

Equality, Capacity and Disability in Commonwealth Law

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1. Introduction

Overview

Justice Connect Seniors Law (**Seniors Law**) and Seniors Rights Victoria (**SRV**) welcome the opportunity to make a submission to the Australian Law Reform Commission (**Commission**) in relation to its review of equal recognition before the law and legal capacity for people with disability.

We commend the Commission on the initiative to undertake a review of the 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.

Australia's population is ageing, both the number of older people and their proportion of the nation's population are increasing. It has been estimated that in the 30 years from 2007, the number of Australians aged over 65 years will more than double, increasing from 2.7 to 6.3 million and will constitute 24% of the population. An increase in the incidence of age-related disability, in particular dementia, is expected to accompany the ageing of the population.¹ The ageing population together with the rising incidence of dementia amongst that population has led to a concerning rise in applications for guardianship and administrative appointments outside the more traditional scope of intellectual disabilities.² Our client group is one which frequently interacts with Victoria's guardianship and administration law, policies and procedures.

Sadly, an increase in the incidence of elder abuse is a likely consequence of the increase of the number of Australians over the age of 60.

Elder abuse is defined by the World Health Organisation as:

*a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.*³

Elder abuse is any knowing, intentional or negligent act by a caregiver or any other person in a relationship of trust with the older person that causes harm (including physical, psychological, financial or social) or a serious risk of harm to a vulnerable adult.

Elder abuse takes many forms. The range of potential harms includes:

- physical (such as slapping, pushing, burning, physical restraint or inappropriate use of medication);
- financial (misuse of funds, forcing or forging signatures, denying access to funds or property, misuse of a POA, overcharging, promise of long-term care in return for money and improper changes to legal documents such as wills or insurance policies);
- psychological (such as verbal intimidation, threats, shaming, loss of privacy, humiliation, loss of dignity, harassment, isolation, deprivation and withholding of affection);
- sexual (such as rape, indecent assault and sexual harassment); and
- neglect (such as leaving the older person with no means to care for themselves and with poor hygiene and personal care which may result in bedsores etc. Neglect also includes a lack of social, cultural, intellectual or physical stimulation).

While some forms of elder abuse are obvious and involve criminal acts, in many cases the problem is subtle and hidden, occurring between older people, their families, neighbours, friends and carers. For this reason, elder abuse has been referred to as "a hidden problem, under-recognised and under-reported due to a stigmatisation and a lack of community awareness".⁴

Elder abuse is typically carried out by someone close to the older person, with whom they have a relationship implying trust. Perpetrators are often family members, such as a spouse, adult children, grandchildren, siblings

¹ Victorian Law Reform Commission, *Guardianship Consultation Paper No 10*, 48-49.

² Victorian Law Reform Commission, *Guardianship: Final Report* (2012).

³ World Health Organisation, *A Global Response to Elder Abuse and Neglect*, 2008.

⁴ Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

or other family members, friends or carers. The abuse may be perpetrated as a result of ignorance, negligence or deliberate intent.⁵

In the context of the current inquiry, it is important that the proposed recommendations address the potential for financial abuse to be perpetuated through the misuse of substituted or supported decision making powers by those in positions of trust and confidence.

Financial abuse is defined by the World Health Organisation as "the illegal or improper exploitation or use of funds or resources of the older person".⁶ Financial abuse is associated with "greed leading to opportunistic or well-planned exploitation, family expectations around inheritance and cultural differences surrounding the use and management of older people's finances".⁷

There is limited data on the prevalence of elder abuse, but from the available data it appears that up to 6% of older people may be the victims of elder abuse.⁸ The issue is probably unreported. There are a number of reasons why victims are unlikely to report abuse, including isolation and reliance on the perpetrator for care and companionship.⁹

Whilst there are clear benefits to older Victorians having arrangements in place for another person to make decisions on their behalf in the event that they are no longer able to make those decisions themselves, the powers conferred on substitute decision makers have also been used to perpetrate elder abuse. Similarly, whilst we support the introduction of the role of "supporter", we are concerned that this new role may also be used to perpetrate elder abuse. It will be necessary to ensure that adequate safeguards are in place to prevent misuse of the supporter role.

This submission addresses issues that Seniors Law and SRV have identified through the provision of legal services to older people in relation to elder abuse and other issues associated with ageing.

The focus of this submission is on the legal, practical and procedural barriers that interfere with the right of people with a disability, particularly those experiencing or at risk of developing cognitive impairments associated with ageing, to enjoy legal capacity on an equal basis with others in all aspects of life.¹⁰ In particular, this submission considers:

- the right to self-determination and presumption of legal capacity
- legal, practical and procedural barriers preventing people with a disability from accessing justice under the current law and policy, including lack of legal representation, inadequate access to support services, the role of litigation guardians and limited avenues for reassessment and appeal
- the role of protective authorities and officials
- a shift away from substituted decision making towards a more supportive model of assisted decision making
- features of the current law which tip the balance in favour of protectionism rather than individual autonomy,¹¹ including plenary orders, lack of review of a guardian or administrator's decisions and the concept of "best interests".

In his speech to the Second World Congress on Adult Guardianship, The Honourable Michael Kirby, AC CMG highlights individual decision-making ability in the following terms:

Life, tears, death and a world of many wrongs have been companions to the law of guardianship over the centuries. Every society must have laws to protect the vulnerable. Even the earliest human societies

⁵ Office of Senior Victorians, *Victorian Government Elder Abuse Prevention Strategic Implementation Plan*, August 2007, Department of Planning and Community Development.

⁶ World Health Organisation/International Network for the Prevention of Elder Abuse (2002) *The Toronto Declaration on the Global Prevention of Elder Abuse*, Geneva, cited in the Report on the Elder Abuse Prevention Project (2005) *Strengthening Victoria's Response to Elder Abuse*.

⁷ Deborah Setterlund, Cheryl Tilse and Jill Wilson "Older People's Knowledge and Experiences of Enduring Powers of Attorney: The Potential for Financial Abuse" (Queensland Law Society Incorporated, Brisbane, 2000).

⁸ World Health Organisation *World Report on Violence and Health 2002* Ch. 5 Older People.

⁹ Seniors Rights Victoria, *Submission to the Victorian Law Reform Commission Guardianship Paper 10*, (2011)

¹⁰ See *United Nations Convention on the Rights of Persons with Disabilities*, GA Res A/RES/61/106, UNGAOR, 61st session, Agenda Item 67(b), UN Doc A/61/611 (13 December 2006) (**Convention**) art 12.

¹¹ See *XYZ v State Trustees Limited* [2006] VSC 444 [66] in which Cavanough J stated: "there may be a need for VCAT to re-examine the exercise of its guardianship and administration jurisdiction generally to determine whether the balance has swung too far in favour of paternalism or protection as against individual autonomy".

recognised the need for this, when inborn or later-acquired disabilities impacted on the individual's capacity and competence to make decisions for themselves. When this happens, the law must step in with an answer.¹²

The challenge is what that answer should be.

