2. Conceptual Landscape—the Context for Reform

Contents

Summary

2.1 This Inquiry takes place within a context of a national and international focus on the rights of persons with disability. This chapter describes the international human rights context and analyses the key concepts in the literature concerning disability and issues of 'capacity'. It provides the essential conceptual structure to present the ALRC's key proposals in this Inquiry.

2.2 The 'paradigm shift' in approaches to persons with disability is discussed, outlining the transition from 'best interests' approaches to ones that emphasise the will and preferences of the individual in models of 'supported' rather than 'substitute' decision-making. The tensions around the meaning and application of art 12 of the *United Nations Convention on the Rights of Persons with Disabilities*[1] (CRPD) are analysed in the light of the historical development of decision-making models for

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

people who may require decision-making support. In this context Australia's Interpretative Declaration in relation to art 12 is considered. The ALRC concludes that, whatever the correct legal understanding of art 12 and substitute decision-making models, the retention of the Interpretative Declaration may act as a handbrake on reform. The ALRC therefore proposes that the Australian Government should review the Interpretative Declaration with a view to withdrawing it.

2.3 The chapter concludes by summarising the implications for reform of the paradigm shift towards supported decision-making. This provides a prelude to Chapter 3, where the ALRC sets out National Decision-Making Principles as the basis for modelling supported decision-making in Commonwealth laws.

International context

United Nations Convention on the Rights of Persons with Disabilities

2.4 Australia was one of the original signatories to the CRPD—the first binding international human rights instrument explicitly to address disability—when it opened for signature on 30 March 2007.[2] Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. The CRPD entered into force for Australia on 16 August 2008,[3] and the Optional Protocol in 2009.[4]

2.5 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'.[5] The CRPD consolidates existing international human rights obligations and clarifies their application to persons with disabilities.[6] It does not create new rights.

2.6 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.[7] But, as noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*, a convention can still assist with the interpretation of domestic law:

> The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should

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2 Prior to the 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).

3 The CRPD entered into force on 3 May 2008, on receipt of its 20th ratification.

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

5 *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.

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

7 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315. See, eg, *Kioa v West* (1985) 159 CLR 550.

> act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law.[8]

2.7 Even when an international convention has been incorporated into domestic law, however, its beneficial impact cannot be assumed. Adam Johnston observed that 'the level of adherence and/or enforcement can rely on many factors':

> The first of these can be political willingness, reflected in the resourcing of relevant agencies. Domestic cultural norms can be important and the broad terms of many conventions can leave much up to an individual reader's interpretation as to what an Article requires. Judicial views, the lobbying of interest groups and the public credibility of international institutions can also play their part.[9]

2.8 While implementation can be a multifaceted challenge, a document like the CRPD can both reflect and propel shifts in thinking—in this context for persons with disability. Family Planning NSW commented that the CRPD is 'a powerful statement of what Australia and the world believe are the fundamental rights of people with disability';[10] and the ACT Disability, Aged and Carer Advocacy Service said that the CRPD 'represents a cultural, identity and legal shift'.[11]

2.9 The CRPD reflects a social model of disability, which describes disability in terms of the interaction between a person's disability and the external world.[12] As the Preamble of the CRPD states:

> 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.[13]

2.10 The Office of the Public Advocate (Qld) said that the CRPD incorporates 'a contemporary approach to disability':

- recognising that disability is an evolving concept and that disability results from the interaction between people with impairments and their surroundings as a result of attitudinal and environmental barriers;
- the right and capacity of people with disability to make valued contributions to their communities; and
- recognising that all categories of rights apply to people with disability, who should therefore be supported to exercise those rights.[14]

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8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288.

9 A Johnston, *Submission 12*.

10 Family Planning NSW, *Submission 04*.

11 ADACAS, *Submission 29*.

12 This is distinguished from medical a model of disability, which 'uses biomedical explanations which locate disability within the individual in terms of pathology': 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.

13 *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.

14 Office of the Public Advocate (Qld), *Submission 05*.

2.11 As Professor Gwynnyth Llewellyn of the Centre for Disability Research and Policy, University of Sydney, submitted: 'defining disability as an interaction means that "disability" is *not an attribute of the person*'.[15]

2.12 In addition to the general principles and obligations contained in the CRPD,[16] art 12 underpins the ability of persons with disability to achieve many of the other rights under the Convention. It recognises the right of persons with disability to enjoy legal capacity 'on an equal basis with others in all aspects of life'.[17] Article 12 is of central importance in this Inquiry.

2.13 By ratifying the CRPD, Australia accepted the obligation to recognise that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life and to take appropriate measures to provide persons with disability access to the support 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.[18]

Other international instruments

2.14 In addition to the CRPD, there are other international instruments of relevance to this Inquiry. The *Universal Declaration of Human Rights* affirms the inherent dignity and the equal and inalienable rights of all people and sets as a common standard the protection of these rights by the rule of law.[19] While the *International Covenant on Civil and Political Rights* makes no specific reference to persons with disability, it enshrines rights to self-determination of all people as well as rights to physical integrity, liberty and security of the person, equality before the law and non-discrimination.[20] Additionally, the *International Covenant on Economic, Social and Cultural Rights* protects the right to work, social security, family life, health, education and participation in cultural life;[21] and the *Convention on the Rights of the Child* refers specifically to disability.[22]

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15 G Llewellyn, *Submission 82*.

16 *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.

17 Ibid art 12.

18 Ibid art 12(4).

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

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

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

22 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2.

2.15 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (CAT)[23] may also be relevant, as there have been suggestions that the use of restrictive practices with respect to persons with disability might contravene the CAT.[24]

2.16 There are also a number of international instruments that specifically protect the rights of women,[25] children[26] and Indigenous peoples,[27] which are of relevance in considering intersectional discrimination. All of these instruments are reflected in the articles of the CRPD.

