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Supported decision-making, legal risk and commercial uncertainty

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Introduction

When I first heard about initiatives to introduce supported and assisted decision making, I immediately regressed to my former self – as a black letter commercial lawyer – working in various areas of Queensland Treasury.

When I heard that financial institutions, aged care homes, telecommunications companies and energy companies refused to contract with a person who they believed to have impaired decision making capacity, I thought well – if I were their lawyer I would also warn them against such transactions, without some sort of additional assurances or guarantees.

And when I sat in meetings and workshops hearing non-lawyers say that we needed to explain substitute and supported decision making simply, all I could think of was first: how hard and how totally abstract all of those concepts are – notions of legal personality, agreement to contract and certainty, and second: how deeply the notion of "contract" is embedded in our day to day social transactions.

So today, we are going to:

- ask what social and legal assumptions are arguably fundamental to our everyday commercial transactions
- consider how the operation of contract law leads to commercial entities viewing transactions with adults with impaired decision making as innately risky
- discuss how the above assumptions and legal frameworks lead to structural discrimination against those with impaired decision making capacity, and
- consider how effective are some of the legislated models for supported and assisted decision making in simultaneously: mitigating commercial risk for third parties, eliminating discrimination, and protecting the adult from abuse by their actual "supporters" or "assistants."

The law of contract

> *"The modern law of contract assumes freedom of contract, that is, freedom to decide whether to contract and to negotiate contractual terms. It also assumes a paradigm situation of one-to-one negotiation of all the terms of an agreement by parties with equal bargaining strength concerned to maximise their individual positions."*
>
> Carter, JW et al *Contract Law in Australia*

In guardianship law we talk about "decision making capacity" but contract law textbooks and cases talk about "legal capacity" and are notably lacking in sensitivity to human rights concepts. The assumptions behind this law are that minors and adults with what **we** would call "impaired decision making capacity" have limited capacity to contract. As I said, the textbooks have no acknowledgement of human rights concepts, lumping together as they do "mental illness and drunkenness" as conditions which could be relied on as a defence to an action for breach of contract.

In *Gibbons v Wright* (1954) 91 CLR 423 the High Court set out the test that each party must have:

> *"…such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation" and "the capacity to understand the transaction when it is explained."*

The common law takes a paternalistic approach but by pre-human rights standards, an arguably ethically defensible position. A contract is not enforceable – i.e. a person cannot be sued on a contract – if they did not have capacity to contract and the other party knew this or even should have known this.

In the above case, the contract is enforceable and binding on the third party. The contract is also voidable – at the election of the person with the alleged incapacity. The exception to this rule is if the contract is considered to be a contract for "necessaries." In the case of a contract for "necessaries" an adult with impaired capacity is still bound by the contract. He or she is bound though to pay a "reasonable" price, and only out of and to the extent of his or her own property.

So, relying on common law contract, the parties could be in argument about what are "necessaries" and what is a "reasonable price"? The certainty of the contract is in doubt.

Scenario A

> Dorothy, who has impaired decision making capacity, enters into a contract with an aged care provider and moves into the aged care home.
>
> Dorothy lives there for six months, but gets bad food, her room is not cleaned and the provider fails to deliver on services.
>
> As the provider is in breach of contract, Dorothy can enforce the contract and get damages ($$) and also avoid the contract for the future – and move out, without penalty.
>
> This is a good and fair result.

Scenario B

> Dorothy lives in the aged care home for six months, gets great food, clean accommodation, and fantastic services as provided for in the contract
>
> Dorothy neglects to pay any fees.
>
> The aged care provider sues for breach of contract but Dorothy successfully raises "incapacity" as a defence – i.e. she didn't have capacity to contract and the aged care provider should have known of the incapacity.
>
> The provider can argue that the contract was for "necessaries" but can then only recoup a "reasonable" price – not necessarily the contract price.