The recommendations made in this submission aim to make sure that the measure of giving the power to make decisions about a person's lifestyle, health, accommodation, work or financial affairs to someone other than that person is a means of "last resort" in both theory and practice.¹³

About Justice Connect and Seniors Rights Victoria

Justice Connect exists to help build a world that is just and fair – where systems are more accessible and accountable, rights are respected and advanced and laws are fairer. In pursuing this vision, Justice Connect:

- provides access to justice through pro bono legal services to people experiencing disadvantage and the community organisations that support them.
- builds, supports and engages a strong commitment to lawyers' pro bono responsibility.
- challenges and changes unjust and unfair laws and policies, using evidence from our case work and the stories of our clients to bring about reform.
- undertakes legal education and law and policy reform aimed at improving access to justice.

In partnership with SRV, Seniors Law assists vulnerable older Victorians with legal issues associated with ageing, with a focus on the prevention of, and response to elder abuse.

The objective of Seniors Law is to improve the ability of older Victorians to age with dignity and respect. Seniors Law is a program of Justice Connect delivered in partnership with SRV, a program of the Council on the Ageing (COTA).

Free legal services are provided by pro bono lawyers from Justice Connect member firms through pro bono clinics at hospitals and health centres across metropolitan Melbourne. Through this case work, Seniors Law is well placed to identify laws that adversely impact the interests of older people and their access to justice. We undertake law reform and advocacy initiatives to advocate for the reform of those laws. Seniors Law staff and pro bono lawyers also undertake a range of community and legal education activities in order to raise awareness of elder abuse and issues associated with ageing and to increase the capacity of community and pro bono lawyers to assist provide legal assistance to older people.

SRV provides leadership across Victoria in responding to older people experiencing abuse, through a network of legal and other supports. SRV was established in April 2008 and is a program of the Council On the Ageing (COTA). SRV works in partnership with Justice Connect Seniors Law, Eastern Community Legal Centre and Loddon Campaspe Community Legal Centre.

SRV is still the only service of its kind in Victoria. We have expertise in the area of substitute decision-making and are, therefore, well positioned to comment on Commonwealth supported and representative decision-making structures proposed by the COMMISSION.

SRV's objectives are to:

- Provide leadership in knowledge, policy and advocacy on issues of elder abuse and older people;

¹² Kirby, M. AC CMG, 'Adult Guardianship: Law Autonomy and Sexuality' Speech, *Second World Congress on Adult Guardianship* (15 Oct 2012) Melbourne, Australia.

¹³ See the declaration of the Australian government upon ratification of the Convention: "Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention 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 ... Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others...": United Nations Multilateral Treaties Deposited with the Secretary-General – Status as at 1 April 2009, Volume 1, Part I, Chapters I to VII, ST/LEG/SER.E/26 p 461.

- Develop and implement education and awareness raising programs for older people and the general community;
- Provide a key point of contact for older people, their families, professionals working with older people and the general community;
- Assist individuals to receive appropriate services and support to make informed decisions in relation to their situation;
- Provide free and accessible legal services that empower clients to meet their legal needs; and
- Establish premises and infrastructure from which to provide information, support and legal services to the target community.

Since July 2013, Seniors Law and SRV have received more than 2,237 inquiries. This resulted in the provision of 323 advices and 144 cases opened.

2. National Decision Making Principles

Seniors Law and SRV broadly endorse the proposal for the introduction of National Decisions Making Principles as ‘a basis for review of relevant Commonwealth, state and territory laws.’¹⁴ However, in order to ensure consistency across jurisdictions, we recommend the implementation of a consistent legislative scheme for the appointment of substitute and supported decision makers reflecting the national decision making principles. This is discussed further below in Part 4 of the submission.

Proposal 3–3 National Decision-Making Principle 2

Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.

We strongly support the proposal to introduce a decision making principle that a person who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.

While it is always preferable for family members and friends with a longstanding relationship and knowledge of the person’s wishes and preferences to act as a supporter or representative, there will be instances where a person has no such support available. One of the key risk factors of elder abuse is isolation.¹⁵ In our experience, many vulnerable older people do not have family members or friends willing to take up the role of supporter or representative.

It is in these situations that Kirby J suggests that “independent, dispassionate, neutral and professional public office holders can be especially useful and even necessary.”¹⁶

In order for this principle to be meaningful, it will be necessary for the Commonwealth to provide funding to a new or existing body to provide assistance to people requiring decision-making support in the absence of available alternatives. Ideally, an independent body would be provided with sufficient resources and funding to ‘employ suitably qualified people to take on the role’ equivalent to the operation of OPA/State Trustees in the Victorian jurisdiction, and other similar bodies in different states and territories. Volunteer support programs could be an option if funding does not support this.

¹⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (2014).

¹⁵ Seniors Rights Victoria, above n 9.

¹⁶ *Holt v Protective Commissioner* (1993) 31 NSLR 227 per Kirby J.

Proposal 3–5 National Decision-Making Principle 3

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

We strongly support a move away from a “best interests” model to a model that prioritises the will, preferences and rights of person who may require decision making support.

One concern with appointing a supported or substitute decision maker is the level to which that person is able to divorce themselves from their own bias and concerns, and act in accordance with the will and preferences of the supported person. For example, a UK study of support workers found that decisions were typically made in accordance with the personal values and goals of the supporter.¹⁷ A survey conducted by ACT organisation ‘Advocacy for Inclusion’ (in relation to substitute decision making) determined that ‘there are cases where people feel decisions are being made for them without consideration of their expressed wishes.’¹⁸

The inclusion of the proposed principle may assist to guide the conduct of supporters and substitute decision makers to focus on the will and preferences of the person they are supporting or making decisions on behalf of.

Proposal 3–7 Representative Decision-Making Guidelines

Any determinations about a person’s decision-making ability and any appointment of a representative decision-maker should be informed by the following guidelines:

- (a) An adult must be presumed to have ability to make decisions that affect their life.
- (b) A person has ability to make a decision if they are able to:
 - (i) understand the information relevant to the decision and the effect of the decision;
 - (ii) retain that information to the extent necessary to make the decision;
 - (iii) use or weigh that information as part of the process of making the decision; and
 - (iv) communicate the decision.
- (c) A person must not be assumed to lack decision-making ability on the basis of having a disability.
- (d) A person’s decision-making ability is to be assessed, not the outcome of the decision they wish to make.
- (e) A person’s decision-making ability will depend on the kinds of decision to be made.
- (f) A person’s decision-making ability may evolve or fluctuate over time.
- (g) A person’s decision-making ability must be considered in the context of available supports. Proposals and Questions 11
- (h) In communicating decisions, a person is entitled to:
 - (i) communicate by any means that enables them to be understood; and
 - (ii) have their cultural and linguistic circumstances recognised and respected.