Interpretative Declarations

2.17 An 'Interpretative Declaration' is a unilateral statement made by a State or an international organisation, in which that State or organisation purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.[28] Australia has made three Interpretative Declarations in relation to the CRPD:[29]

> [Re art 12:] 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;
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> [Re art 17:] 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. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;
>
> [Re art 18:] Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.[30]

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23 *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).

24 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.

25 *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).

26 *Convention on the Rights of the Child*, opened for Signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

27 *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).

28 International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [1.2].

29 *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).

30 Ibid.

2.18 The Interpretative Declarations are intended to outline the Australian Government's understanding of its obligations under the Convention and do not purport to exclude or modify the legal effects of the CRPD.[31]

2.19 For the purpose of this Inquiry, it is the first declaration relating to art 12 and decision-making that is of principal concern. There are differing views about the effect of this declaration, particularly in relation to the role of substitute decision-making, which prompt a reconsideration of its retention. This is considered below.

Concepts and terminology

The challenge of language

2.20 This Inquiry tackles issues of great significance in contributing to the framing of legal policy responses for persons with disability. The ALRC recognises the importance of careful definition of terms and a need to clarify precisely how certain concepts are being described. The language concerning disability has demonstrated great shifts over time, for example:

- the distinction between 'lunatics' and 'idiots' in William Blackstone's day in the mid-18th century;[32]
- the language of 'unsound mind' of the early 20th century, as evident for example in the *Commonwealth Electoral Act 1918* (Cth);[33]
- the use of the terms 'mentally retarded persons' and 'disabled persons' in United Nations Declarations of 1971 and 1975;[34] and
- 'persons with disabilities' in the CRPD in 2007.

2.21 As words have become associated with negative connotations, or used pejoratively, a new lexicon has been developed.[35] As the ALRC commented in its 1989 report, *Guardianship and Management of Property*:

> There is a problem of language when dealing with people with disabilities. Some expressions which used to be common are no longer used by those working in the field because they are regarded as having connotations which tend to lower the dignity of people with disabilities.[36]

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31 International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [1.1]–[1.3]. An Interpretative Declaration can be modified at any time: [2.4.8].

32 William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, 292.

33 For the historical background see, eg, R Croucher, '"An Interventionist, Paternalistic Jurisdiction"? The Place of Statutory Wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674.

34 *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).

35 A similar shift is evident in relation to the terms applying to children born out of wedlock: from 'bastards', to 'illegitimate' to 'ex-nuptial'.

36 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [1.3].

2.22 The ALRC therefore took an approach in that report which was to adopt usages 'current among people who are disabled and those who work with them'.[37]

2.23 The present Inquiry takes place 25 years later and the language has shifted further in the intervening years. In this Inquiry the ALRC seeks to frame concepts and choose terms in ways that reflect the framing principles—in particular that of 'dignity'. Consistent with the approach identified by the ALRC in 1989, words and terms should not be used that 'tend to lower the dignity of people with disabilities'. Even where terms have an established usage,[38] the ALRC considers that the development of a new lexicon serves to signal the paradigm shift reflected in the CRPD. This Inquiry provides an opportunity to contribute to that process.[39]

Definitions of disability

2.24 'Disability' may be defined in different ways and for different purposes. Approaches to defining disability have also shifted over time—particularly from a 'medical' to a 'social' approach. A 'medical' approach is one in which a diagnosis or categorisation of condition leads to consequences—for example, the imposition of guardianship.[40]

2.25 The CRPD does not include detailed definitions of 'disability' or 'persons with disabilities' in its definition section. Rather, art 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.

2.26 For the purposes of this Inquiry, the ALRC is taking a broad encompassing approach to definitions of disability, as reflected in the CRPD.[41] This definition includes: sensory, neurological, physical, intellectual, cognitive and psychosocial disability.

2.27 The social approach to disability, reflected in the CRPD, requires a policy focus on the person and their ability, with the support they require to interact with society and their environment—placing the policy emphasis not on 'impairment' but on 'support'. This approach informs the supported decision-making focus of the ALRC's proposals in this Discussion Paper.

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37 Ibid.

38 In the 1989 report the ALRC gave the following example: 'The problem is complicated by the fact that the medical profession has adopted some words as having reasonably precise meanings but the same words are used differently by non-medical people or are regarded as inappropriate': Ibid.

39 Support for this approach is evident in, eg, ADACAS, *Submission 29*.

40 Terry Carney, 'Guardianship, "Social" Citizenship and Theorising Substitute Decision-Making Law' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law* (Springer, 2012) 1. See also World Health Organisation and World Bank, 'World Report on Disability' (2011) 3–4.

41 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).

Recognition as 'persons'

2.28 The Terms of Reference require a consideration of the recognition of people with disability 'as persons before the law'.[42] This language reflects art 12(1) of the CRPD, that 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law'.[43]

2.29 To be recognised 'as persons' is the first question in any consideration of legal capacity. Historically, certain people have been denied recognition of their ability to act in law, or to have 'legal standing', at all.[44] 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.[45]

2.30 The shift in language from 'disabled persons' to persons or people 'with disability' reflects an emphasis on personhood, rather than disability. It also reflects a social model of disability.

2.31 In its Draft General Comment on art 12, the UNCRPD emphasised that 'there are no circumstances permissible under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited'.[46] In this Discussion Paper, the ALRC proposes a model that emphasises ability and support to exercise legal agency, consistent with a full recognition of personhood. In Chapter 3, where the ALRC introduces the National Decision-Making Principles, there is a deliberate use of 'persons' rather than 'people' in the phrase 'persons who may require decision-making support'. The choice reflects a number of elements: the direction of the Terms of Reference on recognition 'as persons'; an understanding of legal capacity issues as individualised, task-specific and fluctuating; and a focus on an individual's ability rather than a generic, status-based approach.