So the aged care provider, perhaps in the business of providing accommodation to those with declining capacity, is at great commercial risk in entering into a contract with Dorothy, but Dorothy is at no commercial risk.

There are further commercial risks for the third party. A contract can potentially be avoided for duress – that is, if there is a present threat of violence to the adult or to someone with whom the adult is associated.[1] The law has also developed specific protections for those who are experiencing vulnerabilities. A contract can be avoided in cases of "undue influence" where one party, a dominant one, uses the influence that he or she has over the other party to obtain some benefit – that is, an unusually advantageous contractual arrangement that the dominant party would not have received if the bargaining power between the two parties had been equal. For "undue influence" to be used to avoid a contract, the two parties have to be in a relationship of trust or confidence.

"Unconscionability" is another protective doctrine which has been developed by the courts. In *Commercial Bank of Australia Ltd v Amadio* [1983] 151 CLR 447, the elderly Amadio couple were found to be at a special disadvantage because of their age, lack of business background, limited knowledge of English and reliance on their son. The court found that the bank knew of their vulnerable circumstances and yet accepted a third party guarantee from them for their son's risky transactions. Under the doctrine of unconscionability that guarantee was unenforceable.

Some of these remedies developed over the years by the courts have now found their way into contemporary consumer protection legislation. The national *Competition and Consumer Act 2010* provides that where unconscionable conduct is found the contract can be terminated and damages payable. The *Competition and Consumer Act* also provides for "unfair contract terms" in standard form contracts (such as phone or electricity contracts) which essentially leave no bargaining room for the consumer.

In short, the law has always tried to recognise individuals' vulnerabilities and create a level playing field. But this has led to contractual uncertainty or perceived uncertainty and commercial risk for financial institutions, aged care providers, telcos and energy providers. In turn this has led to structural discrimination and breaches of human rights for people experiencing vulnerability. So the paternalistic stance of the law has resulted in people with impaired decision making capacity being at a disadvantage in asserting their autonomy in commercial and social transactions.

Recently I met someone whose daughter had impaired decision making capacity. An energy provider refused to enter into a contract with the daughter, so the mother supported the daughter in taking the matter to the Anti-Discrimination Commission. The matter was conciliated so that the daughter was a party to the contract and the mother was a nominee. The daughter's rights to legal autonomy and capacity under Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (the Convention) were upheld. But the energy company declined (refused?) to apply this practice outside of those individual circumstances.

Human Rights Imperatives

Today we are all concerned with the interpretation of Article 12 of the Convention.

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

[1] *Barton v Armstrong* [1973] 2 NSWLR 598

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall 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.

We all know that Article 12 is the lynchpin of the principle of supported decision making. Australia signed the Convention on 30 March 2007, ratified it on 17 July 2008 and it entered into force for Australia on 16 August 2008. Australia has also made a declaration in respect of Article 12:

> *"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."*[2]

This declaration qualifies Australia's ratification of the Convention and allows for both supported and substituted decision making frameworks.

Despite ratification, there has been limited adoption of supported decision making frameworks in Australian jurisdictions. Instead many guardianship, administration and powers of attorney regimes are primarily substitute decision making frameworks, underpinned by the "best interests" principle.

But the Australian Guardianship and Administration Council does, through its *Australian National Standards of Public Guardianship*, acknowledge, encourage and promote supported decision making. "Standard 2 – support decision-making capacity" provides that:

> *"Staff providing a guardianship service will ensure that all reasonable efforts are made to support represented persons to exercise their own decision-making capacity to the extent possible under the relevant legislation.*
>
> *Staff providing guardianship services in jurisdictions where their Office practices supported decision making as an alternative to substitute decision making will ensure that:*
>
> - *Any supported decision-making arrangements assist supported persons to express their will and preferences, and to develop their own decision-making capacity.*
> - *The role of people who provide decision-making support is acknowledged and respected – including family members, carers or any other significant people chosen to provide support."*[3]

The standards provide the minimum expectations of public guardians, public advocates, and their delegates, when acting as legal decision makers for persons with impaired capacity. The standards promote supported decision making, but also allow for substitute decision making frameworks, and acknowledge the differences in guardianship and administration regimes in the different Australian

[2] *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*
[3] 3rd edition, 2016

jurisdictions. The standards also acknowledge the important role of a person's support network in providing informal decision-making support.