We broadly support the introduction of the proposed Representative Decision Making Guidelines. However, we recommend including an additional guideline relating to unwise or risky decisions. In our experience the outcome of the decision is often erroneously relied on in the assessment as to whether a person has the ability to

¹⁷ Dunn, M. C. et. al., 2010, A Life Like Ours?, Journal of Social Welfare and Family. 54(2):144-160.

¹⁸ Advocacy for Inclusion, Supported Decision making, Legal Capacity and Guardianship (2012).

make a decision. It is important that the proposed Representative Decision Making Guidelines recognise the right to make an unwise or risky decision.

Case study

Eliza had no children. After her husband died, she appointed her nephew as her enduring financial power of attorney to help her pay her bills and manage her finances. She inherited a considerable amount of money from her Aunt Mary. She started seeing a younger man. She often spent large sums of money taking him to various expensive restaurants and on holidays. Although she was spending large amounts of money, Eliza enjoyed the company. She changed her will to leave her entire estate to the younger man.

Section 1(4) of Mental Capacity Act 2005 (UK) (**Mental Capacity Act**) provides that 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision.' We recommend that, in addition to the requirement that the will, preferences and rights of the person must direct decisions that affect their lives in proposal 3-5, proposal 3-7(b) incorporate a requirement similar to section 1(4) of the Mental Capacity Act. Such a provision would clarify that a person must not be considered to lack decision-making ability on the basis that the decision is unwise or unconventional.

3. Supported Decision-Making in Commonwealth Laws

Shift in approach to supported decision-making

Seniors Law and SRV broadly support the introduction of a supported decision making model as an appropriate alternative (and a less restrictive option) for people requiring decision-making assistance. However, we have some concerns about the way these mechanisms will operate alongside the current state and territory decision-making appointments, including guardians and attorneys. The implementation of a Commonwealth model will make the system considerably more complicated. It will be necessary to commit significant resources to ensure that the new system is understood.

In our experience, when an individual lacks or loses capacity, carers and family members will often support them to make decisions without any formal authority.¹⁹ It is rare that a person will make a decision entirely in isolation. Barbara Carter of the Office of the Public Advocate points out that there is a high level of dependence on the expertise and knowledge of those with special qualifications and that it is a rare incidence that any person will make a decision entirely in isolation.²⁰ For instance, older people seeking assistance from our services often request that a child, trusted friend or caseworker communicate with our service on their behalf.

Case study

An older lady contacted SRV to discuss issues with her son. She had limited English and requested that the advocate speak with her daughter on her behalf. Her daughter provided the service with an overview of the situation whilst the older lady provided instructions and clarification.

¹⁹ Seniors Rights Victoria, above n 9.

²⁰ Carter, B. Supported Decision-making: Background and Discussion Paper, Office of the Public Advocate, Victoria.

We note that ‘support is the central theme in the CRPD’²¹. Justice Dixon of the Victorian Supreme Court highlights the shift in attitudes towards models of assisted decision-making particular to the individual involved. In the case of *Erdogan v Ekici*²² Dixon J recommended that:

‘the contemporary approach to balancing the need to protect persons under disability whilst giving proper recognition to their basic human rights now requires greater emphasis on tailored outcomes beyond substitute decision making arrangements, which may extend to concurrent responsibility by supported decision making and co-decision making arrangements with regular reviews’

The Office of the Health and Community Services Commissioner in South Australia advocated for supported decision-making on the basis that ‘many of the complaints they deal with involving the care of people with disability could be avoided, if the person with a disability had been given a greater voice.’²³

Supported or assisted decision making is in operation in some Australian jurisdictions. For example, South Australia and New South Wales are currently piloting trials for supported decision making in the context of personal and financial matters.²⁴ A bill providing for assisted decision making is currently before the Victorian Parliament²⁵.

In our view, subject to the provision of adequate resources and safeguards, a mechanism for the appointment of support decision-makers may act as a valuable (and less restrictive) alternative to VCAT guardianship and administration orders.

It will, however, be necessary to ensure that the entry criteria for the appointment of a supporter remains the same as for the appointment of a substitute decision maker so that the addition of the new roles does not expand the reach of the guardianship and administration regime. Rather, we support the introduction of the new role as a less restrictive alternative for older people who would otherwise require the appointment of a guardian or administrator.

We also have some concerns about the way these mechanisms will operate alongside the current state and territory decision-making appointments, including guardians and attorneys. As previously mentioned, the implementation of a Commonwealth model will make the system considerably more complicated. It will be necessary to commit significant resources to ensure that the new system is understood.

Safeguards

Question 4–3

In the Commonwealth decision-making model, should the relationship of supporter to the person who requires support be regarded as a fiduciary one?

Question 4–4

What safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model?

As with any substitute decision-making arrangement, there is a risk that the supporter or representative will abuse or exploit the supported person.²⁶ Appropriate safeguard mechanisms should be implemented to reduce

²¹ Australian Law Reform Commission, above n 14, 36.

²² [2012] VSC 256.

²³ OPA Annual Report (2012-2013): *Promoting Rights and Interests*, 51.

²⁴ Office of the Public Advocate, ‘Developing a Model of Practice for Supported Decision-making’ (June 2011) <http://www.opa.sa.gov.au/cgi-bin/wf.pl?pid=&mode=cd&file=../html/documents/09_Publications/Supported%20Decision%20Making>; New South Wales Attorney General and Justice, ‘New South Wales Trustee & Guardian, Annual Report 2010–11’ (2011) 37. Queensland Law Reform Commission, A Review of Queensland’s Guardianship Laws, Report No 49 (1996) 201-4; Standing Committee on Social Issues, Parliament of New South Wales, Substitute Decision-Making for People Lacking Capacity (2010)[5.62]–[5.102] (‘Substitute Decision-Making Report’).

²⁵ *Powers of Attorney Bill* (Vic) 2014

²⁶ Seniors Rights Victoria, above n 9, 11.

the incidence of abuse by people in support roles. The potential for elder abuse in the context of supported or representative decision-making derives from the following factors:

- The person has a cognitive impairment and is unable to effectively monitor the activities of the supporter or representative;
- Family members, who are highly trusted by the person requiring support, are most likely to be appointed in the role of supporter or representative decision-maker;
- There is often limited understanding of the roles and responsibilities of guardians and attorneys.

Seniors Law and SRV consider it appropriate that the relationship of supporter and supported person is fiduciary in nature.

In the experience of our clients, it is not uncommon for people who owe fiduciary obligations to them to breach those obligations. For example, a common form of financial elder abuse is misuse of a power of attorney. This tends to occur when the attorney takes a benefit for himself not authorised by the power in breach of his or her fiduciary relationship with the donor.

