The Australian Guardianship Tribunal System: Lessons To Share With Canada

2017 Canadian Elder Law Conference
Vancouver, 2 November 2017

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Introduction

A person's ability to determine their own future and to make choices about their own life and circumstances strikes at the very heart of what it means to be human. So what happens when a person's capacity to make decisions for themselves about important issues affecting their everyday life and the management of their assets is impaired? How are questions like these answered?: "Where should the person live?", "What medical treatment and services should they receive" and "How is their money to be managed?" Whose values or standards or what decision-making framework is to be applied in making such decisions? How is the desire to prevent the risk to or the exploitation of vulnerable people balanced against a person's freedom to make their own decisions? And even before that, what tests should be applied to determine the level of capacity required to make these everyday decisions? Should a person be free to make decisions that may not accord with a 'best interests' standard? These are not new questions and are questions that are no doubt just as important and vexed in Canada as they are in Australia.

In more recent times, these questions have received a renewed attention and focus, propelled by the UN Convention on the Rights of Persons with Disabilities ('the Convention'), which came into being in 2008[1].

In preparing for this presentation today I have endeavoured to gain an understanding of the workings of the assisted and substituted decision-making jurisdiction in British Columbia, with particular reference to the *Adult Guardianship Act*, R.S.B.C. 1996 ("AGA"), the *Patients Property Act*, R.S.B.C. 1996 ("PPA") and the *Representation Agreement Act,* R.S.B.C. 1996 ("RAA"). I will only make comments in relation to this legislation where there is a useful comparison to the legislation in my own jurisdiction. I apologise for focusing on only one Canadian jurisdiction, but like Australia, you simply have too many to compare! If my understanding is correct, putting statutory property guardianship to one side, in British Columbia applications can be made to the Supreme Court seeking orders to resolve many of the many questions I have just raised. In Australia, specialist tribunals predominantly exercise

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

the power to answer these questions[2], using the framework of substitute decision-making. Such matters are only dealt with by the courts in small numbers. However, the existing substitute decision-making model in Australia, a 'best interests' model, has been criticised for being too paternalistic and for taking away the right to self-determination too easily.

International law and thinking on the rights of persons with disabilities now favours a model that puts the 'will, preferences, and rights' of the person concerned at the centre of the decision-making process. A ***supported decision-making*** model is preferred to the current ***substitute*** decision-making model, in keeping with the Convention.

In the brief time I have today I will endeavour to explain the current Australian system for the appointment of substitute decision-makers and the role Tribunals play, to examine how concepts of supported decision-making currently exist (largely informally), look at some of the reform proposals currently being examined, and make some comments on the similarities and differences between the British Colombian and Australian jurisdictions.

The Australian context

So that my remarks may be better understood, I will provide a brief outline of the context in which my jurisdiction in the state of New South Wales (NSW) operates.

[2] NSW Civil and Administrative Tribunal (NCAT), Australian Capital Territory Civil and Administrative Tribunal (ACAT), Queensland Civil and Administrative Tribunal (QCAT), Victorian Civil and Administrative Tribunal (VCAT), Western Australia State Administrative Tribunal (SAT), South Australian Civil and Administrative Tribunal (SACAT), Tasmanian Guardianship and Administration Board (GAB), Northern Territory Civil and Administrative Tribunal (NTCAT).

The current population of Australia is estimated to be 24.6 million[3], so somewhat less than Canada's 36.7 million[4]. The population of NSW is 7.8 million[5]. NSW is one of eight states and territories which make up the Commonwealth of Australia, that is, we operate under a federal system of government similar to Canada. There is a division of responsibility for discrete areas as set out in the Australian Constitution and the rest is determined by agreement between the Federal government and the individual state and territory governments. The states and territories are broadly responsible for making laws and providing services concerning guardianship so, akin to Canada, we have eight separate (but quite similar) systems operating in Australia. To add to the complexity, however, the Federal Government is largely responsible for legislation impacting upon those most likely to have recourse to the guardianship jurisdiction, such as the aged care sector and the newly implemented National Disability Insurance Scheme (NDIS).