'Equal recognition'

2.32 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

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42 The Terms of Reference are set out in full on the ALRC website: <www.alrc.gov.au>.

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

44 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'.

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

46 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [5].

the CRPD, 'including to refer to the rights of people with disability to make decisions and act on their own behalf'. The concept of equality therefore emphasises independent decision-making by persons with disability.

2.33 Professor Terry Carney stated that equality, in the sense used in art 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').[47]

2.34 The UNCRPD emphasised that the idea of equality reflected in art 12 is essentially about the exercise of human rights: '[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'.[48] Rather than providing additional rights, art 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'.[49]

2.35 In this Inquiry, the ALRC is considering how equal recognition of persons 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.

2.36 The key element in equal recognition, as understood in the CRPD and the discourse that has developed around it, is the embracing of a supported decision-making paradigm so that persons with disability are acknowledged as having the right to make decisions on an equal basis with others and are supported in exercising that right. The linking of support with equality was made in submissions. For example, Hobsons Bay City Council, while supporting the framing principles, said that

> equality should also recognise that in some instances people with disabilities need to be treated with equity in order to create equality. For example, needing additional assistance with some elements of the law in order to fully participate.[50]

Legal capacity

2.37 The Terms of Reference require consideration of Commonwealth laws and legal frameworks that deny or diminish the ability of persons with disability to exercise 'legal capacity'. This language reflects art 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.

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47 Terry Carney, above n 40, 3. See also Terry Carney, 'Participation and Service Access Rights for People with Intellectual Disability: A Role for Law?' (2013) 38 *Journal of Intellectual and Developmental Disability* 59, 66.

48 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [1].

49 Ibid.

50 Hobsons Bay City Council, *Submission 44*.

2.38 Capacity in a general sense refers to decision-making ability. Decisions may cover a wide range of choices in everyday life. They may relate to personal matters, financial and property matters, and health and medical decisions. 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—to be recognised as legal persons. Legal *agency* is the ability to exercise these rights and duties to perform acts with legal effects. Dr Mary Donnelly commented that

> A presumption of agency underlies the liberal conception of autonomy. Our choices are autonomous because they are, in a fundamental sense, *our* choices.[51]

2.39 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'.[52]

2.40 Legal capacity sets the threshold for undertaking certain actions that have legal consequences. For example, a range of transactions may involve an age threshold as a benchmark of when a person is regarded as being able to act independently and with binding effect—to have legal agency to make 'legally effective choices'.[53] Legal capacity goes to the validity, in law, of choices and being accountable for the choices made. As Carney states:

> Those who make the choice should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent.[54]

2.41 There are examples of tests of legal capacity—in terms of levels of understanding for particular legal transactions—that have been developed through the common law:[55]

> Legal incapacity means that, in law, a person is not competent to enter into legal transactions, such as making a contract, executing a will, or giving a legally-recognised consent, for example to an operation.[56]

2.42 The common law starts from a presumption of legal capacity—'the law's endorsement of autonomy'.[57] Common law definitions of legal capacity are generally

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51 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 24.

52 The right to recognition as a legal agent is also reflected in art 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: United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [11]. See also Bernadette McSherry, 'Legal Capacity Under the Convention on the Rights of Persons with Disabilities' (2012) 22 *Legal Issues* 23.

53 Terry Carney and David Tait, *The Adult Guardianship Experiment—Tribunals and Popular Justice* (Federation Press, 1997) 3.

54 Ibid.

55 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.

56 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [1.4].

57 Donnelly, above n 51, 93.

invoked after the event, when a transaction is later challenged on the basis of a lack of capacity (in the sense of agency) to rebut the presumption of legal capacity.[58] The definitions in these contexts focus on the nature of the transaction and the level of understanding required for legal agency. The common law—including doctrines of equity—also includes protective doctrines for vulnerable people, such as the doctrines concerning undue influence and unconscionable transactions.[59] Where a lack of the required level of understanding is proven in the particular circumstances, the transaction may be set aside. Such doctrines focus on a transaction and the circumstances surrounding it. They are decision-specific and involve assessments of understanding relevant to the transaction being challenged. As Bruce Arnold and Dr Wendy Bonython commented,

> It is axiomatic that in some instances differences in capability will be recognised in law. Lack of capacity is one [of] those instances, and is not inherently discriminatory on the basis of disability.[60]

2.43 Capacity assessments have been made as the trigger for formal arrangements for decision-making support through the appointment of, for example, guardians and administrators—or for the commencement of enduring powers of attorney and advance directives. They are also made in the context of a range of health care decisions.

2.44 The common law presumption is embodied in some guardianship legislation.[61] In the Commonwealth context, the *National Disability Insurance Scheme Act 2013* (Cth) includes an assumption of capacity:

> 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.[62]

2.45 Legal capacity is a different concept from 'mental capacity' and should not be confused with it.[63] 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'.[64]

2.46 Stakeholders emphasised the distinction between legal capacity and mental capacity. For example, People with Disability Australia (PWDA), the Australian

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58 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, G E Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) ch 2. This was expressed in the legal maxim '*omnia praesumuntur rite et somemniter esse acta*': all acts are presumed to have been done rightly and regularly.

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

60 B Arnold and Dr W Bonython, *Submission 38*.

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

62 *National Disability Insurance Scheme Act 2013* (Cth) s 17A(1). See also *Mental Capacity Act 2005* (UK) s 1, which addresses this explicitly by providing that individuals are assumed to have capacity to make decisions unless otherwise established.

63 See, eg, the distinction between medical and legal perspectives in Terry Carney, above n 40.

64 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [12].

Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRC) commented that any proposal for a uniform approach to legal capacity

> must remove any notion that the assessment of mental capacity is also an assessment of legal capacity, that assessing mental capacity is a mechanism through which to limit legal capacity, and that the existence of a cognitive impairment creates a limit to the exercise of legal agency. Concerns with the provisions in, and operation of, legislation ...cannot be ameliorated or rectified without an acceptance of this premise.[65]

2.47 This reflects two concerns: first, that legal capacity assessments should not simply be equated with mental capacity; and, secondly, that people with cognitive impairment should not be assumed to have limited legal capacity, in the sense of being able to exercise legal agency.

2.48 Similarly, stakeholders pointed to the danger of defining legal capacity on the basis of disability—of those who *have* legal capacity; and those who *have not*. Such a 'binary model' does not reflect how legal capacity should be represented. Arnold and Bonython submitted that

> [Legal capacity] may be context-dependent, and fluctuate, rather than static and permanent. In many instances, the primary focus of the law is not whether the individual has a disability; rather, it considers whether that disability impairs the individual's ability to act as a legally recognized entity, with the powers and obligations such recognition attracts. A person who is physically disabled, therefore, is entitled to exactly the same presumption of capacity at law as someone without a physical disability. ... For many disabled people, the question of capacity is no more relevant to them than it is [to] the remainder of society.[66]

2.49 What is clearly not appropriate in the context of the CRPD is a disqualification or limitation on the exercise of legal capacity *because of* a particular status, such as disability. As National Disability Services remarked, '[t]he crux of the issue is seen in historic legal frameworks that place constraints on the exercise of legal capacity based solely on disability status'.[67] The approach should therefore be on the support needed to exercise legal agency, rather than an assumption or conclusion that legal agency is lacking because of an impairment of some kind.

2.50 In this Inquiry the ALRC suggests that even the word 'capacity' may carry some of the connotations of previous times. 'Capacity' is regularly confused with 'legal capacity', and 'legal capacity' is regularly conflated with 'mental capacity'. To avoid such confusion and to focus the reform direction towards support in decision-making, the ALRC uses 'ability'.[68]

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65 PWDA, ACDL and AHRC, *Submission 66*.

66 B Arnold and Dr W Bonython, *Submission 38*.

67 National Disability Services, *Submission 49*. See also PWDA, ACDL and AHRC, *Submission 66*.

68 Others talk about 'capability', such as Amartya Sen and Martha Nussbaum. See discussion in Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

Supported and substituted decision-making

2.51 There is an important distinction between 'substituted' and 'supported' decision-making. It is the key issue in the discussion surrounding the meaning and effect of art 12 of the CRPD.

2.52 Decision-making supports and arrangements for persons 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 appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical);[69] 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 (guardians and administrators).[70]

2.53 For Aboriginal and Torres Strait Islander people with disability decision-making may also have a collective quality.

2.54 Formal arrangements may also include recognition of support by family, friends or others where provision is made for designation of a 'nominee' for particular purposes, such as 'correspondence nominees' in the Centrelink context.[71]

2.55 The formal appointment of guardians and administrators in Australia occurs under state and territory laws. Guardians and administrators are vested with power to make decisions on behalf of persons assessed to be unable to make decisions for themselves.

2.56 In the literature discussing support for people who may require decision-making assistance there is an evident tension in the way that the labels of 'supported decision-making' and 'substituted decision-making' are used. The discourse around art 12, and particularly the General Comment on art 12 when published as a draft,[72] has exacerbated this tension. The ALRC considers that it is constructive to summarise the development of the use of these terms, and the conflict around them, and to place this in the context of formulating legal policy responses in this Inquiry that prioritise supported decision-making.

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69 Sometimes referred to collectively as 'living wills'. See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [4.3].

70 In some cases, such as emergency medical decisions, there are statutory hierarchies of those who may authorise certain actions—'generic lists of suitable proxies in the legislation': Carney and Tait, above n 53, 4.

71 These are considered in Ch 4.

72 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility*.

The emergence of 'substitute' decision-making

2.57 Decision-making support has a long history, conventionally summarised in the evolution and development of guardianship regimes. Professors Carney and David Tait describe the history of adult guardianship as comprising three periods:

> The first period was characterised by an emphasis on protecting the property of individual family members who were disabled, with the courts stepping in to provide this security. The second period was one in which Public Trustee organisations took over responsibilities for property management for the whole groups of institutionalised people, usually without judicial review (or only token review). Medical control was growing, as forms of treatment and care became more specialised and sophisticated. Court-ordered guardianship was used occasionally, alongside various forms of welfare or mental health guardianship. The third stage maintained the ease of access characteristic of the second stage, but anchored reforms to a commitment to protecting individual freedoms. The state took on new responsibilities to minimise its own role.[73]

2.58 The first period was one in which the focus was upon the person who was being 'protected' and what they would have wanted.[74]

2.59 Guardianship and management of property reveal two broad themes: 'providing appropriate protection for those unable to look after themselves'; and 'preserving and, where possible, enhancing the personal autonomy of such persons'.[75] However, as Sarah Burningham commented, when these themes are articulated in legislative regimes,

> there is great potential for conflict between competing values as legislators attempt to manufacture statutes that both respect the adult's autonomy and protect the adult from harm. This tension recurs throughout guardianship's history.[76]

2.60 There may also be a distinction between law and what happens in practice. 'Traditional' guardianship laws have been described as 'exceedingly paternalistic', protecting the estate of the person under protection, and not promoting their autonomy, especially where 'plenary' forms were used involving a complete vesting of authority in another person. The disability rights movement of the 1960s led to increasing pressure to move away from such models, championing a social, rather than a medical, model of disability.[77]

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73 Carney and Tait, above n 53, 22.

74 A good example is *Ex Parte Whitbread, in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99, 35 ER 878. See discussion in Donnelly, above n 51, 178; John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' [1994] *Oxford Journal of Legal Studies* 159; R Croucher, '"An Interventionist, Paternalistic Jurisdiction"? The Place of Statutory Wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674.

75 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.1]. This report concerned the ACT.