Case study

An older man signed over an enduring power of attorney to his daughter and over a short period of time she emptied his bank account. Although legally competent to make his own decisions, he felt unable to confront his daughter about the situation or refuse her demands, particularly as she had threatened to refuse him access to his grandchildren if he does so.

Case study

Terry was devastated to have discovered that the daughter he trusted enough to give his power of attorney to had abused that trust. She told him that she had purchased a home on his behalf but instead registered the property in her own name. She also used the power to misappropriate funds in excess of \$50,000. After a lifetime of hard work, Terry was left with nothing except terrible grief at the loss of his relationship with his daughter.

Breaches are not confined to instances of the attorney acting without regard to the principal's interests and includes situations where the attorney was misguided or failed to properly understand his or her role.

Case study

An older man signed over an enduring power of attorney to his niece to activate when he lost capacity. Believing the power began immediately, his niece transferred money from his bank account without permission.

The relationship of supporter to supported person and similarly, representative and represented person, may be subject to abuse or exploitation. Regarding the relationship as a fiduciary one may help to reduce instances of abuse and provide a 'full range of equitable remedies that are available in those circumstances'.²⁷ We

²⁷ Victorian Law Reform Commission, *Guardianship*, Final Report No. 24 (2012) [8.128-8.130] quoted in the Australian Law Reform Commission, *Equality, Disability and Capacity: Discussion Paper* (2014), 88.

acknowledge the view that a ‘supported person should be responsible for the consequences of any decisions made within a supported arrangement because they retain decision-making authority’²⁸ However, given that the supported person will frequently be in a position of vulnerability to their supporter²⁹ it is vital that there are appropriate mechanisms for accountability, including provision that the supporter relationship is fiduciary. A range of other safeguards will also be necessary to ensure that supporters do not breach their obligations to the person being supported. It is our view that ‘increased accountability of the conduct of decision makers is essential in order to reduce the incidence of abuse associated with these powers.’³⁰ We acknowledge that striking the balance between appropriate safeguard mechanisms and over-excessive regulation of supporters is a delicate one. Any new obligations must not be so onerous as to dissuade ordinary people from taking on the role of supported decision-maker or representative. It is also important that the supported decision making measures are accessible and understandable to enable those who proposed represented people trust to assume the role of supporter or representative.

With this in mind, we propose a system which reflects the recommendations in the SRV submission to the VLRC report. These require:

- (a) The introduction of a mandatory online registration scheme;
- (b) the representative or supported decision-maker to sign a statement agreeing to comply with their responsibilities before they undertake their role, as is already the case in relation to some personal appointments;
- (c) the representative to keep accurate separate records of all decisions made;
- (d) the representative to submit an annual declaration of compliance with their obligations during the previous year; and
- (e) random audits of the records of a percentage of all representative decision makers.³¹

In our view, the requirement to lodge annual declarations is not too onerous for representative decision makers. Whilst the lodgment of annual declarations alone is unlikely to prevent abuse, the annual declarations form part of an overall regime which we believe will reduce the incidence of abuse without being overly onerous. It may be appropriate to establish an independent regulatory body or Commonwealth agency (or confer state based tribunals with the power) to monitor and undertake investigations. It may also be appropriate for that body to receive declarations and carry out random audits.

A national registration scheme would provide a central database of all appointed supporters and allow Commonwealth agencies to quickly and efficiently check the status of a purported supporter.

As with any new system, it will be necessary to devote significant resources to provide training and support for supporters and representatives to ensure they understand their role and can effectively fulfil their responsibilities.

4. Possible implications of a Commonwealth scheme

Proposal 3–1

Reform of Commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require support in making decisions should be guided by the National Decision-Making Principles and Guidelines, set out in Proposals 3–2 to 3–9.

²⁸ Australian Law Reform Commission, above n 14, 87.

²⁹ Ibid.

³⁰ Ibid.

³¹ See Seniors Rights Victoria, above n 9, for further information.

Proposal 4–1

Commonwealth laws and legal frameworks should encourage supported decision-making by adopting a model for individual decision-making consistent with the National Decision-Making Principles and Proposals 4–2 to 4–9 (the ‘Commonwealth decision-making model’).

We are concerned with implementing an additional layer of legislative frameworks introducing ‘supported decision making’ and principles and guidelines regulating decision-making that is specific to Commonwealth laws. It has the potential to create inconsistency between roles and responsibilities of supporters or representatives appointed under Commonwealth laws, and those appointed under existing state and territory legislation. In turn, this may further confuse the vulnerable or cognitively impaired people who require assistance making decisions and their supporters and representatives who already deal with complicated State and Territory laws.

National Decision-Making Principles and Guidelines

Consideration should be afforded to whether a conceptual overlay of broad principles is sufficient to effect change. We are concerned that the national decision-making principles are not enshrined in legislation and therefore, the states are not obliged to adopt any or all of the proposed supported decision-making principles. Potential conflicts may arise if, upon review of State and Territory legislation, particular jurisdictions implement some, but not all, the proposed decision-making principles, which may in turn be at odds with the principles implemented in other States or Territories. This has the potential to create a divide between jurisdictions and work against the COMMISSION’s motive to foster a nationally consistent approach to supported decision-making.

Rather than creating a set of principles as a conceptual overlay for reform, Seniors Law and SRV consider it more appropriate to implement a consistent legislative scheme for the appointment of substitute and supported decision makers, and reflecting the national decision-making principles.

Interaction between decision-makers

Question 4–6

How should supporters and representatives under the Commonwealth decision-making model interact with state or territory appointed decision-makers?

The roles and responsibilities of Commonwealth assisted decision-makers and supporters must be clearly defined and distinguished from the roles of state appointed guardians, and an appropriate training program implemented to ensure understanding of obligations and responsibilities.

We agree with the comments of the Financial Services Council that ‘harmony between State and Territory Guardianship and Administration laws and Commonwealth laws is highly desirable so as to enhance the effectiveness of disability services on a national level.’³² Seniors Law and SRV also support the Office of the Public Advocate (Qld) position that if several systems of decision-making support exist, ‘those systems must integrate and, where appropriate, allow the same decision-maker to act in all systems.’³³

To this effect, we prefer the approach where if a person requires full decision-making support, the appointment of an existing state or territory appointed decision-maker should be permitted and encouraged. We agree it would

³² Financial Services Council, *Submission 35* quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (2014), 87.

³³ Office of the Public Advocate (Queensland), *Submission 05* to the Australian Law Reform Commission discussion paper *Equality, Capacity and Disability in Commonwealth Laws*, December 2013, 8.

be desirable for individuals to have the same appointed decision-maker at a Commonwealth and State and Territory level.

