disability in relation to health care is involuntary treatment. Article 17 of the CRPD protects the physical and mental integrity of people with disability on an equal basis with others.<sup>307</sup> In common law, it is unlawful for any medical practitioner to treat an adult without their consent, 'except in cases of emergency or necessity'.<sup>308</sup> In all states and territories, legislation supplements the common law rules about requiring consent to medical treatment, including for adults when they are unable to make their own decision.<sup>309</sup>

241. In relation to medical treatment for people with mental illness state and territory laws generally provide for the involuntary detention and treatment of people with severe mental illness if the person is in need of treatment and is likely to self-harm or harm others.<sup>310</sup> The criteria and processes for involuntary medical treatment are being reviewed in several jurisdictions.<sup>311</sup>

242. Another significant issue relating to consent to medical treatment is involuntary or coerced sterilisation of girls and women with disability, and of intersex people. It has been suggested that girls and women with disability in the care of families and in institutionalised settings have been subjected to sterilisation due to pregnancy risks related to sexual abuse.<sup>312</sup> The clinical reasons given in support of sterilisation for girls and women with a disability are usually linked to the avoidance of pregnancy<sup>313</sup> or the management of menstruation where it has an adverse impact on the health of the woman.<sup>314</sup> Sterilisation of intersex people is reportedly undertaken to 'normalise' them

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Optometry Board of Australia; Osteopathy Board of Australia; Pharmacy Board of Australia; Physiotherapy Board of Australia; Podiatry Board of Australia; and Psychology Board of Australia.

307 Article 17 of the CRPD states that 'every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.'

308 *Rogers v Whitaker* (1992) 175 CLR 479, 489.

309 *Guardianship and Management of Property Act 1991* (ACT); *Guardianship Act 1987* (NSW); *Adult Guardianship Act* (NT); *Guardianship and Administration Act 2000* (Qld); *Powers of Attorney Act 1998* (Qld); *Guardianship and Administration Act 1993* (SA); *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1990* (WA).

310 *Mental Health (Treatment and Care) Act 1994* (ACT); *Mental Health Act 2007* (NSW); *Mental Health and Related Services Act* (NT); *Mental Health Act 2000* (Qld); *Mental Health Act 2009* (SA); *Mental Health Act 1996* (Tas); *Mental Health Act 1996* (WA); *Mental Health (Consequential Provisions) Act 1996* (WA).

311 In the ACT, Victoria and Western Australia. Tasmania has finalised its review and enacted the *Mental Health Act 2013* (Tas) which is effective from 1 January 2014.

312 Senate Standing Committee for Community Affairs, *Inquiry into the Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (2013) rec 5.

313 *Ibid* [1.19].

314 *Ibid*.

and to clinically treat ‘disorders of sexual development’.<sup>315</sup> However, this has raised significant concerns.<sup>316</sup>

243. The Senate Standing Committee for Community Affairs (the Senate Committee) Inquiry into Involuntary or Coerced Sterilisation of People with Disability in Australia made a number of recommendations. The first report in relation to girls and women with disability included recommendations that:

- sterilisation should be banned unless undertaken with consent;<sup>317</sup> and
- state and territory laws regulating the sterilisation of adults with disability be amended to state explicitly the presumption of capacity for people with disability to make their own decisions unless objectively assessed otherwise.<sup>318</sup>

244. Disability and human rights advocates have criticised the first report into the involuntary or coerced sterilisation of girls and women with disability on the grounds that it does not recommend a complete ban of the practice.<sup>319</sup>

245. In the second report of the Senate Committee on the involuntary or coerced sterilisation of intersex people, the Committee recommended that all medical treatment of intersex people take place under guidelines that support deferral of normalising treatment until the person can give fully informed consent.<sup>320</sup> The Senate Committee also recommended authorisation by a court or tribunal for the ‘complex and contentious’ medical treatment of intersex people who are unable to make decisions for their own treatment.<sup>321</sup>

246. The ALRC welcomes stakeholder comments on issues relating to consent to medical treatment and other health care-related issues affecting people with disability.

**Question 34.** What issues arise in relation to health care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to health care to address these issues?

315 Senate Standing Committee for Community Affairs, *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013).

316 See, eg, National LGBTI Health Alliance, Submission to the Senate Standing Committee for Community Affairs, *Inquiry Into the Involuntary and Coerced Sterilisation of People with Disabilities in Australia* (2012).

317 Senate Standing Committee for Community Affairs, *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) rec 6.

318 Ibid rec 8.

319 Therese Sands, People with Disability Australia was interviewed on ABC radio: ABC Radio National, ‘Calls for Tighter Laws Around Disability Sterilisation’ *PM* (Mark Colvin) 17 July 2013 <<http://www.abc.net.au/pm/content/2013/s3805215.htm>>.

320 Senate Standing Committee for Community Affairs, *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) rec 3.

321 Ibid reccs 5–7.



### *Aged care*

247. More than 343,000 Australians receive some type of Australian Government subsidised aged care service.<sup>322</sup> This number is increasing every year as Australia's population ages. The care needs of older people vary, but generally, low level community care is the initial step in the Australian aged care system.<sup>323</sup> A person may then receive respite care in a residential aged care facility, progressing to low level or high level care in a residential aged care facility, as a permanent resident.<sup>324</sup> Other than these aged care services, the Australian Government operates a broader system of health delivery, income support, and housing and community services.<sup>325</sup>

248. The aged care related issues for people with disability include:

- negative attitudes towards ageing and the elderly resulting in age discrimination in the delivery of services;
- physical neglect and abuse from the use of restrictive practices in aged care facilities; and
- emotional or financial exploitation as older people with disability, especially dementia,<sup>326</sup> lose functional or decision-making capacity in relation to many aspects of their lives.