The primary position is that all staff providing a guardianship service will ensure that all reasonable efforts are made to support people to exercise their own decision-making capacity – to the extent possible under each jurisdiction's legislation.

Legislated models for supported and assisted decision-making

Supported decision making is often conducted informally, or as part of the practice of a guardian. However, there have been several attempts to "formalise" these arrangements with the object of promoting compliance with Article 12 of the Convention. These legislated regimes are designed to create certainty and transparency around supported decision making – for decision makers and their supporters but especially for third parties. They also include protections and accountability mechanisms so that supporters do not exploit their position in a way which enables or leads to financial abuse. This complex balance is difficult to achieve.

Adult Guardianship and Trusteeship Act 2008 (Alberta)

The legislation in Alberta provides for both supported decision making[4] and co-decision making.[5] A supported decision making appointment is authorised by the adult who therefore has their autonomy preserved to the extent that they themselves appoint the supporter. However a co-decision maker can only be appointed by the court.

Both the supporter and the co-decision maker can only act in relation to "personal matters"[6] – that is, any matter, except a "financial matter," relating to the adult including: health care, accommodation, contact with friends/family, participation in social activities and education, employment, and legal proceedings that don't relate primarily to financial matters.

So the scope of the supporter's or co-decision maker's role is limited significantly by the exclusion of "financial matters." A "financial matter" means a matter relating to acquisition, disposition, management or protection of property, and "property" is defined widely to include "without limitation":

> *"(i) things and rights or interests in things,*
> *(ii) anything regarded in law or equity as property or an interest in property,*
> *(iii) any right or interest that may be transferred for value from one person to another,*
> *(iv) any right, including a contingent or future right, to be paid money or to receive any other kind of property, and*
> *(v) any cause of action to the extent that it relates to property or could result in a judgement requiring a person to pay money."*[7]

So on the face of it, there are grey areas around the definition of "financial matter." And the exclusion of "financial matters" seems to be wide enough to exclude everyday purchases, all bank transactions, the organisation of all phone and energy accounts, accommodation decisions, and salary negotiations, from the ambit of the supported and co-decision making provisions. So is the scope of these supported and co-decision making powers too narrow to be of any real use? Financial matters have obviously been excluded to lower the risks of supporters and co-decision makers abusing their powers. But this protective mechanism significantly lowers the scope of operation.

[4] Section 4 Supported decision-making authorisation
[5] Sections 13 Co-decision-making order
[6] Sections 3 and 12
[7] Section 1(cc)

Representation Agreement Act 1996 (British Columbia)

The model in British Columbia has been described as a combination of a supported decision making agreement and an enduring power of attorney. The *Representation Agreement Act* is quite innovative in that it dispenses with the traditional notion of "capacity." Section 8 provides that an adult may make a representation agreement even if the adult is incapable of making a contract, incapable of managing his or her personal care, or incapable of the routine management of his or her financial affairs.[8]

A representation agreement for a supported decision making arrangement provides for the legal recognition of support people. The adult themselves can appoint someone to help them make decisions or to make decisions on behalf of the adult. The types of decisions relate to personal care and routine management of financial affairs, including payment of bills, receipt and deposit of pension and other income, food purchases, accommodation and other services, making investments, and obtaining legal services. Specifically excluded from coverage is the sale of real property.[9]