Features of the proposed legislative framework

In developing the legislative framework detailing the Decision-Making Principles and introducing ‘supported decision making’, Seniors Law and SRV suggest the following should be considered for effective operation:

- (a) state courts and tribunals should retain responsibility for operational administration of the Decision-Making Principles and implementation of ‘supported decision-making’. For example, the expertise of state tribunals can be used when making decisions about appointing, assessing and limiting supportive decision-makers;
- (b) the process of appointing decision-makers must be streamlined to avoid duplication of functions and appointment of multiple decision-makers for the purposes of making the same decisions. For example, a person appointing an administrator and then being required to appoint an authorised person solely for the purposes of communicating with Centrelink;
- (c) states would adopt a consistent approach to the Decision-Making Principles, whether through adoptive legislation, transfer of powers, etc.;
- (d) states would incorporate the legislative frameworks required to implement supportive decision making; and
- (e) federal body will retain oversight of legislative frameworks detailing the Decision-Making Principles and introducing ‘supported decision making’ to promote consistency between the states and territories.

5. Access to Justice

Conducting civil litigation

Legal representation

Question 7-2

Should the Australian Solicitors’ Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors’ duties of confidentiality where:

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

Seniors Law and SRV support an amendment to the Australian Solicitors’ Conduct Rules (the **Rules**) to provide a new exception or qualification to a lawyer’s duty of confidentiality to a client to enable the lawyer to seek the appointment of a guardian or administrator in certain limited circumstances.

Case study

Penny is a 90 year old lady born overseas. She migrated to Australia in the 1940s with her husband and has no children. The couple lived in South Australia. Her only living relative is her niece, Julie, who lives in Victoria.

After her husband has passed away, Julie visited Penny at her home in South Australia. Penny has never been close to her niece, and Julie only increased contact with Penny following the death of Penny's husband.

In 2009, Julie visited Penny at her home. During this visit, Penny gave Julie access to her bank account. Shortly afterwards, Penny appointed Julie as her attorney by enacting an enduring power of attorney (EPOA) for financial and personal health matters. The EPOA was made in South Australia.

One year later, Julie insisted on taking Penny with her to live in Victoria. Penny did not want to leave South Australia. All her personal belongings were left behind, and Julie arranged for her to move into a small granny flat behind her investment property. The couple renting the investment property agreed to assist Penny with various household tasks in exchange for discounted rent. Julie confiscated Penny's bank book and personal items. As a result, Penny had no access to her pension or other funds. Julie also restricted Penny's movements and did not provide her with a key to the granny flat.

Penny approached SRV in 2011 and instructed that she did not want Julie controlling her financial affairs and making decisions about her health or personal affairs. She expressed a strong desire to return to her home in South Australia. She also told SRV that Julie has called her a madwoman and threatened to admit her to a nursing home.

Initially, SRV did not revoke the EPOA due to concerns about Penny's capacity to understand the legal nature and effect of the document. Shortly after approaching SRV, Penny instructed her bank to suspend Julie's authority on her account and to cancel her bankcard which Julie used to withdraw funds. After obtaining access to the account, SRV identified withdrawals of more than \$50,000 from the account. Penny was not aware of these withdrawals and had never received instalments of money from Julie.

SRV subsequently made an application to VCAT on behalf of Penny and as part of the application, requested VCAT to authorise the Office of the Public Advocate (OPA) to investigate the matter further. OPA investigated and the matter was subsequently listed for a VCAT hearing. At the hearing, Julie insisted that Penny did not have capacity to make decisions about her finances. The information before VCAT on this issue was ambiguous, and the member adjourned the hearing and directed that OPA procure an independent neuropsychological assessment on Penny's capacity to make decisions about her own financial and personal matters. VCAT also agreed (upon request from SRV) to suspend the EPOA and ordered Julie to lodge accounts, statements and receipts and further documentation relating to the exercise of the EPOA with VCAT.

A neuropsychological report was produced in respect of Penny, and the assessment was that she had the cognitive ability to revoke the EPOA. VCAT subsequently ordered that Penny had capacity to revoke the EPOA and ordered the proceeding to be dismissed.

Penny's case illustrates the dilemma facing lawyers who are uncertain about their client's capacity to provide instructions in relation to their legal problem. Like many of our clients, Penny had no other family members or friends to assist who could support her or to make an application for the appointment of a substitute decision maker. Ultimately, SRV lawyers decided to make the application to VCAT on behalf of Penny and it was determined that Penny did have capacity to revoke the EPOA.

However, the lawyers were bound by the Professional Practice and Conduct Rules 2005 (the **Victorian rules**). Rule 3 provides for an express duty of confidentiality and rule 12 states that a lawyer is under a duty to advance

and protect the client's interests. Both duties are repeated at rule 1-1 of the Rules which states that a "practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients' best interests and maintain clients' confidences".

Furthermore, Law Institute of Victoria Ethics Committee rulings indicate that where a lawyer has doubts about their client's capacity, they should seek medical assessment and in the event that the client refuses to consent to an assessment the lawyer may cease to act, giving reasons. If the lawyer is of the view that the client does not have capacity, they may make an application to have a guardian appointed but if the client objects to the application, they should cease to act, giving reasons.³⁴

Had the SRV lawyers formed the view that Penny did not have capacity to instruct them in relation to the application, they would have faced the difficult choice of ceasing to act for Penny, the alleged victim of serious financial abuse, or breaching their duty of confidentiality by making an application to VCAT seeking the appointment of an administrator. This raises significant concerns about the ability of clients like Penny to access the justice system and to realise their right to equality before the law.³⁵

There is, however, New South Wales authority for a qualification to the obligation of confidentiality. In the 2001 decision of *R v P*³⁶, the Court held that there was no absolute rule against a solicitor bringing an application for the appointment of a guardian or administrator against their client's wishes, finding that there was no misuse of confidential information in the circumstances. However, the court noted that the bringing of such applications by a solicitor is extremely undesirable. Lawyers should only bring such an application as a last resort, where all other avenues have been explored, including the possibility of another person bringing the action.³⁷

On 25 September 2013, the Public Interest Law Clearing House (as it was known then, now known as Justice Connect) jointly hosted a roundtable with the Office of the Public Advocate Victoria (**OPA**) and the Law Institute of Victoria (the **roundtable**). The roundtable was attended by representatives from Justice Connect, OPA, the LIV, government departments, statutory bodies, the judiciary and trustee services, amongst others. The question of whether an amendment to the Victorian Rules to provide for an exemption or qualification to the duty of confidentiality was desirable was considered at that meeting. The risk that lawyers might too readily rely on the exemption rather than work to support their client to provide instructions was considered. On balance, however, the attendees supported a proposal to amend the Victorian Rules to provide for a limited exemption or qualification to the duty of confidentiality.

Rule 9.2 of the Australian Solicitors' Conduct Rules (the **Australian Rules**), provides a number of exemptions to the duty of confidentiality. Seniors Law and SRV recommend that rule 9.2 be amended to include an additional exemption similar to the exemption provided in rule 1.14 of the American Bar Association Model Rules of Professional Conduct (American Rules).