249. Policy and funding responsibility for aged care services shifted from states and territories to a national approach with the introduction of the *Aged Care Act 1997* (Cth).<sup>327</sup> Residential and home care providers must be accredited by the Aged Care Standards and Accreditation Agency<sup>328</sup> and meet certain requirements prescribed in the *Aged Care Act* in order to receive an Australian Government subsidy.<sup>329</sup> There will be

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322 Australian Government, *About the Scheme—Aged Care Complaints Scheme* (12 November 2013) <<http://agedcarecomplaints.govspace.gov.au>>.

323 Australian Institute of Health and Welfare, *Residential Aged Care in Australia 2010–11: A Statistical Overview*, Aged Care Statistics Series No 36 Cat No AGE 68 (2012); Australian Institute of Health and Welfare, *Aged Care Packages in the Community 2010–11: A Statistical Overview*, Aged Care Statistics No 37 Cat No AGE 68 (2012).

324 Australian Institute of Health and Welfare, *Residential Aged Care in Australia 2010–11: A Statistical Overview*, Aged Care Statistics Series No 36 Cat No AGE 68 (2012); Australian Institute of Health and Welfare, *Aged Care Packages in the Community 2010–11: A Statistical Overview*, Aged Care Statistics No 37 Cat No AGE 68 (2012).

325 *Aged Care Overview—Aged Care Standards and Accreditation Agency* (12 November 2013) <<http://www.accreditation.org.au/>>.

326 Over half of permanent residents in Australian Government-funded aged care facilities had a diagnosis of dementia in 2011–2012: Australian Institute of Health and Welfare, *Residential Aged Care in Australia 2010–11: A Statistical Overview*, Aged Care Statistics Series No 36 Cat No AGE 68 (2012). Studies suggest the prevalence of dementia is greater for Indigenous people than the non-Indigenous population: K Smith and Flicker, 'High Prevalence of Dementia and Cognitive Impairment in Indigenous Australians' 71 *Neurology* 1470; S Henderson and GA Broe, 'Dementia in Aboriginal Australians' 44 *Australian and New Zealand Journal of Psychiatry* 869.

327 Kerridge, Lowe and Stewart, above n 306, 659.

328 *Aged Care Overview—Aged Care Standards and Accreditation Agency*, above n 325.

329 Ibid.

intersections of aged care with various Commonwealth, state or territory systems for the provision of NDIS, disability services and health services.<sup>330</sup>

250. The *Living Longer Living Better* aged care reform was announced on 20 April 2012 to create a nationally consistent system that provides older Australians with more choice and control over a full range of services.<sup>331</sup> Key aspects of the reform included a gateway to aged care services called *My Aged Care*,<sup>332</sup> the introduction of Consumer Directed Care and various supplements in recognition of additional costs involved in caring for people with dementia and people with mental health conditions.<sup>333</sup> Two new national strategies were developed to address the specific aged care needs of people from culturally and linguistically diverse backgrounds<sup>334</sup> and older people who are lesbian, gay, bisexual, transgender or intersex.<sup>335</sup>

251. Aged care providers are increasingly involved in the delivery of complex palliative and end of life care and there is a need to improve advanced care planning.<sup>336</sup> Guidelines for future substitute decision-making for health and medical care decisions and living arrangements are outlined in the *National Framework for Advanced Care Directives* as agreed by the Australian Health Ministers' Advisory Council.<sup>337</sup>

252. The ALRC seeks submissions on the aspects of aged care outlined above and other issues that affect the legal recognition of people with disability and their ability to exercise legal capacity.

**Question 35.** What issues arise in relation to aged care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to aged care to address these issues?

330 The NDIS is discussed above at paragraphs 144 to 148. Health care is discussed above at paragraphs 234 to 245.

331 *Aged Care (Living Longer Living Better) Act 2013* (Cth); *Aged Care (Bond Security) Amendment Act 2013* (Cth); *Aged Care (Bond Security) Levy Amendment Act 2013* (Cth); *Australian Aged Care Quality Agency Act 2013* (Cth); *Australian Aged Care Quality Agency (Transitional Provisions) Act 2013* (Cth).

332 Australian Government Department of Health and Ageing, *My Aged Care (the Aged Care Gateway)* (12 November 2013) <<http://www.livinglongerlivingbetter.gov.au/>>.

333 Australian Government Department of Health and Ageing, *Living Longer Living Better* (12 November 2013) <<http://www.livinglongerlivingbetter.gov.au/>>. Since the change of government in September 2013, applications for the Workforce Supplement for aged care workers have been suspended.

334 Australian Government, *National Ageing and Aged Care Strategy for People from Culturally and Linguistically Diverse (CALD) Backgrounds 2012*.

335 Australian Government, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy 2012*.

336 Australian Government Department of Health and Ageing, *Australian Government Response to the Productivity Commission's Caring for Older Australians Report* (12 November 2013) <<http://www.livinglongerlivingbetter.gov.au/>>.

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

## Restrictive practices

253. People with disability in the care of disability service providers and in a range of institutions who display ‘challenging behaviour’ or ‘behaviours of concern’<sup>338</sup> may be subjected to restrictive practices. While restrictive practices may be used in some circumstances in response to ‘challenging behaviour’, there are concerns that such practices can also be imposed as a ‘means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support’.<sup>339</sup>

254. Restrictive practices involve the use of interventions and practices that have the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion.<sup>340</sup> Such practices are used by disability services providers across jurisdictions, as well as in a range of institutional settings including in supported accommodation and group homes, residential aged care facilities, mental health facilities, schools, hospitals and prisons.<sup>341</sup> However, limited data is available on the prevalence or impact of restrictive practices on people with disability in Australia.