A representative has the same right to information and records relating to the adult as does the adult themselves.[10] It is interesting that financial affairs can be within the ambit of an agreement and a representative may delegate to a qualified investment specialist, all or part of their authority with respect to investment matters.[11] A representative's duties are set out in section 16 and include an obligation to keep accounts and other relevant records.[12] To offer protection to the adult for decisions relating to finances, there must be two joint representatives, or one representative and a "monitor."[13] The overarching duty of a monitor is to make reasonable efforts to determine whether a representative is carrying out their duties under the legislation. In fulfilling those duties the monitor may visit and speak with the adult, and report any breaches of duty to the Public Guardian and Trustee.[14]

The benefits of this legislative regime are clear. There is an innovative and less interventionist test of "capability." This allows the representative to be appointed by the adult, not by a court, so the decision to have a representative and the choice of representative is an autonomous decision by the adult. The breadth of authority to include financial affairs is wide, and there are safeguards relating to record keeping and the creative idea of a "monitor." There is also a degree of commercial certainty for third parties in that anything done by the representative on behalf of an adult is binding on the adult.[15]

However, the model also has its challenges. While the convention test of "capacity" is abandoned, will the more fluid test nevertheless lead to its own uncertainties and litigation when the financial stakes are high? Also, any third party will need to carefully review the terms of the representative's authority under the agreement. In particular, they will need to ascertain whether the representative has been appointed as a supporter or as a substitute decision maker (the latter being effectively, an attorney).

The technical requirements and documentation which are no doubt designed to protect the adult from abuse or exploitation, could nevertheless be seen as fairly burdensome on all involved. A representation agreement must be in writing and is subject to prescribed signing and witnessing

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[8] Section 8(2) goes on to list relevant factors to consider whether a person is incapable of making a representation agreement, including whether the adult demonstrates choices and preferences. See also s.3 presumption of capability.
[9] *Representation Agreement Regulation* s.2
[10] *Representation Agreement Act* s.18
[11] *Representation Agreement Act* s.16(6.1)
[12] *Representation Agreement Act* s.16(8)
[13] *Representation Agreement Act* s.12 "Monitors." See also that if the named representative is the Public Trustee, Guardian or a trust company or credit union, no monitor is required.
[14] *Representation Agreement Act* s.20
[15] *Representation Agreement Act* s.19

requirements.[16] The representation agreement will be invalid unless each representative completes a certificate in the prescribed form.[17] A monitor must also complete a certificate in the prescribed form.[18] If all of these formalities are not complied with then the agreement is not valid.[19] But complicating this, there are exceptions to invalidity if the representative could not reasonably have known of the defect in the agreement.[20] To resign, a monitor has to give written notice to the adult and each representative.[21] If the monitor becomes "incapable" then the authority of the representative is suspended.[22] In short, there are a lot of requirements which, if not adhered to, can undermine the certainty of the arrangement for all involved.

Having said this, I know that many people are enthusiastic about this model, and understand that after an effective education program it has had a good take-up by financial institutions dealing with their aged clients. However, given the apparent limitations we need to consider as to whether this formalisation of an informal model can really be the whole solution.

Adult Guardianship and Co-decision-making Act 2000 (Saskatchewan)

This is an interesting model which deserves a longer review than we can give it today. In short, a person or entity can apply to the court to be a co-decision maker for an adult in relation to personal matters or property matters.[23] "Property" includes both real (i.e. land) and personal property. A co-decision maker can be appointed if an adult's capacity is impaired so that he or she requires assistance to make "reasonable" decisions.[24] A co-decision maker may advise the adult on matters, share with the adult the authority to make decisions, and may do all things to give effect to their authority. But the co-decision maker must acquiesce in a decision made by the adult "if a reasonable person could have made the decision … and no harm to the adult is likely to result from the decision."[25]

Any document evidencing a co-decision is voidable unless the adult and co-decision maker co-sign the document.[26] Any decision made in good faith is deemed to have been made by the adult.[27] The co-signature of a co-decision-maker is not a guarantee for a loan or other document.[28] Every property co-decision maker must provide an annual accounting to the registrar of the court of their decisions made and actions taken.[29] The Act also provides that every property co-decision maker shall provide a bond with the court that is in an amount equal to or greater than the value of the adult's estate.[30]