The American Rules include a confidentiality rule with broader exemptions than under the Victorian or Australian Rules. An exemption applies in the event that a lawyer reasonably believes that the client has diminished capacity and is at risk of substantial physical, financial or other harm unless action is taken.³⁸ In these circumstances, the lawyer may take "reasonably necessary protective action".³⁹ This action may include consulting with third parties who have the capacity to protect the client and, but only in appropriate cases, seeking the appointment of a substitute decision maker.⁴⁰

We recommend that any amendment to the Australian Rules should require the lawyer to take into consideration all the legislative criteria and to consider whether matters can be resolved less restrictively. The exemption should only operate when all other least restrictive alternatives have been considered, with the solicitor being required to make reasonable attempts to support the client to make decisions before relying on the exemption.

³⁴ Lauren Adamson, Mary-Anne El-Hage and Julianna Marshall, 'Incapacity and the Justice System in Victoria' (Discussion Paper, Public Interest Law Clearing House 2013), p2 available at <http://www.justiceconnect.org.au/our-programs/seniors-law/law-and-policy-reform/access-justice/incapacity-and-justice-system-victoria>.

³⁵ Ibid

³⁶ *R v P* [2001] NSWCA 473.

³⁷ Adamson et al, above n34, 2.

³⁸ American Bar Association, Model Rules of Professional Conduct, r.1.14.

³⁹ Ibid.

⁴⁰ Ibid.

Litigation representatives

Proposal 7-4

The rules of federal courts should provide that a person needs a litigation representative if the person cannot:

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

The current definition of capacity varies enormously not only amongst states but also depending on the applicable area of law. The definition of disability and whether or not a finding of disability is necessary in order for a finding of incapacity or for the appointment of a substitute decision maker also differs. This lack of consistency has the result that assessment is an excruciatingly complex task.

The introduction of capacity principles and a legislative definition of incapacity would provide guidance when assessing when a person is unable to make their own decisions, particularly if the principles formed part of a legislative scheme applicable to the Commonwealth as well as the states and territories.

However, we support a two stage test in relation to the appointment of a substitute decision maker including a litigation representative. The first stage requires an assessment as to whether the person has a cognitive or mental impairment. Medical evidence may be required in order to make this assessment.

The second stage requires an assessment as to whether the person, by reason of the cognitive impairment, is unable to do a number of things including:

- (a) understand the information relevant to the decision;
- (b) retain that information;
- (c) use or weigh that information as part of the process of making the decision; or
- (d) communicate the decision in some way (whether by talking, using sign language or any other means)

but with a qualification that mere memory lapses or an inability to retain long-term memories should not be sufficient to find that someone has lost capacity, as long as they are able to retain information for as long as is necessary for them to make the decision.

Parts (a) to (d) above are incorporated in the definition of capacity used in the *Mental Capacity Act 2005* (UK). We support the adoption of a definition of capacity along these lines, together with the guiding principles contained in section 3(1) of the *Mental Capacity Act 2005* (UK) with the qualification that it is only necessary for the person to retain the information for long enough to make the decision.

Guardianship laws in all Australian states, other than Queensland require a causal link between a finding of incapacity and a disability or impairment. This is also consistent with the approach adopted in England and Wales.⁴¹

The issue of whether the presence of a 'disability' should be linked to a finding of capacity, was debated during the VLRC's Inquiry into Guardianship in 2012. Victorian Legal Aid in their submission addressed concerns of removing the criterion of 'disability' altogether because of the perceived broadening of the capacity test which could be satisfied merely because of objectively bad decisions.⁴² The VLRC commission shared this view and recommended that because 'capacity' is determined through a professional judgment, which is inherently subjective, some objective grounds had to remain in place to ensure that overly liberal orders regarding substituted decision making could be made.

⁴¹ *Mental Capacity Act 2005* (UK), s 2(1).

⁴² Victorian Legal Aid, Submission CP 73 to the Victorian Law Reform Commission Guardianship Consultation Paper 10 (2011)

A review of supported decision making in the ACT concluded differently.⁴³ Advocacy for Inclusion argued that the reference to a condition or disability as an aspect of capacity is not only discriminatory but prevents the assessment of capacity as a decision specific approach.

Whilst we support a move away from a status based approach to incapacity which is inconsistent with the CRPD towards a decision specific approach, in our experience it is important to retain an objective element of the test. The rules should more closely reflect the common law and focus on capacity in relation to the particular transaction, but in making that assessment, it should be necessary for there to be some sort of cognitive or mental impairment. In the absence of an objective test which requires the existence of a mental or cognitive impairment, there is a very real risk that the appointment of a substitute decision maker will be made in circumstances where a person is perceived to be making risky or unwise decisions. It can be difficult to divorce the “quality” of a decision from the process of making the decision, which can have the effect of denying on older person the dignity of risk. This is particularly relevant for older people who receive formal care. In our experience, service providers are often concerned about breaching their duty of care owed to the older person when the older person makes decisions that may be deemed unsafe or unwise.

Case study

An older person had his capacity questioned as a result of engaging in behaviour that a service provider deemed to be "harmful" or "risky". The VCAT application was accompanied by a neuropsychologist's report but not a more recent ACAS assessment that showed he had no cognitive impairment. As a result, VCAT did not have all the information regarding the older person's capacity. However, with SRV's assistance, he attended the hearing and had the hearing adjourned to allow for a plan to be formulated allowing him to return home with appropriate support without having a guardian appointed.

As a result, we prefer the retention of a concept along the lines of cognitive or mental impairment, in that a guardian or administrator should only be appointed in cases where a person does not have the capacity to make decisions and that incapacity is caused by a cognitive or mental impairment. In our view, this option retains an objective element and ensures that people who make unwise decisions are not caught in the guardianship and administration net. We do, however, recommend that the term “disability” is not used to highlight the fact that the disability or impairment is only relevant to the extent that it impacts the person’s ability to make decisions.

Finally, we agree that the appointment of a litigation representative in relation to the conduct of a proceeding is potentially inconsistent with the CRPD in that the appointment is generally made for the entirety of the proceeding when capacity may evolve or fluctuate over time. However, we agree with the COMMISSION that such concerns are outweighed by the need to promote the dignity, equality, autonomy, inclusion and participation of all people involved in civil proceedings. However, whilst we acknowledge that arguments about efficiency and certainty are valid, the rules should be improved to improve compliance with the CRPD.

Article 12 of the CRPD provides that, amongst other things, measures relating to the exercise of legal capacity apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

At the very minimum, the decision to appoint a litigation representative should be reviewable and subject to regular review.

Litigation guardians are currently appointed by the court in which the proceedings are taking place pursuant to the relevant court rules. The states and territories have courts and tribunals established to consider applications for the appointment of substitute decision makers.⁴⁴ The legislation governing these

⁴³ Advocacy for Inclusion ‘Supported Decision Making, Legal Capacity and Guardianship – Implementing Art 12 of the Convention on the Rights of Persons with Disabilities in the ACT’ (August 2012).