76 Sarah Burningham, 'Developments in Canadian Adult Guardianship and Co-Decision-Making Law' (2009) 18 *Dalhousie J. Legal Stud.* 119, 128.

77 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [2.8].

> The principles of new legislation were fairly consistent: the least restrictive option (with guardianship as a last resort), promoting maximum autonomy, encouraging habilitation and living as 'normally' as possible, and a preference for family over state proxies. This meant keeping orders as short and limited as possible. Generally 'private' arrangements were to be preferred to public ones, and a 'substituted judgement' principle was to be used rather than a 'best interests' one, where these came into conflict.[78]

2.61 'Best interests' standards, as suggested in this quote, were ones that preceded, and were to be contrasted with, a 'substituted judgement' approach. The 'best interests' principle was seen to reflect the idea of 'beneficence'—a dominant theme in medical ethics, in which the 'primary imperatives were for doing good for the patient, the avoidance of harm and the protection of life'.[79]

2.62 A best interests standard was identified as associated with paternalistic approaches to persons with disability; 'substituted judgment' was seen as reflective of the person and respectful of their autonomy. Describing the emergence of the substituted judgment approach in the United States in the context of healthcare decision-making, Dr Mary Donnelly said that it was a standard 'based on what the patient would have wished had [they] had capacity notwithstanding, in some cases, very limited evidence of [their] likely views or preferences'.[80] Even in the medical context, therefore, the best interests standard had given way to autonomy.[81]

2.63 In a report in 1995, Robin Creyke described the emergence of a 'common core of principles' to guide substitute decision-makers as '[o]ne of the most remarkable developments in this area of law'. It involved an appreciation that disability

> is not an absolute state and that individuals' capacities to reason and to make decisions continue, or can be developed, in some areas, albeit they are lost, or cannot be exercised without assistance or training in others. This awareness, coupled with the growing focus on people's rights as individuals, led to the notion that the powers given to substitute decision-makers should be restricted and tailored to the special needs of the individual for whom assistance is needed.[82]

2.64 The 'guiding philosophies' that became 'strongly entrenched in Australian laws for guardians, financial managers or administrators' by the 1990s were: the presumption of competence; normalisation; the least restrictive option; respect for autonomy; and fostering self-management.[83] Even in a reformed context of being committed to advancing individuals' rights, 'best interests' standards were still retained.

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78 Carney and Tait, above n 53, 17–18. Citations omitted.

79 Donnelly, above n 51, 11. Donnelly refers to the Hippocratic Oath.

80 Ibid 176. Donnelly, 185, refers to the 'first significant application' of the standard in the decision of the Supreme Court of New Jersey in *Re Quinlan* (1976) 70 NJ 10.

81 See discussion in Donnelly, above n 51, 14–16. Donnelly refers in particular to the work of Tom Beauchamp and James Childress in their pioneering work on medical ethics.

82 R Creyke, *Who Can Decide? Legal Decision-Making for Others*, Aged and Community Care Service Development and Evaluation Reports, No 19, Department of Human Services and Health, Aged and Community Care Division (1995) 38.

83 Ibid 40.

2.65 The Australian Guardianship and Administration Council (AGAC) described the approach of state and territory appointments as being 'governed by three principles, variously expressed', that:

> (a) an appointment must promote as far as possible the person's freedom of decision and action (sometimes called the 'least restrictive alternative' or 'autonomy' principle); and
>
> (b) an appointment promotes the person's best interests; and
>
> (c) the person's wishes are given effect to, wherever possible.[84]

2.66 'Best interests' and the person's wishes are both used. Some 'best interests' standards have also been expressed in terms of prioritising the wishes and preferences of the person. For example, the *Mental Capacity Act 2005* (UK) s 4(6) requires a person making a determination of 'best interests' to consider, 'so far as is reasonably ascertainable':

> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so.[85]

2.67 In addition, s 4(7) requires the decision-maker to take into account, 'if it is practicable and appropriate to consult them', the views of:

> (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
>
> (b) anyone engaged in caring for the person or interested in his welfare,
>
> (c) any donee of a lasting power of attorney granted by the person, and
>
> (d) any deputy appointed for the person by the court,
>
> as to what would be in the person's best interests and, in particular as to the matters mentioned in subsection (6).

2.68 Of such a hybrid standard, Donnelly writes that it 'attempts to mitigate the consequences of a loss of capacity while staying within a best interests framework'.[86]

Shift towards supported decision-making

2.69 Although substitute decision-making was a step that was seen as an advance and an expression of autonomy for persons with disability, and conceptually linked to the disability rights movement of the 1960s, by the second decade of the 21st century it

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84 Australian Guardianship and Administration Council, *Submission 51*.

85 A similar model is included, for example, in the Mental Health Bill 2013 (WA), pt 2 div 3, 'Best interests of a person'.

86 Donnelly, above n 51, 203. This approach, she writes, is 'not without difficulties': 203.

had become the focus of criticism in a new articulation of a standard described as 'supported decision-making'.

2.70 'Supported decision-making' places the person who is being supported at the front of the decision-making process. The decision is *theirs*. As Carney summarises:

> Supported decision-making encompasses a range of processes to support individuals to exercise their legal capacity, and these consist of:
>
> - effective communication, including in the provision of information and advice to a person and through ensuring that a person is able to communicate their decisions to others;
> - spending time to determine a person's preferences and wishes;
> - informal relationships of support between a person and members of their social networks;
> - agreements or appointments to indicate that a relationship of support exists; and
> - statutory relationships of support—whether through private or court/tribunal appointment.[87]

2.71 In the context of developing 'supported decision-making', 'substitute' is often equated with 'guardianship' and both are assumed to represent a standard that is not consistent with the rights of persons with disability. However, interwoven in the discussion about 'substitute' and 'supported' decision-making is a lack of conceptual clarity about the role that a person's wishes and preferences play when another acts for them as a 'substitute' decision-maker; and the role that a 'supporter' plays in assisting a person to make decisions. Conceptual confusion is also exacerbated when models use 'best interests' language but expressed in terms of giving priority to the person's wishes and preferences. Given the tensions around the usage and understanding about 'substituted' decision-making, the ALRC considers that it might be preferable to move away from this language altogether. These tensions are seen in the discussion about the meaning and effect of art 12 and submissions from stakeholders in this Inquiry.