Again, there are clear benefits to this regime. There is flexibility for the co-decision maker to assist with a decision or to make a co-decision. The co-decision making brings a degree of commercial certainty for the third party. There are also extensive safeguards. However, the co-decision making model is clearly limited in the amount of autonomy it gives to the adult, and there is a paternalistic element in that there are judgments to be made about whether the adult is making "reasonable"

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[16] *Representation Agreement Act* s.13
[17] *Representation Agreement Act* ss.5(4) and 6(2); *Representation Agreement Regulation,* Schedule Form 1
[18] *Representation Agreement Act* s.12(5); *Representation Agreement Regulation*,
[19] *Representation Agreement Act* ss 5(4), 12(2)
[20] *Representation Agreement Act* s.24. Under s.30(3)(e1) there is also a process whereby the Public Guardian and Trustee can apply to the court for an order that a representation agreement is not invalid solely because of defect in execution.
[21] *Representation Act* s.12(6)
[22] *Representation Act* s.12(8)
[23] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* ss.6, 14, 15
[24] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* s.14(a)(i)
[25] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* s.17
[26] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* ss.16 and 41
[27] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* ss.23 and 48
[28] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* ss.16(2) and 41(2)
[29] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* s.54 and Regulation Form L
[30] *Adult Guardianship and Co-decision Making Act (Saskatchewan)* s.55 – may be of a lesser amount if otherwise directed

decisions or not. There may also be some confusion for a third party because a co-decision maker signs a document without apparently having any liability under the document. But the most significant limitation would appear to be the imposition of the bond. While this provides insurance against abuse by the co-decision maker, the bond would be prohibitive in many cases and discourage or disqualify relatives or friends from taking on the role of co-decision maker.

Assisted Decision-Making (Capacity) Act 2015 (Republic of Ireland)

This legislation was enacted 30 December 2015 and once commenced[31] will replace the somewhat archaic "Wards of Court" system. Ireland signed the Convention in 2007 but must introduce this law reform before ratification. The Act provides for substitute decision making but also assisted decision making and co-decision making. An adult who considers that their capacity "is in question or may shortly be in question" can appoint a person to assist them in making decisions on personal welfare or property matters[32] or they may appoint a co-decision maker.[33]

Assisted decision makers and co-decision makers are appointed by agreement. The functions of a decision making assistant are to advise, explain, ascertain the adult's will and preferences, and assist the adult to obtain any information or personal records relevant to a decision. They are also to assist the adult to make, express and communicate the decision, and to endeavor to ensure that decisions are implemented. A decision-making assistant must not make a decision on behalf of the adult. A decision taken by the adult with the assistance of the decision-making assistant is deemed to be taken by the adult for all purposes. [34] Anyone can make a complaint to the Director of the Decision Support Service (Director) [35] about the behaviour of an assistant.[36]

A co-decision making agreement must be registered.[37] The Director reviews the application for registration and any objections received, and the Director conducts an initial annual review and a further review every three years.[38] Co-decision making agreements have to be drafted in compliance with the regulations.[39]

The benefits of the Irish model are that it definitely offers some public legitimacy to assistant decision makers and co-decision makers and makes them accountable. It also has broad application to personal affairs and property. The disadvantage of the model is the heavy layer of accountability and regulation. This will protect adults from exploitation – especially because a person can be disqualified from being an assistant or co-decision maker[40] – but it may make friends and relatives think twice before agreeing to appointment, and also places a heavy administration burden on government. There may also be concerns by third parties around the lack of certainty in the fluid test of capacity, and they will still need to conduct their due diligence on agreements to make sure that the assistant or co-decision maker is acting within the scope of the agreement.[41]