⁴⁴ For example, Victorian Civil and Administrative Tribunal; NSW Civil and Administrative Tribunal; Northern Territory local courts and a Guardianship Panel; ACT Civil and Administrative Tribunal; Tasmanian Guardianship and

bodies provides a framework in which the relevant powers must be exercised.⁴⁵ Whilst it may be timely to review the operation of these bodies to ensure compliance with the CRPD, members sitting on the state bodies have considerable expertise in making capacity assessments and those assessments are made within an overall framework, unlike judges sitting in Commonwealth courts making determinations pursuant to the provisions in an order of the relevant court rules.

In Victoria, the Magistrates Court, County Court and Supreme Court are able to refer the issue of whether a party before the court requires a guardian or administrator or both appointed under the Guardianship and Administrations Act (Vic) 1986 (**G&A Act**) to the Victorian Civil and Administrative Tribunal (**VCAT**) for a determination pursuant to section 66 of the G&A Act. Appointments made by VCAT have the benefit of being subject to appeal⁴⁶ and regular review⁴⁷ and can be tailored to the requirements of the litigation.

At the roundtable in September 2013, there was a discussion about whether the current court processes adequately protect and promote the interests of litigants without capacity to instruct a lawyer or engage in litigation. Participants at the roundtable indicated that courts should retain the ability to appoint litigation guardians for litigants who require a litigation representative but that they should also have the ability to refer the question to a specialist body such as VCAT.

In addition to the ability to refer questions of capacity to a specialist court or tribunal, the court rules should be amended to specifically provide for an appeal of the decision to appoint a litigation representative and for a regular review of the appointment.

Proposal 7-5

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

In order to comply with the CRPD, it is necessary to ensure access by persons with disabilities to the support that they require to exercise legal capacity, as reflected in Proposed Decision Making Principle 2.

Litigants must be provided with the support necessary to make, communicate and participate in decisions relating to the litigation. Many of our clients are isolated and have very little support from family and friends. In order to ensure that giving the power to make decisions to someone other than that person is a means of last resort in both theory and practice, it will be necessary to fund appropriate bodies to carry out this function for people who do not have any other options.

From our experience, vulnerable older people can be denied the right to equality before the law and access to the justice system by a failure to provide necessary support.

Administration Board; Queensland Civil and Administrative Tribunal; Western Australia State Administrative Tribunal; South Australian Guardianship Board.

⁴⁵ For example, Division 3 in Part 4 and Division 3 of Part 5 of the *Guardianship and Administration Act 1986* (Vic) and section 4 of the *Guardianship and Management of Property Act 1991* (ACT).

⁴⁶ *Guardianship and Administration Act 1986* (Vic), div 1 pt 6.

⁴⁷ *Ibid*, s 35D and div 2 pt 6.

Case study

Mary was very elderly and had suffered from a stroke when she entered into a contract she did not have the capacity to enter. Supreme Court proceedings were commenced against her seeking to enforce the contract.

The plaintiffs' lawyers argued that Mary could not defend the proceedings without the appointment of a litigation guardian. Mary did not have any friends or family who could take on the role and there is no funded litigation guardian service for civil matters in Victoria. Fortunately the matter settled as Mary didn't know how she would have been able to defend the proceeding without a litigation guardian.

The failure to provide the necessary support to litigants in federal courts will result in older people being denied the right to legal capacity and equality before the law in breach of the CRPD.

We would support a provision in the federal court rules requiring the court to ensure that the litigant is provided with the support necessary to promote the capacity of the older person along the lines of:

In determining whether a person needs a litigation representative, the court must ensure that the litigant has been provided with all support necessary to promote the ability of the person to make, communicate and participate in relation to the litigation.

The role of litigation representatives

Proposal 7-6

The rules of federal courts should provide that litigation representatives:

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

Article 12(4) of the CRPD provides that measures relating to the exercise of legal capacity should respect the rights, will and preferences of the person, be proportionate and tailored to the person's circumstances, apply for the shortest time possible and be subject to regular review. In our view, the rights, will and preferences of the person should be starting point, and not just a consideration, in the decision-making process of a substitute decision maker.⁴⁸

We support the proposed shift from the protective “best interests” approach towards the proposed “substituted decision” model, requiring the litigation representative to take into account the will and preferences of the represented person. We would go further and recommend that the federal court rules be amended to include a requirement in the court rules that a substitute decision maker make the decision that the person would have

⁴⁸ Seniors Rights Victoria, above n 9, 24.

made if they were able to do so. Substitute decision makers should only depart from the wishes of the represented person in circumstances where the decision is likely to cause serious harm to that person.⁴⁹

Case study

An older man whose case manager was concerned about his drinking signed an application for a guardian without being given the chance to read it. The case manager, who thought she was acting in the best interests of the older man, placed him in a nursing home in a locked ward to “dry” him out. The older man wished to return to his home and live independently but was not allowed to.

Proposal 7-7

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

We strongly support the proposal that Federal courts should issue practice notes explaining the duties of litigation representatives to the person they represent and to the court.

Participants at the roundtable on 25 September 2013 agreed that there should be guidelines or practice notes available to assist litigation guardians perform the role. Feedback from participants indicated in some cases there was a limited understanding of the role of a litigation guardian by litigants and the legal profession. It was recommended that any guidelines or practice notes include:-

- (a) what the role of litigation guardians involves;
- (b) the extent to which the litigation guardian should actively participate in the development of the represented person’s case setting out activities which a litigation guardian may undertake, for example, obtaining reports to assist the case or making contact with service providers;
- (c) the ability of a litigation guardian to challenge their lawyer in ways that any litigant may challenge their lawyer;
- (d) the authority of a litigation guardian to change lawyers;
- (e) whether the litigation guardian needs to act through a lawyer when the litigation guardian is a lawyer;
- (f) whether settlements or consent orders need to be approved by the presiding court.

The New South Wales Attorney-General’s Department has produced excellent resources in relation to that jurisdiction including a code of conduct and handbook for Guardians ad Litem as well as resources for courts and tribunals. We recommend that these resources be adapted for use in federal and state and territory jurisdictions.⁵⁰ These resources are part of a larger program including funding for litigation guardians which we also recommend be implemented at the federal and state level in other states and territories.

There was also support at the roundtable for the development of guidelines specifically for lawyers acting for a client with a litigation guardian.

⁴⁹ Ibid.

⁵⁰ Available at <http://www.gal.nsw.gov.au>.

6. Restrictive Practices

Proposal 8-1

The Australian Government and the Council of Australian Governments should facilitate the development of a national or nationally consistent approach to the regulation of restrictive practices. In developing such an approach, the following should be considered:

- (a) the need for regulation in relation to the use of restrictive practices in a range of sectors, including disability services and aged care;
- (b) the application of the National Decision-Making Principles; and
- (c) the provision of mechanisms for supported decision-making in relation to consent to the use of restrictive practices.