Substitute decision-making and the CRPD

2.72 An important issue to clarify is whether the CRPD permits substitute decision-making at all, or in what form. This also begs the question of what is meant by substitute decision-making in the CRPD context, how it is different from supported decision-making, and the extent to which arguments are ones of substance rather than of form. In the context of this Inquiry, the question becomes one of the implications for this analysis in informing reform proposals for Commonwealth laws and legal frameworks.

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

87 Carney, above n 47, 60.

Comment on Article 12.[88] After submissions were considered, the General Comment was finalised in April 2014.[89]

2.74 What is meant by the distinction? As the Committee explained, 'support' is a broad term—'that encompasses both informal and formal support arrangements, of varying types and intensity'.[90] It then spelled out its understanding of the difference between a 'support' model and a 'substitute' one.

2.75 A *supported* model comprises '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 should all incorporate key provisions to ensure compliance with article 12'.[91] 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).[92]

2.76 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

> (i) legal capacity is removed from a person, even if this is just in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will or (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences.[93]

2.77 The General Comment was prompted by what the UNCRPD described as 'a general misunderstanding of the exact scope of the obligations of States Parties under Article 12'.[94] Australia's view, as expressed through its Interpretative Declaration in respect of art 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.[95]

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88 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility*.

89 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law*.

90 United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law and Draft General Comment on Article 9 of the Convention—Accessibility* [15].

91 Ibid [25].

92 Bernadette McSherry, above n 52, 26.

93 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [23]. There was a slight change in wording between the draft and final versions of this paragraph, but not of significance to the meaning.

94 Ibid [3].

95 *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). Canada made a similar declaration.

2.78 In the 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*'.[96] What is required is 'both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives'.[97]

2.79 The UNCRPD commented about Australia's 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'.[98]

2.80 The ALRC acknowledges that there is considerable tension about what is described as 'substitute decision-making'. As noted above, so-called 'substitute' regimes were conceptually anchored in the will and preferences of the person. They may, in fact, not be proscribed under art 12—so long as the governing standard is not 'the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences'.[99] Would a regime that contains elements (i) and (ii) of the General Comment, but which has a subjective focus and not an objective lens in element (iii), be regarded as an acceptable *supported* decision-making model, and not a *substituted* decision-making model?

2.81 Stakeholders pointed to art 12(4) and its requirements of safeguards, implicitly acknowledging measures that may be regarded as 'substitute' models. The Office of the Public Advocate (SA) observed that the protections of art 12(4) 'make sense as protections for substitute decision making as a "measure relating to exercising capacity"'.[100] The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance noted that Australia's Interpretative Declaration reflected this safeguards approach in relation to substitute decision-making arrangements,

> where decision-making support may extend to decisions being made by a third party on behalf of the person with the impairment, but where such arrangements

96 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [24]. Emphasis added.

97 Ibid.

98 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, [24] <http://www.ncid.org.au/index.php/docman-documents/reports/30-un-report-on-australia-2013/file>.

99 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [23].

100 Office of the Public Advocate (SA), *Submission 17*. To similar effect see: Caxton Legal Centre, *Submission 67*.

> should be put in place only when they are necessary in order to enable to exercise of legal capacity and only where there are sufficient safeguards in place.[101]

2.82 While substitute decision-making models that reflect the constraints identified in such comments may technically not be contrary to the CRPD, '[t]here is still considerable debate over the significance of the [CRPD] for guardianship'.[102] Is 'guardianship' compatible with the CRPD? Or is it rather a question of what kind of guardianship (or whatever other label is used) is incompatible with it—namely, only guardianship where decisions are made without reference to the wishes and preferences of the person under protection? John Chesterman states:

> What is clear is that the Convention obliges countries to use guardianship as little as possible, and to limit as much as possible the powers that guardians have. Moreover, the Convention obliges us to utilise other processes, particularly now supported decision-making, wherever possible. In this way, the Convention is promoting some degree of uniformity, and will continue to do so as jurisdictions review their guardianship systems.[103]

2.83 The Office of the Public Advocate (Qld) referred to the ongoing debate about guardianship and art 12 of the CRPD. It submitted that, 'regardless of views about the compatibility of guardianship laws with the Convention', and even though guardianship is supposed to be an intervention of last resort, 'there are concerns that it is excessively used and misapplied':

> The accessibility and low cost of Australian guardianship systems have resulted in guardianship applications being sought in preference to other options that are less restrictive and do not infringe on people's rights. Arguably, it has also resulted in some guardianship orders being broader than is necessary.[104]

Australia's Interpretative Declarations

Proposal 2–1 The Australian Government should review the Interpretative Declaration in relation to art 12 of the *United Nations Convention on the Rights of Persons with Disabilities* with a view to withdrawing it.

2.84 In September 2013, Australia appeared before the 10th session of the UNCRPD.[105] In its concluding observations, the Committee recommended that Australia review its Interpretative Declarations in order to withdraw them.[106] The ALRC considers that the Declaration in relation to art 12 may be acting as a handbrake on reform and it is timely to reconsider the need for it, and, if retained, its wording.

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101 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

102 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26, 31.

103 Chesterman, above n 102, 31.

104 Office of the Public Advocate (Qld), *Submission 05*. Citations omitted.

105 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>.

106 Committee on the Rights of Persons with Disability, above n 98.

2.85 In the Issues Paper, the ALRC asked about the impact the Interpretative Declaration in relation to art 12 had 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.