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[31] At this time the commencement date has not been announced
[32] *Assisted Decision-Making (Capacity) Act 2015* s.10
[33] *Assisted Decision-Making (Capacity) Act 2015* s.17
[34] *Assisted Decision-Making (Capacity) Act 2015* s.14
[35] See definition of "Director" in s.94
[36] *Assisted Decision-Making (Capacity) Act 2015* s.15
[37] *Assisted Decision-Making (Capacity) Act 2015* ss.21, 22
[38] *Assisted Decision-Making (Capacity) Act 2015* s.26
[39] *Assisted Decision-Making (Capacity) Act 2015* s.31(a) yet to be drafted
[40] *Assisted Decision-Making (Capacity) Act 2015* ss.11(1)(h), 18(1)(h)
[41] Note s.23(1) – "A relevant decision which is made within the scope of a registered co-decision-making agreement shall not be challenged on the grounds that the appointer did not have the capacity to make the decision."

Powers of Attorney Act 2014 (Vic)

The Victorian *Powers of Attorney Act* commenced on 1 September 2015 and has a strong focus on supported decision making. The Act presumes that an adult has decision making capacity which means that they can:

- understand the information relevant to the decision and the effect of the decision
- retain that information to the extent necessary to make the decision
- use or weigh that information as part of the process of making the decision, and
- communicate the decision and the person's views and needs as to the decision in some way.[42]

The Act further:

- recognises that a person may have capacity for some matters only, and that capacity can fluctuate, and
- recognises that a person may have decision making capacity for a matter with practicable and appropriate support.[43]

Such support may include using information or formats tailored to the particular needs of the person, communicating or assisting the person to communicate their decision, giving the person additional time and discussing the matter with the person, or using technology that alleviates the effects of the person's disability.

Entities exercising power under the Act must ensure the person is given practicable and appropriate support to enable the person to participate in decisions affecting the principal, as much as possible in the circumstances. Where a person does not have capacity, the decision maker must give effect to the person's wishes, encourage the person's participation in decision making, and promote the personal and social wellbeing of the person.[44]

Significantly, the Act introduced the role of the "supportive attorney" who can be appointed by an adult to assist them in making and giving effect to the adult's decisions in personal or financial matters.[45] A limitation of this model is that a supportive attorney can only be appointed by a person who has decision making capacity.[46]

In contrast with the traditional attorney role, the supportive attorney does not make decisions for the person – the supportive attorney assists the person to make their own decisions. The appointment is available to people who have decision-making capacity but need support to exercise that capacity. In particular, the supportive attorney may assist the person to reach the threshold for legal capacity. Supportive attorneys are designed to support people with disability to make and give effect to their decisions.

The person may appoint a supportive attorney to assist with decisions about financial matters and personal matters – the appointment may be plenary or specify certain matters. The person may give the supportive attorney powers to:

- access, collect or obtain personal information[47]
- communicate information or decisions of the person,[48] and

[42] *Powers of Attorney Act 2014* s.4
[43] *Powers of Attorney Act 2014* s.4
[44] *Powers of Attorney Act 2014* s.4(e) and the Example
[45] *Powers of Attorney Act 2014* Part 7, especially s.85
[46] *Powers of Attorney Act 2014* s.86
[47] *Powers of Attorney Act 2014* s.87
[48] *Powers of Attorney Act 2014* s.88

- take reasonable action to give effect to the person's decisions.[49]

However, there are some limitations to the supportive attorney role. Supportive attorneys cannot take action to give effect to significant financial transactions, including most investments, most real estate transactions, land dealings, and substantial personal property dealings. There are some exclusions – a supportive attorney may invest up to $10,000 in interest bearing accounts of authorised institutions, and enter into a residential tenancy for a premises where the person lives or intends to live. [50]

A supportive attorney appointment does not have effect for any period during which the person does not have decision making capacity for matters to which the supportive attorney appointment applies.[51] This means that a supportive attorney appointment may be insufficient on its own to protect a person's rights and interests where the person's decision making capacity fluctuates. Consequently, a person should also consider having other arrangements in place, such as an enduring power of attorney, to ensure that they have maximum control and input in decision making in any circumstances.