255. The use of restrictive practices may potentially involve breaches of a number of articles of the CRPD<sup>342</sup> and the CAT.<sup>343</sup> The UNCRPD has expressed its concern about the use of restrictive practices in Australia. In particular, it has recommended that Australia ‘take immediate steps to end such practices, including by establishing an independent national preventative mechanism to monitor places of detention’.<sup>344</sup>

## Regulation of and responses to restrictive practices

256. The regulation of restrictive practices in Australia primarily arises under disability services and mental health legislation, as well as under a range of policy directives, statements and guidance materials. However, regulatory approaches to restrictive practices are inconsistent across these systems and Australian jurisdictions.

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338 The ALRC acknowledges that these terms are subjective and that in many circumstances such behaviour can be understood as ‘adaptive behaviours to maladaptive environments’ and may be a ‘legitimate response to difficult environments and situations’: Paul Ramcharan et al, ‘Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers’ (Research Report, Office of the Senior Practitioner, 2009) 2.

339 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 241.

340 See, eg, definitions in Australian Government, *Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector*, May 2013; *Disability Act 2006* (Vic) s 3(1).

341 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 91–101.

342 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 3, 14–17, 19.

343 See, eg, Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd Sess, UN Doc A/63/175 (28 July 2008) 9.

344 Committee on the Rights of Persons with Disability, above n 15, 36.

**Disability services**

257. Disability services regulation in jurisdictions such as Victoria, Queensland and Tasmania occurs through disability services legislation.<sup>345</sup> For example, the *Disability Act 2006* (Vic) provides for the Office of the Senior Practitioner, the role of which is to protect the rights of people with disability who are subject to restrictive interventions. It includes monitoring, audit and investigation as well as power to set appropriate standards and guidelines. One of the key components of this approach involves the development of behaviour support plans.<sup>346</sup> There is also a Restrictive Intervention Data System in Victoria which records the use of restrictive practices.

258. The approach in other jurisdictions includes policy-based frameworks, voluntary codes of practice, as well as regulation through the guardianship framework.<sup>347</sup>

**Mental health**

259. In the context of the mental health system, jurisdictions such as Victoria and Queensland have detailed provisions relating to restrictive practices, combined with detailed minimum standard guidelines<sup>348</sup> and a policy statement.<sup>349</sup> Legislative provisions are less detailed in other jurisdictions.<sup>350</sup> In NSW, the use of restrictive practices is regulated by a lengthy and detailed policy directive.<sup>351</sup> However, this is an area of ongoing review and reform. For example, in Tasmania new mental health legislation is due to take effect from 1 January 2014 to regulate restrictive practices.<sup>352</sup> There are also several ongoing reviews of mental health legislation and bills before Parliament in a number of jurisdictions.<sup>353</sup>

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345 *Disability Act 2006* (Vic); *Disability Services Act 2006* (Qld), (Tas).

346 Any person subject to restrictive intervention in disability services in Victoria must have a behaviour support plans (BSP). The BSP must outline the relevant supports and demonstrate that the restrictive intervention is the least restrictive option and is being used as a last resort. BSPs are designed to reduce the use of restrictive interventions: *Disability Act 2006* (Vic) pt 7.

347 For example, in NSW, guidelines govern the use of restrictive practices in relation to adults. In addition, a distinct number of restrictive practices, referred to as restricted practices, have additional safeguards in place which require completion of a documented plan, of which authorisation by an internal Restricted Practices Authorisation mechanism is a part. Guardians appointed under the *Guardianship Act 1987* (NSW) may be authorised to consent to the use of restrictive practices for people over 16 years of age. Restrictive practices in relation to children are governed by *Children and Young Persons (Care and Protection) Act 1998* (NSW) and *Children and Young Persons (Care and Protection) Regulation 2012* (NSW). Note, there is an ongoing review of the *Disability Services Act 1993* (NSW).

348 *Mental Health Act 1986* (Vic) ss 81, 82; Chief Psychiatrists Guideline *Seclusion in Approved Mental Health Services* (2011).

349 *Mental Health Act 2000* (Qld) pt 4A; Queensland Health Department, *Policy Statement on Reducing and Where Possible Eliminating Restraint and Seclusion in Queensland Mental Health Services* (2008). See also, Queensland Health Department, *Mental Health Act 2000 Resources Guide* (2012).

350 See, eg, *Mental Health Act 2009* (SA) ss 7(h), 90, 98; *Mental Health Act 1996* (WA) ss 116–124; *Mental Health and Related Services Act 1998* (NT) ss 61, 62; *Mental Health (Treatment and Care) Act 1994* (ACT).

351 NSW Health, *Aggression, Seclusion & Restraint in Mental Health Facilities in NSW Policy Directive*, June 2012.

352 *Mental Health Act 1996* (Tas) ss 34–36; *Mental Health Act 2013* (Tas).

353 For example: Victoria—drafting of new mental health legislation is ongoing but a bill is expected to be introduced into Parliament in 2013; WA—the *Mental Health Bill 2013* (WA) was introduced into Parliament in October 2013; ACT—the *Mental Health (Treatment and Care) Amendment Bill 2013*

260. There are also a range of other relevant guidelines, including guidelines released by the Royal Australian and New Zealand College of Psychiatrists and the Australian Psychological Association.<sup>354</sup>

261. At a national level, the Commonwealth, State and Territory Governments have developed a proposed *National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector* (National Framework). The aim of the proposed National Framework is to reduce the use of restrictive practices in the disability services sector. A range of concerns have been expressed about the proposed National Framework, including in relation to terminology; its limited coverage, being confined to disability services; and limited provision for reporting and monitoring of restrictive practices.<sup>355</sup> The National Framework has not yet been finalised.

