**ELDER ABUSE – ISSUES PAPER 47**

**Question 32: What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?**

**Joshua Richards’ Submission**

I am a fifth year law and criminology student at Murdoch University and for the past 6 months I have been volunteering at the Mental Health Law Centre (‘MHLC’). MHLC is a community legal centre which provides free legal advice and representation to mentally ill clients. One of the areas of law practiced by the MHLC is guardianship and administration matters. My time at the MHLC has given me insight into the abuse suffered by elderly mentally ill people from their guardians or administrators.

My submission will be focusing on question 32 presented by the ALRC. Elderly people are a vulnerable class of people. If they are subject to a guardianship or administration order this is because they lack the requisite decision-making capacity. This places them in a further vulnerable position and they can easily be abused or exploited.

**Evidence of elder abuse by appointed decision-makers**

There is no exact figure outlining the rate of elder abuse by appointed decision-makers. People who require guardians have diminished capacity; accordingly, it is difficult to ascertain how frequently abuse occurs. However, a number of different bodies have acknowledged the potential abuse or neglect caused by substituted decision-making.[[1]](#footnote-1) Further, Ms Anita Smith, President of the Tasmanian Guardianship and Administration Board, has stated that substituted decision-making does not always protect an individual from financial abuse.[[2]](#footnote-2) Therefore, it is reasonable to assume that substituted decision-making can cause elder abuse.

I do note that substituted decision-making can also be a safeguard to elder abuse.[[3]](#footnote-3) However, as discussed below, supported decision-making is an alternative safeguard that may reduce elder abuse by guardians and administrators.

**Substituted versus supported decision-making**

For the purposes of this section the ‘current law’ is the *Guardianship and Administration Act 2000* (WA) (‘the Act’). The other States have similar Acts with similar provisions; however, there is no uniform Commonwealth legislation.

Section 44(1)(a) of the Act provides that a person may be a guardian if they act in the interest of the individual. This section is idealistic and expressly provides for substituted decision-making. However, as noted above, substituted decision-making may result in potential abuse or neglect. In contrast to this, the *Mental Capacity Act 2005* (UK) s 4(6) requires the guardian to consider the “person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)”. The UK position provides for a focus on the preferences of the individual which is important because it attempts to maintain the autonomy of the individual, which should be the focus of a guardianship or administration order.

In 2014 the ALRC recommended that guardians should be supportive decision-makers rather than substitute decision-makers.[[4]](#footnote-4) This is consistent with the notion that elderly people lacking the requisite capacity should still retain as much autonomy as possible. This does not inherently prevent abuse; however, it may reduce negligent or indirect abuse.

**International treaties**

Australia became a signatory to the CRPD[[5]](#footnote-5) in 2007 and ratified it the following year. The United Nations Disability Committee’s position is that art 12 of the CRPD implies “a shift from the substitute decision-making paradigm to one that is based on supported decision-making.”[[6]](#footnote-6) The Committee also stated that Member States have misinterpreted art 12. The Committee’s position is not to specifically reduce elderly abuse, but to allow people with disabilities or reduced capacity to have “equal basis with others”,[[7]](#footnote-7) which in turn may indirectly reduce elder abuse.

The CRPD is not binding on Australia or any of its States; however, it has been ratified and should be implemented. Australia should also follow the opinions of the UN Disability Committee as it is the specified international body established to interpret the CRPD. The Commonwealth has the power to establish uniform legislation implementing supported decision-making through its external affairs power.[[8]](#footnote-8)

**Recommendation**

A Senate Committee has already agreed that reform to implement supported decision-making is a necessary step; however, no legislative action has been taken to do this.[[9]](#footnote-9) The Commonwealth should create uniform legislation to introduce supported decision-making and limit substituted decision-making to exceptional circumstances. The uniform legislation should include a similar provision to s 4(6) of the *Mental Capacity Act 2005* (UK), focusing on the preferences of the individual and preserving their autonomy. By introducing supported decision-making and ensuring a focus on preserving autonomy, elder abuse should decline while the use of guardians and administrators will remain an adequate safeguard.

**Challenges to supported decision-making**

There are a few challenges which still exist. First, it must be determined what type of case is ‘exceptional’ to justify substituted decision-making. Second, as noted by the Senate Committee, research must be conducted to ensure that the supported decision-making scheme implemented is effective.[[10]](#footnote-10) Third, this will not solve all elder abuse by guardians and it is still a problem area.

1. Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015) 73. [↑](#footnote-ref-1)
2. Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 19. [↑](#footnote-ref-2)
3. Mike Clare, Barbara Black Blundell and Joseph Clare, ‘Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data’ (2011) *Crime Research Centre: University of Western Australia* 18. [↑](#footnote-ref-3)
4. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 88. [↑](#footnote-ref-4)
5. *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). [↑](#footnote-ref-5)
6. United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) 1. [↑](#footnote-ref-6)
7. Ibid 2. [↑](#footnote-ref-7)
8. *Australian Constitution* s 51 (xxix). See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1. [↑](#footnote-ref-8)
9. Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015) 77. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)