We are impressed and grateful Victoria has taken the lead on legislating and implementing a supportive attorney model to promote supported decision making. While there may be challenges with the model, we hope it will be a solution in many cases. We look forward to this afternoon's session on the *Powers of Attorney Act* to learn more about the model in practice.

Guardianship and Administration Act 2000 (Qld)

The Queensland guardianship and administration regime is regulated under the *Guardianship and Administration Act 2000* (Guardianship Act). This Act operates in conjunction with the *Powers of Attorney Act 1998*, which establishes a regime for general and enduring powers of attorney and statutory health attorneys. The Guardianship Act provides for substitute decision making, but even though it was enacted prior to the signing of the Convention, nevertheless provides a robust legislative framework for supported decision making.

The Queensland Civil and Administrative Tribunal may appoint a guardian or administrator if satisfied that: the person has impaired capacity for the matter; there is a need for a decision or a risk to the person; and the person's needs will not be adequately met or interests adequately protected without an appointment.[52] "Capacity" is assessed according to the Act in relation to a particular matter the subject of a decision. That is, capacity is domain specific. A person has capacity for a matter if "the person is capable of:

(a) understanding the nature and effect of decisions about the matter, and
(b) freely and voluntarily making decisions about the matter, and
(c) communicating the decisions in some way."[53]

Unless the tribunal orders otherwise, a guardian or administrator is authorised to do anything in relation to a particular matter that the person could have done if the person had capacity for the matter.[54]

And yet, it is submitted there are many provisions of the Guardianship Act which emphasise the importance of and arguably the primary importance of supported decision making, so that substitute decision making should only be a last resort.

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[49] *Powers of Attorney Act 2014* s.89
[50] *Powers of Attorney Act 2014* s.89
[51] *Powers of Attorney Act 2014* s.102
[52] *Guardianship and Administration Act 2000 (Qld)* s.11
[53] *Guardianship and Administration Act 2000 (Qld)* Schedule 4 Dictionary
[54] *Guardianship and Administration Act 2000 (Qld)* s.33

The Guardianship Act provides that:

- there is a presumption of capacity[55]
- as long as the adult has some way of communicating his or her decision, they does not have to communicate it orally to show capacity[56]
- an adult's right to make decisions is fundamental to the adult's inherent dignity
- the capacity of an adult to make decisions may differ according to the support available from the members of the adult's existing support network
- the right of an adult with impaired decision making capacity to make decisions should be restricted and interfered with to the least possible extent
- an adult with impaired capacity has a right to adequate and appropriate support for decision making,[57] and
- it encourages involvement in decision-making of the members of the adult's existing support network.[58]

Guardians and administrators must apply the general principles prescribed in the Act; also "the community is encouraged to apply and promote the general principles."[59]

These general principles assert:

- that all adults regardless of capacity have the same human rights
- the importance of empowering an adult to exercise the adult's basis human rights
- the right of an adult to respect of his or her human worth and dignity, and
- the adult's right to be a valued member of society.

Principle 6 recognises the importance of encouraging and supporting a person to achieve their maximum potential and to become as self-reliant as possible. Principle 7 recognises supported decision making principles through maximum participation, minimal limitations and substituted judgment. In particular, principle 7 recognises:

- an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account
- the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions
- the adult must be given any necessary support, and access to information, to enable the person to participate in decisions affecting their life
- the adult's views and wishes are to be sought and taken into account to the greatest extent practicable when exercising power for a matter for the adult, and
- an entity in performing a function or exercising a power under the Act must do so in the way least restrictive of the person's rights. However, they must do so in a way consistent with the adult's proper care and protection. This has been interpreted and is applied as a "best

[55] *Guardianship and Administration Act 2000 (Qld)* Schedule 1 Part 1 General Principles
[56] *Guardianship and Administration Act 2000 (Qld)* s.146(3)
[57] *Guardianship and Administration Act 2000 (Qld)* s.5
[58] *Guardianship and Administration Act 2000 (Qld)* s.7
[59] *Guardianship and Administration Act 2000 (Qld)* s.11 and Schedule 1, Part 1

interests" principle which had the potential to override the adult's autonomous decision making.