262. The ALRC welcomes stakeholder feedback on whether the proposed National Framework, through its regulation of, and commitment to, reducing restrictive practices, is consistent with ensuring that people with disability are recognised as equal before the law and able to exercise legal capacity.

263. There are also a number of interaction points between state and territory systems and the NDIS in the context of restrictive practices. Regulation of service providers and the use of restrictive practices occurs at a state and territory level. Under the NDIS, people with disability who are participants will be able to choose their providers. This means restrictive practices authorised under a state or territory regime may occur in the context of service provision, which is funded by the NDIS.

264. In addition, the NDIS framework provides for the registration of providers. Where a participant has his or her plan funds managed by the NDIA, they will only be able to receive support from providers registered with the NDIA. Registered providers must satisfy a number of requirements in relation to qualifications, approvals, experience and capacity for the approved supports and are subject to certain reporting requirements.<sup>356</sup> This may mean, for example, that where a service provider has a complaint made against it arising from the use of restrictive practices and is the subject of action by the state and territory regulator, this may have flow-on effects for the purposes of remaining an NDIA registered provider.

265. In light of the inconsistency across jurisdictions with respect to restrictive practices, as well as potential interaction with the NDIS, the ALRC is interested in stakeholder comments on whether it might be appropriate to develop a national or

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(ACT) is available as an exposure draft; Queensland—despite relatively recent legislation there is currently a review focusing on areas for improvement of the legislation; NSW—a review commenced in mid-2012 and reported to Parliament in May 2013. An Expert Reference Group has been appointed and consultations are ongoing.

354 'Evidence-Based Guidelines to Reduce the Need for Restrictive Practices in the Disability Sector' (Australian Psychological Society, 2011).

355 See, eg, Advocacy for Inclusion, *Submission to Proposed National Framework for Reducing Restrictive Practices in the Disability Service Sector*, June 2013; Federation of Community Legal Centres Victoria, *Submission to Proposed National Framework for Reducing Restrictive Practices in the Disability Service Sector*, June 2013.

356 *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013* (Cth) pt 4.

nationally consistent regulatory or principles-based framework with respect to the regulation and reduction of restrictive practices.

**Question 36.** In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?

**Question 37.** What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?

### **Marriage, intimate relationships, parenthood and family law**

266. Article 23 of the CRPD recognises the right of people with disability to marry and found a family.<sup>357</sup> However, in Australia, many people with disability experience discrimination or difficulties in exercising their rights to marry, form intimate relationships, sexual expression, have a family and parent. In particular, many people with disability

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

Widespread discrimination against parents with disability occurs in relation to child protection agencies and their interface with the disability support system leading to much higher rates of children being removed from parents with disability than from parents who do not have a disability.<sup>358</sup>

267. Further, many of the key documents and frameworks, including the NDS, National Disability Services Standards, and National Framework for Protecting Australia's Children 2009–2020 contain either no or limited recognition of the rights of people to marry, form intimate relationships, have a family or to parent.

268. While some of these issues arise in a service delivery context, or at a state and territory rather than a Commonwealth level, a number relate directly to issues of legal capacity and Commonwealth laws and legal frameworks.

### ***Marriage***

269. The *Marriage Act 1961* (Cth) provides that a marriage will be void in a number of circumstances, including where the consent of either of the parties is not real

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

358 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 15–16.

because that party was mentally incapable of understanding the nature and effect of the marriage ceremony.<sup>359</sup>

270. As a result, before a marriage is entered into, it is important for the person solemnising the marriage to determine that the parties to the marriage are mentally capable of understanding the nature and effect of the marriage ceremony. It is an offence for a celebrant to solemnise a marriage where he or she has reason to believe that one of the parties does not meet this standard.<sup>360</sup>

271. A number of categories of people are authorised celebrants for the purposes of solemnising marriages under the *Marriage Act*.<sup>361</sup> Ministers of Religion are registered with states and territories to solemnise marriages for a recognised denomination. A range of state and territory officers are also entitled to solemnise marriages; for example, officers of the relevant Registry of Births, Deaths and Marriages. Marriage celebrants are registered under the Commonwealth Marriage Celebrants program.

272. Marriage celebrants must solemnise marriages under the *Marriage Act* and *Marriage Regulations 1963* (Cth) and comply with the Code of Practice for Marriage Celebrants and ongoing professional development obligations.<sup>362</sup> There are a number of guidelines for celebrants;<sup>363</sup> and celebrants must undergo performance reviews by the Registrar of Marriage Celebrants.<sup>364</sup>

273. The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* suggest that to determine whether a party's consent is real, a celebrant should speak to the party in the absence of the other party, speak to third parties and keep relevant records.<sup>365</sup> The Guidelines state that

in cases of mental capacity to understand the nature and effect of the marriage ceremony, a very simple or general understanding will be sufficient. A high level of understanding is not required. The authorised celebrant should ask questions of the person about whom they have concerns in order to gauge the level of their understanding of the marriage ceremony and what it involves.<sup>366</sup>

274. The Guidelines also provide a list of questions to assist celebrants to identify situations where consent issues may arise.<sup>367</sup>

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

360 *Ibid* s 100.