2.86 The submissions revealed distinct themes:

- the conceptual blurring about supported and substitute decision-making evident in the CRPD and surrounding discussions;[107]
- discomfort with the idea of 'substitute decision-making';[108] and
- concerns about the Interpretative Declaration in relation to art 12—in terms of its wording or in its effect.

2.87 The OPA (SA), for example, identified some ambiguity in the terms of the Interpretative Declaration with respect to art 12—namely in its statement that the CRPD 'allows for fully supported or substituted decision-making arrangements'.[109] Does this mean that 'fully supported' arrangements are equated with 'substituted' arrangements? The OPA (SA) found this wording 'unhelpful', as 'implying that fully supported and substituted are the same', which it considered they were not.[110]

2.88 On the other hand, the Centre for Regional Law and Justice and the National Rural Law and Justice Alliance, while agreeing about the ambiguity, submitted that, if substitute decision-making is to be understood as 'fully supported' decision-making, this is

> consistent with the tenor of Article 12, in the sense that the role of any third-party decision maker should be primarily to enable the exercise of the person's legal capacity on an equal basis with other members of the community. This means realising the decisions that the person themselves would make if they were able to do so, rather than making the decision that the third party decision maker considers in their best interests.[111]

2.89 In other words, substitute decision-making should be regarded as consistent with art 12, so long as it is not based on a best interests standard; and to the extent that Australia's Interpretative Declaration is only saying this, it is not objectionable. Some stakeholders supported the idea reflected in the Interpretative Declaration: that substitute decision-making may be appropriate in the limited circumstances identified: 'as a last resort and subject to safeguards'.[112]

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107 Eg, Office of the Public Advocate (SA), *Submission 17*; Mental Health Coordinating Council, *Submission 07*.

108 Eg, Caxton Legal Centre, *Submission 67*.

109 Office of the Public Advocate (SA), *Submission 17*. See also Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

110 Office of the Public Advocate (SA), *Submission 17*.

111 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

112 B Arnold and Dr W Bonython, *Submission 38*; NSW Council for Intellectual Disability, *Submission 33*.

2.90 The OPA (SA) submitted that the challenge in having such a declaration was not only that 'it fulfils its legal purpose', but also that it 'does not unnecessarily slow change in giving people with disability equal rights':

> A declaration can be an impediment if it creates a sense of complacency that our existing substitute arrangements already fully meet the expectations of the UNCRPD, and there is no need to change practices.[113]

2.91 The idea that having such a declaration may be an impediment to reform was also highlighted, for example, by the Disability Advocacy Network Australia (DANA), which argued that it

> has the effect of protecting the status quo of paternalistic substitute decision making regimes, inhibiting reform and slowing exploration and implementation of supported decision-making models in Australia.[114]

2.92 DANA submitted that 'reform to the legislative and regulatory framework is vital and must be prioritised' and 'to retain the Declaration and continue to accept the status quo would substantially diminish Australia's progress in disability rights and undermine its position as a State committed to advancing the inclusion, participation and wellbeing of people with disabilities, in our country and overseas'.[115]

2.93 The ALRC considers that there is weight in the argument that the Interpretative Declaration may impede reform. This is not to say, however, that it is incorrect in law—given that there is considerable ambiguity and confusion in art 12, its surrounding discourse and even the wording of the Declaration itself. However, it has been identified as a matter of concern by the UNCRPD and by many interested stakeholders, which suggests that the timing is opportune to review it.

Implications for reform

2.94 A critical evaluation of all assisted decision-making models is called for in light of the UNCRPD's comments and the range of responses by stakeholders in this Inquiry. While the CRPD and its surrounding discourse have set a new benchmark of expectation, not only in terms of law, but also practice, the themes remain essentially those identified by the ALRC in 1989: 'providing appropriate protection for those unable to look after themselves'; and 'preserving and, where possible, enhancing the personal autonomy of such persons'.[116] There are also dangers in action that is not anchored in a strong conceptual framework, and tested in implementation. Caxton Legal Centre pointed out that

> A number of writers comment that insufficient research has been done on both supported decision making models and guardianship itself, and warn against inviting a 'bricolage' of experimental models resembling a 'young child's

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113 Office of the Public Advocate (SA), *Submission 17*.

114 Disability Advocacy Network Australia, *Submission 36*. See also NMHCCF and MHCA, *Submission 81*.

115 Disability Advocacy Network Australia, *Submission 36*. See also Carer's Alliance, *Submission 84*; WWDA, *Submission 58*; National Disability Services, *Submission 49*; Public Interest Advocacy Centre, *Submission 30*.

116 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.1]. This report concerned the ACT.

> pocketful of melted lollies on a hot summer's day'.[117] The task is complex and highly nuanced and as Terry Carney suggests, perhaps the best recommendation is to marshall the evidence and debate which is the least imperfect of the policy options at the disposal of the law.[118]

2.95 Two key policy issues are how far 'support' can really go without attracting criticism of being a legal fiction;[119] and the need to underpin change in practice by evidence. AGAC observed that, while supported decision-making 'is an excellent development and will be extremely successful in avoiding guardianship for many people with disabilities', it was 'not capable of universal application'.[120]

> Arguments for the total abolition of substituted decision making in favor of supported decision making or co-decision making fail to address the question: what mechanisms will be in place for the persons who, even with the benefit of infinite resources, cannot or will not act to protect their own interests?
>
> …
>
> Some decision making impairments may be accommodated or rectified but at the end of the spectrum there will be a very small proportion of persons whose impairments mean that they lack decision-making ability, even with infinite resources available for support. For those persons, the appointment of a substitute decision maker becomes a reasonable accommodation to ensure that they are afforded basic human rights including the right to exercise legal capacity.[121]

2.96 The policy impetus is clearly away from models that, in substance, form or language, appear as substitute decision-making ones. Although some have queried whether reformed law will have the desired effect *in practice*, and may be understood by stakeholders as 'little different from its predecessor', a shift to supported decision-making is to be highly commended', as Carney states, 'on the basis of its symbolic significance'.[122]

> It can be argued that at the very least a shift towards supported decision making sends two important symbolic messages regarding: (i) rejection of avoidable paternalism; and (ii) repositioning the state as an *adjunct to* (or facilitator of) civil society.[123]

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117 Citing Terry Carney and Fleur Beaupert, 'Public and Private Bricolage—Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175, 177.