In the VLRC Final Report, it was noted that:

- (a) many people who lack capacity to make decisions about their accommodation and restrictive practices live in facilities such as nursing homes with the informal consent of a family member or friend;
- (b) there is no common law or statutory authority permitting this practice;
- (c) there is no oversight of these decisions or scrutiny of restrictive practices.⁵¹

Based on our casework, Seniors Law has identified two key decisions where regulation is required to clarify the person responsible for making the decision and safeguards and oversight of those decisions:

- (a) the decision to enter the aged care facility; and
- (b) the decision to use restrictive practices while the person resides at the aged care facility.

These decisions may result in the deprivation of liberty of vulnerable older people in aged care facilities, many of whom have no means of seeking independent advice. In response to the VLRC review, Aged Care Crisis submitted that:

older people who are perceived to have cognitive impairment are the only group of people who can be placed in locked facilities, against their will, without any reasonably accessible procedures for appeal. Clearly, people must be kept safe but we are aware of several instances where the basic human right, not to be kept locked away or otherwise restrained without due process, has been disregarded. We can think of no other group of people where this situation would be regarded as acceptable.⁵²

Case study

An older man was frustrated with a rehabilitation facility that would now allow him to return home in circumstances where his children did not support his desire to do so. The man's capacity was not impaired, but the facility was concerned about their duty of care. The man was told that if he attempted to leave the facility the police would be called.

⁵¹ Victorian Law Reform Commission, above n 2, 318.

⁵² Victorian Law Reform Commission, above n 2, 329, quoting Aged Care Crisis, *Submission CP 38 to the Victorian Law Reform Commission Discussion Paper 10* (2011).

The VLRC Final Report identified the complex law, standards and practices that currently regulate the deprivation of liberty of an older person at an aged care facility:

- the writ of *habeas corpus*;
- the tort of false imprisonment;
- the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**);
- statutory authority to deprive liberty, including under the *Mental Health Act 1986* (Vic) and *Disability Act 2006* (Vic);
- regulation of residential services under the *Aged Care Act 1997* (Cth) and *Supported Residential Services (Private Proprietors) Act 2010* (Vic); and
- aged care assessment service.

Some of these avenues may not be appropriate for legal and practical reasons. For example, provisions in the *Disability Act 2006* (Vic) do not extend to disabilities solely related to ageing and the Charter does not provide a stand-alone cause of action – it must rely on an existing cause of action, such as a writ of *habeas corpus* or the tort of false imprisonment, which present their own practical barriers to justice.⁵³

Due to the failure of current laws to provide a comprehensive framework, we support the development of a national or nationally consistent regulatory approach to guide the making and oversight of these important decisions. In developing the appropriate regulatory response, the following principles should be considered:

- the older person is presumed to have capacity to make decisions;
- if the capacity of the older person is in doubt, the proposed decision-maker must have medical evidence that the older person lacks capacity before making the decision;
- the decision-maker should comply with the proposed National Decision-Making Principles and consider options that promote the older person's liberty and autonomy – admission to an aged care facility and use of restrictive practices are measures of absolute 'last resort';
- the possibility of supported decision-making is to be explored before imposing substitute decision-making;
- these decisions should be reviewable and regularly reassessed by a tribunal or court; and
- if an older person does not consent to entry to the aged care facility or use of restrictive practices, the proposed decision-maker can only make these decisions under formal appointment as a substitute decision-maker.

When identifying the appropriate decision-maker, principles from existing statutory regimes should also be followed. For example, section 37 of the G&A Act details the priority of people who are eligible to be a 'person responsible'. When a decision-maker has not been appointed, the spouse of the older person takes priority over other relatives. As noted in our submission to the VLRC review, this approach is not regularly followed;

*"current practice in relation to medical decision-makers often involves an element of ageism, in that elderly spouses are regularly discounted by staff at medical facilities or carers when a person responsible is needed. This, combined with the potential for a conflict between the represented person and family members in relation to decisions to admit the older person into care, increases the risk of abuse and the need for the types of safeguards discussed in the Consultation Paper."*⁵⁴

⁵³ *Disability Act 2006* (Vic), s3; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s39.

⁵⁴ Seniors Rights Victoria, above n 9, 71.

7. Review of State and Territory Legislation

Proposal 10-1

State and territory governments should review laws that deal with decision-making by people who need decision-making support to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision making model. In conducting such a review, regard should also be given to:

- (a) interaction with any supporter and representative schemes under Commonwealth legislation;
- (b) consistency between jurisdictions, including in terminology;
- (c) maximising cross-jurisdictional recognition of arrangements; and
- (d) mechanisms for consistent and national data collection.

Any review should include, but not be limited to, laws with respect to guardianship and administration, informed consent to medical treatment, mental health and disability services.

The law on substituted decision-making is provided by the sub-national legislatures of the states and the self-governing territories of the Commonwealth and by residual common law. This has resulted in eight different regimes, which vary widely in their forms of regulation.

The Office of the High Commissioner for Human Rights in Geneva has noted that the CRPD is at odds with the practice of guardianship laws that run through the current legal framework in state and territory legislation in Australia.⁵⁵ Following from the national ratification of the *Convention on the Rights of Persons with Disabilities*, his view is that it is now incumbent upon each of the state and territory governments to uphold and implement the principles, intent and spirit of the Convention in all of its legislative processes, policies and resources.

Michael Kirby in his speech at the Second World Congress on Adult Guardianship in Melbourne on 15 October 2012 argued strongly for a move towards national legislation.

There have been efforts to introduce some consistency and administrative arrangements between the various jurisdictions.

The Australian Guardianship and Administration Council (AGAC) was established in 1993 in Sydney at the second National Conference on Guardianship and Administration. AGAC seeks to provide a national forum for state and territory agencies that protect adults with a decision-making disability through adult guardianship and administration. The Council also seeks to develop consistency and uniformity, as far as practicable, in respect to significant issues and practices and to encourage dialogue at a national level to enhance quality decision making and client focused outcomes. AGAC was significant in the decision to adopt national guardianship standards and to establish administrative arrangements between Boards and Tribunals to deal with guardianship and administration orders made in alternate jurisdictions.

As detailed in part 5, we support a nationally consistent approach to implementing decision-making principles, introducing supported decision-making and the consistent use of terminology between states and territories. We suggest state and territories retain responsibility for operational administration of the Decision-Making Principles and implementation of 'supported decision-making'. Naturally, this will involve changes to state and territory laws through, for example, legislation adopting the national approach to decision-making principles and supported

⁵⁵ United Nations, Office of the High Commissioner for Human Rights, *From Exclusion to Equality: realising the Rights of Persons with Disabilities* (Geneva, 2007).

decision-making model. A federal body, however, should retain oversight of state and territory laws to promote consistency.