361 *Ibid* pt IV div 1.

362 *Ibid* s 39G.

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

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

365 Australian Government Registrar of Marriage Celebrants, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, February 2012, 77–80.

366 *Ibid* 79.

367 *Ibid* 80.

275. In some jurisdictions, under guardianship legislation, a guardian of a person with disability cannot consent or refuse to consent to a marriage, but may give an opinion as to whether the guardian thinks the marriage should proceed. Disability Rights Now has suggested this may give guardians ‘undue influence over the extent to which a person with disability can realise their right to freely marry’.<sup>368</sup>

276. More broadly, Disability Rights Now has expressed the view that these provisions effectively exclude ‘some people with disability, particularly those with cognitive impairments from entering into marriage’.<sup>369</sup> Such provisions reveal a key tension between the need to protect people with disability from exploitation or forced marriage, while ensuring that any person with disability who is able to understand and consent should be entitled to marry freely.

277. The ALRC is interested in stakeholder comments on what changes, if any, may need to be made to Commonwealth laws and legal frameworks in relation to marriage and celebrants to ensure people with disability are recognised as equal before the law and able to exercise legal capacity.

**Question 38.** What issues arise in relation to marriage that may affect the equal recognition before the law of people with a disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to marriage or marriage celebrants to address these issues?

### *Intimate relationships*

278. Many people with disability may be denied the right to engage in intimate relationships, in part as a result of the

attitudes of support staff, agency policies that prohibit sexual relations and an aggressive risk management culture in many support agencies. There may also be a directive from parents or family members to the residential facility to prohibit this for their adult child regardless of the person’s wishes and their adult status.<sup>370</sup>

279. People with disability who live in group homes or institutions, and lesbian, gay, bisexual, transgender and intersex people with disability face particular difficulties.<sup>371</sup>

280. There are also legislative barriers in some jurisdictions, including provisions that make it an offence to have sexual intercourse with a person who, for example, does not have the capacity to consent to sexual intercourse because of ‘cognitive incapacity’.<sup>372</sup>

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

369 Ibid.

370 Ibid 158.

371 See, eg, Michael Kirby, ‘Adult Guardianship: Law, Autonomy and Sexuality’ (2013) 20 *Journal of Law and Medicine* 866, 873.

372 See, eg, *Crimes Act 1900* (NSW) s 61HA(4)(a) and the broad definition of cognitive impairment under s 61H(1A); *Crimes Act 1958* (Vic) ss 50–52.



Clearly, the meaning of capacity in this context, the relevant standard and means of assessing whether an individual meets the required standard will be vital in cases involving possible criminal behaviour under these provisions.

281. A related issue, which combines both service delivery and legislative aspects, relates to service provider facilitation of access to sexual services for people with disability. While in some jurisdictions service providers are prevented from facilitating access to sex workers, in other jurisdictions there are policy and procedural guides which contain policy principles and working guidelines concerning access to sexual services for people with disability.<sup>373</sup>

282. There is a key tension implicit in this area between the protective role of the state—as expressed through the negation of consent in circumstances of cognitive incapacity—to protect people with disability from possible exploitation or assault, with the autonomy of the individual with a disability and their rights to privacy and intimate relationships.<sup>374</sup>

283. The ALRC is interested in stakeholder comments on what, if any, changes should be made to Commonwealth law and legal frameworks to recognise the right of people with disability to form and engage in intimate relationships.

**Question 39.** What issues arise in relation to people with disability and intimate relationships that may affect their equal recognition before the law or ability to exercise legal capacity? What changes, if any, should be made to Commonwealth law and legal frameworks to address these issues?

### *Parenthood*

284. People with disability experience a range of different types of discrimination and face difficulties in relation to parenting, including for example with respect to adoption, sterilisation,<sup>375</sup> and child protection and removal. In particular, parents with disability are significantly over-represented in the child protection system. The children of people with disability are subject to removal from their parents at a higher rate than the general population.<sup>376</sup>

373 See, eg, Touching Base, *Policy and Procedural Guide for Disability Service Providers Supporting Clients to Access Sex Workers*, 2011.

374 See, eg, Michael Kirby, above n 371. See also *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 16, 22, 23.

375 Sterilisation is discussed at paragraphs 242 to 245 above.

376 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 153–155; New South Wales, *Care and Support—Final Report on Child Protection Services: Standing Committee on Social Issues*, Parl Paper No 408 (2002) 2002; New South Wales, *Making It Happen—Final Report on Disability Services: Standing Committee on Social Issues*, Parl Paper No 247 (2002); Gwynnyth Llewellyn, David McConnell and Luisa Ferronato, 'Prevalence and Outcomes for Parents with Disabilities and Their Children in an Australian Court Sample' (2003) 27 *Child Abuse & Neglect* 235.

285. While many of the key issues in this area appear to arise in state and territory jurisdictions, the ALRC welcomes feedback in relation to parenting-related matters which may raise issues under Commonwealth laws and legal frameworks.

### ***Family law***

286. A range of potential issues that may affect people with disability being recognised as equal before the law, or exercising legal capacity, arise in the context of family law. The ALRC seeks stakeholder feedback on these issues which may, for example, relate to:

- assessment of capacity where incapacity is either alleged by another party, or the court has concerns about the legal capacity of a party;
- legal representation and issues around the giving of instructions, discussed above at paragraph 191;
- case and litigation guardians, including issues of appointment, costs and exposure to liability;<sup>377</sup>
- expert reports;<sup>378</sup>
- primary and secondary considerations in parenting matters, including for example, assessment of capacity to provide for the needs of the child;<sup>379</sup>
- spousal maintenance, including considerations of future need;<sup>380</sup> and
- property orders.<sup>381</sup>

**Question 40.** What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?

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377 See, eg, *Family Law Act 1975* (Cth) s 123(1)(o); *Federal Magistrates Act 1999* (Cth) s 87(1)(h); *Family Law Rules 2004* (Cth) rr 6.08, 6.09, 6.10(1); *Federal Circuit Court Rules 2001* (Cth) rr 11.08, 11.09, 11.11.