118 Caxton Legal Centre, *Submission 67*. Citing Terry Carney, above n 40, 15. Carney and Beaupert, above n 118, 177.Carney and Beaupert, above n 117, 177.

119 Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' [1990] *Yale Law Journal* 1. See also Donnelly, above n 51, 185–187.

120 Australian Guardianship and Administration Council, *Submission 51*.

121 Ibid.

122 Carney, above n 47, 62.

123 Terry Carney, above n 40, 12.

2.97 The issue for policy reform, and law reform, is how to express this in a way that clearly reflects the paradigm shift in approach and thinking to the levels of support required for those who require decision-making support. As the Caxton Legal Centre submitted:

> The task is a tremendous one. The greatest challenges to ensuring equality before the law and the exercise of legal capacity for persons with disability involve the political will to endorse change to reflect consistency with a social model of disability, to provide sufficient education to the entire community, to stakeholders including all levels of employment and management, and to institutions and to implement the supply side and demand side reforms to ensure that supported decision making can effectively operate.[124]

2.98 Legal and policy reform must also include consideration of when support amounts to full support—where a person is not able to exercise any decision-making ability and may not have access to supporters in their network of family. It is in such cases, where the appointment of someone to make decisions is needed, that the standard by which they act and the nature of their appointment become the critical focus.

2.99 The NSW Council for Intellectual Disability submitted that

> Even with a comprehensive national strategy there will continue to be a need for a backstop of a substitute or fully supported decision-making system. In the absence of such a system, there will be no way to resolve many situations:
>
> - in which people with intellectual disability are being neglected, abused, exploited or overprotected on an ongoing basis and are unable to recognise these breaches of rights or and assert themselves in responding to the breaches.
> - in which there are disputes within families or between families and service providers or others about what decisions should be made about where a person should live, about health care or services or other lifestyle decisions.[125]

2.100 The need for support, and appropriate policy responses, is likely to increase moreover as Australia's population ages.[126] The Caxton Legal Centre submitted that,

> given the projected exponential increase in the ageing population and the consequent increase in the incidence of terminal cognitive diseases such as dementia and Alzheimer's, coupled with the factor of social isolation and sparse or non-existent support networks for many older people, the retention of a process of formal substituted decision making may be essential.[127]

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124 Caxton Legal Centre, *Submission 67*.

125 NSW Council for Intellectual Disability, *Submission 33*.

126 Demographic shifts were outlined in the ALRC's report: Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013) ch 2.

127 Caxton Legal Centre, *Submission 67*. See also Australian Guardianship and Administration Council, *Submission 51*.

2.101 But where institutional mechanisms of support cannot be avoided, 'new priorities, processes and language' are needed.[128] The legal and policy issues must focus on key questions. When is it appropriate to appoint someone to act on behalf of another? What test is used to determine when this should happen? What should this be called? What standard should guide the actions of a person appointed to act on another's behalf? What accountability mechanisms need to be in place? These questions necessarily focus on guardianship laws and the impact of the CRPD in moulding future reforms. As Barbara Carter observed:

> Guardianship is the 'elephant in the room' of Art 12 and the debate continues to rage about whether guardianship is allowable under the Convention. This debate is effectively stymying considered discussion of how the Convention, in its totality should be implemented in domestic guardianship legislation.[129]

2.102 The policy challenge for reform in this context was summed up neatly in the Caxton Legal Centre submission:

> Can a guardianship system remain as indicated by Australia's Interpretative Declaration and still provide full recognition of people with disability before the law and their ability to exercise legal capacity? The key issue centres around the adequacy of support mechanisms to assist persons with disability in decision making, so that substitute decision making truly is the last resort.[130]

2.103 The ALRC considers that the focus of reform initiatives needs to be towards providing clarity around the expectations of persons with disability, their families and carers, and the courts and tribunals involved in appointing those to assist in decision-making where it is required. The policy pressure is clearly towards establishing and reinforcing frameworks of support in law and legal frameworks, and through funding of support models. The momentum is also towards building the ability of those who may require support so that they may become more effective and independent decision-makers.

2.104 There will also be a need for thorough research. The Caxton Legal Centre submitted that

> models of supported decision making need to be thoroughly researched and evaluated particularly given the implications of profound change—the paradigm shift—across institutions, agencies, services and the community generally. The suggestion has been made that there is little evaluative research into the efficacy and acceptability of guardianship systems, and this too should be remedied. At the very least, guardianship should not continue on the basis of 'business as usual'. And as a number of writers have observed, legislative change without equal attention to supply side and demand side reforms, including adequate resourcing of free legal services for persons with disability, will only be as useful as the paper it is printed on.[131]

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128 ADACAS, *Submission 29*.

129 Barbara Carter, 'Adult Guardianship: Human Rights or Social Justice?' (2010) 18 *Journal of Law and Medicine* 143, 145.

130 Caxton Legal Centre, *Submission 67*.

131 Ibid.

2.105 The hardest and most challenging policy area will always be in the context of those who require the most support: to build law and legal frameworks in ways that signal the paradigm shift of the CRPD in practice as well as in form. In this Discussion Paper the ALRC puts forward a model that seeks to signal this shift in Commonwealth laws and to provide the catalyst towards further reform at the state and territory level.