The above principles are also prescribed in the *Powers of Attorney Act 1998* for decision makers authorised under that legislation.[60]

In conclusion, our submission is that the legislation already provides a sound framework for supported decision making without actually formalising supportive or assistive arrangements. If legal frameworks were the total answer to ensuring that the rights of adults with impaired capacity were upheld, then this legislation arguably sets the standard. The challenge though is in implementation and in having the time and resources to advocate and support adults through complex environments.

In Queensland we already have an obligation under the legislation to undertake supported decision making – and this is our aspiration and our strategy going forward. We would welcome strengthening of the legislation to further promote supported decision making in practice.

Where to from here?

In summary, there are various approaches to black letter models for supported decision making. On paper many aspects of these schemes appear complex and confusing and potentially costly. However, there are many commentators and practitioners who speak highly of these schemes, and we are grateful that others have trodden first into these difficult waters.

Our submission is that we should not let an overemphasis on black letter models distract us from focusing on what can already be achieved and should be achieved under current legislative frameworks which already demand that we work as supported decision makers. Legislative change can lead and drive community behaviour, but legislation in itself is not the answer, and there are inherent problems in formalising informal arrangements. It is easy to pass an Act, the hard part is ongoing implementation and resourcing.

References

Carney, Terry. "Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?" *Laws* 4 (2015): 37-59.

Carney, Terry and Fleur Beaupert. "Public and Private Bricolage – Challenges Balancing Law, Services & Civil Society in Advancing CRPD Supported Decision Making." *UNSW Law Journal* 36.1 (2013): 175-201.

Carter JW et. al. 5th ed. Sydney: Lexis/Nexis Butterworths, 2007.

Herr, Stanley S. "Self-Determination, Autonomy, and Alternatives for Guardianship." *The Human Rights of Persons with Intellectual Disabilities: Different but Equal*. Ed. Stanley S Herr et al. Great Britain: Oxford University Press, 2003. 429-453.

Intellectual Disability Rights Service. "Guardianship and administration laws across Australia." 2012. <http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf>

Kohn, Nina A, Jeremy A Blumenthal and Amy T Campbell. "Supported Decision-Making: A Viable Alternative to Guardianship?" *Penn State Law Review* 117.4 (2013): 1111-1157.

[60] *Powers of Attorney Act 1998 (Qld)* Schedule 1, Part 1

Office of the Public Advocate Queensland. “Autonomy and decision-making support in Australia: A targeted overview of guardianship legislation.” 2014. <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/249405/Decision-making-support-for-Queenslanders-with-impaired-capacity-A-targeted-overview-of-guardianship-legislation-in-Australia-March-2014.pdf>

Office of the Public Advocate Queensland. “Decision-making support in Queensland’s guardianship system: A systemic advocacy report.” 2016. <http://www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf>

Office of the Public Advocate South Australia. “Evaluation of the Supported Decision Making Project.” 2012. <http://www.opa.sa.gov.au/files/batch1376447055_final_supported_decision_making_evaluation.pdf>

Purser, Kelly and Tuly Rosenfeld. “Assessing testamentary and decision-making capacity: Approaches and models.” *Journal of Law and Medicine* 23.1 (2015): 121-136.

Then, Shih-Ning. “Evolution and Innovation in Guardianship Laws: Assisted Decision-Making.” *Sydney Law Review* 35.133 (2013): 133-166.