378 For example, reports by family consultants employed by the Family Court as well as reports by other experts and report writers: *Family Law Rules 2004* (Cth) pt 15.5; *Family Law Regulations 1984* (Cth) reg 7. Relevant experts: Ch 15 expert, Reg 7 report writer not employed by Court, family consultant employed by court.

379 Primary considerations under s 60CC(2), secondary considerations under s 60CC(3): *Family Law Act 1975* (Cth).

380 Section 72 provides entitlement to spousal maintenance in some circumstances, section 75(2) considerations include future capacity to earn: *Ibid*.

381 Section 79 provides power to make orders and consider contributions, but also need to consider future needs under s 75(2): *Ibid*.

## Particular disability communities

287. People with disability who are also members of particular disability communities often face intersectional problems and have particular experiences and perspectives across a range of areas.

288. The Terms of Reference ask the ALRC to have particular regard for the ways Commonwealth laws and legal frameworks affect people with disability who are also children, women, Indigenous people, older people, people in rural, remote and regional areas, people from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex people.

289. The ALRC welcomes stakeholder feedback about the experiences of people with disability from these particular groups. The ALRC is also interested in comment on the ways in which Commonwealth laws and legal frameworks could be amended or adapted to ensure people from these groups are recognised as equal before the law and are able to exercise their legal capacity.

## Children

290. There are approximately 290,000 children with a disability in Australia.<sup>382</sup> Of this number, over half have a profound or severe disability<sup>383</sup> and about one fifth have a moderate or mild disability.<sup>384</sup>

291. Article 7 of the CRPD protects the right of children with disability to enjoy all of their rights on an equal basis with other children and ensures that their ‘best interests’ will be a primary consideration in all state actions concerning them.<sup>385</sup> Article 7(3) of the CRPD relates to the exercise of legal capacity by children with disability and states that they should ‘express their views freely on all matters affecting them’ with due consideration for their age and maturity and assistance that is appropriate to the child.

292. The *National Framework for Protecting Australian’s Children 2009–2020* (the National Framework for Children) commits to reducing child abuse and neglect<sup>386</sup> and has identified disability as a risk factor for abuse and neglect.<sup>387</sup> However, the UNCRPD has noted that there is no comprehensive national policy for children in Australia that articulates how the rights of children with disability should be implemented.<sup>388</sup>

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382 Australian Bureau of Statistics, *Children with a Disability, Australian Social Trends, March Quarter 2012, Cat No 4102.0* (2012).

383 Ibid.

384 Ibid.

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

386 Council of Australian Governments, *Protecting Children Is Everyone’s Business: National Framework for Protecting Australia’s Children 2009–2020*.

387 Ibid.

388 Committee on the Rights of Persons with Disability, above n 15, para 18.

293. Other issues affecting children and young people with disability may relate to the role of parents and other people who provide care for them,<sup>389</sup> the removal of children from parents with intellectual disability,<sup>390</sup> their living arrangements, including problems stemming from young people with disability being cared for in aged care facilities<sup>391</sup> and the over-representation of children and young people with disability in the juvenile justice system.<sup>392</sup>

## Women

294. There are about two million women with disability in Australia.<sup>393</sup> Almost 700,000 women and girls with a disability live in rural and remote Australia.<sup>394</sup> Women with disability face multiple challenges as they may be discriminated against both on the basis of gender and the basis of their disability.<sup>395</sup> Women with disability may also confront additional societal challenges as mothers and carers.

295. The *UN Convention on the Elimination of Discrimination against Women* provides for women's equality before the law.<sup>396</sup> The CRPD obliges a State Party to take all appropriate measures to ensure the full and equal enjoyment of all human rights by women with disability, recognising the 'multiple discrimination' they face.<sup>397</sup>

296. There are a number of issues affecting women with disability. These include concerns related to bodily integrity and economic opportunities. Women and girls with disability are often at greater risk of violence, abuse and neglect, both within and outside the home.<sup>398</sup> Coerced or involuntary sterilisation of women with disability is considered to be an infringement of the right to the personal integrity of the person.

297. Women with disability are also particularly vulnerable to becoming victims of crime, specifically sexual assault.<sup>399</sup> The *National Plan to Reduce Violence against Women and their Children 2010–2020* aims to address the concern that women with a physical or intellectual disability are more likely to experience domestic violence and the violence is likely to be more severe and continue for longer.<sup>400</sup>

389 The role of family, carers and other supporters is discussed above at paragraphs 108 to 111.

390 Schetzer and Henderson, above n 222.

391 Due to the lack of viable alternatives for the high care needs of young people with disability, some 7,500 of them live in aged care facilities.

392 Devon Indig et al, '2009 NSW Young People in Custody Health Survey: Full Report' (NSW Justice Health and Juvenile Justice, 2011); Dianna T Kenny and Paul K Nelson, 'Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs' (Sydney University Press, 2008).

393 Australian Bureau of Statistics, *Disability, Australia, 2009, Cat No 4446.0* (2011).

394 Ibid.

395 The 'triple disadvantage' faced by women is mentioned in Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012, 45.

396 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 15.

397 *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 6.

398 Ibid preamble (q).

399 'A Question of Justice: Access to Participation for People with Disabilities in Contact with the Justice System', above n 218.

400 'National Plan to Reduce Violence against Women and Their Children 2010-2022' (Council of Australian Governments, February 2011).

298. Economic disadvantages affect the quality of life for women with disability. Women and men with disability appear to have different economic prospects. Women with disability are less likely to be in the paid workforce and have lower incomes than men with disability.<sup>401</sup> They are also more likely to be sole parents or in their parental family than men with disability.<sup>402</sup>

### Aboriginal and Torres Strait Islander peoples

299. Data on disability among Aboriginal and Torres Strait Islander people is limited, but the prevalence of disability is estimated at more than double that of the non-Indigenous population.<sup>403</sup> Aboriginal and Torres Strait Islander children aged 0–14 years have much higher rates of disability than non-Indigenous children (14.2% compared with 6.6%).<sup>404</sup>

300. There are various explanations of the high incidence of disability in the Aboriginal and Torres Strait Islander communities. Disability may be attributable to socio-economic disadvantage and exposure to high risk factors such as poor nutrition and substance abuse.<sup>405</sup> There may also be cultural reasons, for example, as ‘disability’ is not a concept that is recognised among some Aboriginal and Torres Strait Islander communities.<sup>406</sup> Where it is understood, it may be dismissed as insignificant or irrelevant to their identity, leading to Aboriginal and Torres Strait Islander people not identifying themselves as people with disability.<sup>407</sup> Further, often the impact of past removal from family and community deters Aboriginal and Torres Strait Islander people from seeking government assistance.<sup>408</sup>

301. All Australian governments have pledged to reduce the disparity between Indigenous and non-Indigenous people. The *National Indigenous Reform Agreement* commits COAG to closing the gap between Indigenous and non-Indigenous Australians in life expectancy of ten years within a generation, and halving the gap in the infant mortality rate for Indigenous children.<sup>409</sup>

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401 Arthur O'Reilly, *The Right to Decent Work of Persons with Disabilities* (International Labour Organization, 2007) 47–50.

402 Sage, *Encyclopedia of Disability* (2006), Vol 2, ‘Gender, International’ as at 11 November 2013, 764.

403 Australian Institute of Health and Welfare, *Introduction to Disability and Disability Services in Australia* (12 November 2013) <<http://www.aihw.gov.au/introduction-to-disability-and-disability-services-in-australia/>>.

404 Australian Bureau of Statistics, *Profiles of Disability 2009, Cat No 4429.0* (2012); Australian Bureau of Statistics, *Profiles of Disability, Australia 2009: Comparison of Disability Prevalence between Aboriginal and Torres Strait Islander Peoples and Non-Indigenous Peoples, Cat No 4429.0* (2013); Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2009, Cat No 4430.0* (2010).

405 Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, August 2012; Productivity Commission, ‘Disability Care and Support’, above n 29.

406 Productivity Commission, ‘Disability Care and Support’, above n 29, ch 11.

407 Productivity Commission, ‘Disability Care and Support’, above n 29.

408 NSW Ombudsman, *Improving Service Delivery to Aboriginal People with a Disability: A Review of the Implementation of ADHC's Aboriginal Policy Framework and Aboriginal Consultation Strategy*, Special Report to Parliament, September 2010.

409 Productivity Commission, ‘Disability Care and Support’, above n 29.

302. Aboriginal and Torres Strait Islander people with disability are significantly over-represented in the criminal and juvenile justice systems, and in the care and protection system, both as parents and children.<sup>410</sup> There have been instances of Aboriginal people with intellectual disability, cognitive impairment or psychosocial disability who have been detained in prisons or psychiatric facilities without being convicted of a crime because they were found to be ‘unfit to plead’.<sup>411</sup>

### **People from CALD backgrounds**

303. People with disability from CALD backgrounds and their carers may face some distinct difficulties, including in relation to:

- myths, stereotypes and stigma as well as cultural concepts of disability;
- the role of family;
- language and accessibility barriers;
- access to income support payments;<sup>412</sup> and
- lack of willingness to engage with complaint mechanisms, for example under the DDA, or broader court or dispute resolution processes.<sup>413</sup>

304. Difficulty accessing interpreters, or information in community languages, appears to be a significant issue for CALD people with disability in their engagement with service providers and government agencies as well as courts and tribunals. Further, as the roll-out of the NDIS continues, there is some concern about the impact of the reduction in state and territory based services and funding for interpreter services.

305. In addition to issues arising in relation to laws and legal frameworks, there are a range of service delivery issues, including the lack of culturally appropriate services and lack of knowledge of, or willingness to access, services that do exist. There is also a lack of research or data with respect to CALD people with disability in Australia.

### **Older people**

306. As Australia’s population ages, a number of issues are likely to emerge in relation to disability and ageing. The first issue arises due to increased numbers of older people with disability, given that the prevalence of disability increases with age. For example, in 2011 the Australian Institute of Health and Welfare indicated that

After around 50 years of age the prevalence of disability rose considerably, from 20% in the 50–54 years age group to more than 80% among people aged 85 years or over.

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410 Ibid.

411 Cock, above n 221.

412 There is a ten year waiting period for DSP for migrants.

413 For an overview of issues, see, eg, Federation of Ethnic Communities’ Councils of Australia, *Policy on People with Disability from Multicultural Community Backgrounds*, February 2011; National Ethnic Disability Alliance, *Submission to the Productivity Commission Inquiry into Long Term Disability Care and Support*, August 2010.

Rates of severe or profound core activity limitations were even more strongly associated with ageing. This degree of disability was reported for fewer than one in 20 Australians up to the age of 55 years (excluding the peak in boys aged 10–14 years), but almost one-third of people aged 75 years or over.<sup>414</sup>

307. The second key issue is the ageing of people with disability. The number of older people with disability as a proportion of the total number of people with disability is likely to increase with population ageing:

In addition to an increase in disability overall, population ageing changes the composition of the population with disability. In 1981, 10% of all Australians with disability were aged under 15 years and 31% were 65 years or older; in 2009, 7% of the population with disability were aged 0–14 years and 39% were 65 years or over. If this continues, the mix of services and support required by older people with disability will need to increase, relative to those required by younger people.<sup>415</sup>

308. These increases in turn raise concerns about the capacity of disability services, health and social security systems to respond to increased demand. In addition, the increase in older people with disability, including the onset of dementia and related conditions, will mean defining and assessing capacity, as well as consistency across jurisdictions, is likely to become increasingly important.

309. Another key issue is the role of older people providing care to people with disability. According to ABS statistics, older people provide the majority of informal care for persons with disability and people aged 60 years and older.<sup>416</sup> As a result, in considering how the role of family, carers and other supports should be recognised in law, the age profile of such carers needs to be considered.

## **LGBTI people**

310. Lesbian, gay, bisexual, transgender and intersex (LGBTI) people with disability often face intersectional discrimination and may have to disclose both their sexual orientation, gender identity or intersex status as well as their disability, resulting in what has been referred to as a ‘second coming out’.<sup>417</sup> Broadly, the social exclusion and isolation as well as mental health issues which are experienced by many LGBTI people may be exacerbated for those who also have disability, and access to services which cater for the needs of LGBTI people with disability can be difficult.<sup>418</sup>

414 Australian Institute of Health and Welfare, *Australia's Welfare 2011, Cat No AUS 412* (2011) 11.

415 Ibid 12.

416 In 2009, 62% of total carers were mature age. Mature age persons also comprised 70% of primary carers for people with disability or aged 60 years or over: Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2009, Cat No 4430.0* (2010) 10.

417 NSW Gay and Lesbian Rights Lobby and City of Sydney, *Uncloseting Discrimination: Consultation Report on the Intersections of Discrimination*, March 2012, 41.

418 See, eg, NSW Gay and Lesbian Rights Lobby and City of Sydney, *Uncloseting Discrimination: Consultation Report on the Intersections of Discrimination*, March 2012, National LGBTI Health Alliance, *The Mental Health of Sexuality, Sex and Gender Diverse Australians*, Briefing Paper, December 2009.

311. However, the particular issues of relevance to this Inquiry appear to arise in relation to medical services and treatment as well as family, sexuality and intimate relationships.

312. In the context of health and medical treatment, key issues arise in relation to: recognition and involvement of same-sex partners for the purposes of consent and medical decision making; HIV/AIDS; and involuntary medical interventions involving intersex people which may affect their long-term health and wellbeing, such as sterilisation.<sup>419</sup>

313. Another issue many LGBTI people with disability face is discrimination and prejudice around their right to engage in intimate relationships. This issue is exacerbated in institutional settings where carers and support staff may not be appropriately trained or aware of issues arising for LGBTI people.

314. Finally, the operation of religious exemptions under anti-discrimination legislation has been highlighted by members of the LGBTI community as being particularly problematic where disability, health, aged care and other services are provided by religious organisations.

### **People in rural, remote and regional areas**

315. Two key factors are vital in considering the needs, experiences and perspectives of people with disability who live in rural, remote and regional areas. First, disability tends to be more common in rural and remote areas than in urban areas.<sup>420</sup> Secondly, in terms of age profile, the population outside of capital cities is older than in other areas, and this age profile is projected to continue.<sup>421</sup>

316. Despite this, people with disability living outside major cities are significantly less likely to access disability support services than those living within major cities.<sup>422</sup> Remoteness may in some instances exacerbate disadvantage for a person with disability living in a rural, remote or regional area. Some of the particular issues facing people with disability in rural, remote and regional areas include: the need for flexibility in rules and provision of support; transport issues; collaboration between services; and the capacity of the disability workforce in such areas.<sup>423</sup> Further, where access to services is provided electronically to overcome accessibility issues, this in turn may create new accessibility issues for people with disability using electronic networks and systems.

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419 See, eg, National LGBTI Health Alliance, Submission to the Senate Standing Committee for Community Affairs, *Inquiry Into the Involuntary and Coerced Sterilisation of People with Disabilities in Australia*, (2012).

420 'National Disability Agreement', above n 33, 32.

421 Australian Bureau of Statistics, *Disability and Work, Australian Social Trends, March Quarter 2012, Cat No 4102.0* (2012).

422 Australian Institute of Health and Welfare, *Rural, Regional and Remote Health: Indicators of Health System Performance* Rural Health Series 10 (September 2008) 3.5.7.

423 See, eg, 'Delivering Equitable Services to People Living with a Disability in Rural and Remote Areas: FAHCSIA Practical Design Fund (NDIS) Project 2013' (National Rural Health Alliance, June 2013).



**Question 41.** How do Commonwealth laws and legal frameworks relating to equal recognition before the law and capacity affect people with disability who are:

- (a) children;
- (b) women;
- (c) Aboriginal and Torres Strait Islander;
- (d) from culturally and linguistically diverse backgrounds;
- (e) older;
- (f) lesbian, gay, bisexual, transgender or intersex; or
- (g) living in rural, remote and regional areas?