Current Guardianship Laws and Hearing Procedures

The legislation pertaining to guardianship in NSW is very similar to other Australian jurisdictions. The *Guardianship Act 1987* (NSW) commenced in 1989 and has not been significantly reformed since that time.

The Guardianship Division of the NSW Civil and Administrative Tribunal ("the Tribunal"), known as NCAT, is the primary body in NSW for making guardianship orders relating to people, aged 16 years or more[6], with cognitive disabilities. NCAT was established on 1 January 2014 following the amalgamation of 22 separate Tribunals, one of which was the former Guardianship Tribunal of NSW[7]. NCAT as a whole is comprised of 251 Tribunal members (predominantly sessional), 196 staff, and in 2016/2017 received 66,837 applications and conducted 78,426 hearings in over 70 locations across the state of NSW. The Division is managed by a Deputy President of the Tribunal who reports to the President of the Tribunal, a judge of the Supreme Court of NSW, the superior court of the state. The Tribunal shares the guardianship jurisdiction with the Supreme Court. A person can apply to either the Supreme Court or the Tribunal for orders under the Guardianship Act[8] and in the common law tradition, the Supreme Court retains the parens patriae jurisdiction.

[3] Australian Bureau of Statistics, available at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0
[4] Statistics Canada, available at: http://www.statcan.gc.ca/eng/start
[5] Australian Bureau of Statistics, available at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0
[6] Note that orders appointing a guardian or providing consent to medical treatment can only be made under the *Guardianhsip Act* for those aged 16 years or more (s 15(1)(a) and s 34(1)(a)), however, there is no age restriction in relation to financial management orders.
[7] For further information on NCAT please refer to the President of NCAT, Justice Wright's paper on NCAT available at:
http://www.ncat.nsw.gov.au/Documents/speech_overview_of_nsw_civil_and_administrative_tribunal.pdf
[8] Section 31 of the *Guardianship Act 1987* (NSW).

The Tribunal appoints substitute decision-makers for adults with decision-making incapacity. That is, it appoints guardians for personal, health and lifestyle decisions, and financial managers for financial and/or legal decisions. In the majority of applications that can be made to the Tribunal, anyone "with a genuine concern for the welfare" of the person with a disability has standing to make an application[9]. There is no fee or charge for making an application.

In preparing for today I noted with interest the mechanism by which a statutory property guardian can be appointed under Part 2.1 of the AGA. If my understanding is correct, the majority of appointments of substitute decision makers in British Columbia stem from orders of the Supreme Court under the PPA, that is, through a judicial process. However, if a health authority designate (which I understand to usually be a medical practitioner) upon receipt of a report from a qualified health professional which concludes that a person is incapable of managing their financial affairs is satisfied of a number of statutory criteria outlined in s 32(3) of the PPA, they may proceed to issue a certificate of incapability[10]. Upon the issue of such a certificate the PGT becomes the person's statutory property guardian[11]. I note that the designate must not issue a certificate unless they have first sought the views of the PGT, the person and the person's spouse or near relative if applicable. In exceptional circumstances there is scope for a designate to provide certification without first notifying the person or those close to them if they are concerned that notification may cause harm to the person or loss or damage to their property[12]. I could not identify any statistics on how often, if at all, such exception has been utilised.

There is no like mechanism in any Australian jurisdiction which permits the appointment of a substitute decision maker through a non-judicial process. Any appointment of a substitute decision-maker (not appointed by the person themselves) can only be made by a Court or Tribunal. In NSW, this entails: the applicant being required to serve the application for an order on the person[13], notice of the hearing of the application being provided by the Tribunal on statutory parties (in most cases consisting of the applicant, person, their spouse, their carer(s), and either the Public Guardian for guardianship applications or the NSW Trustee and Guardian for financial management applications[14]); and a hearing being conducted[15] (that is, there is no scope to make a determination "on the papers" without a hearing).

[9] Sections 9 and 25I of the *Guardianship Act 1987* (NSW).
[10] AGA at s.32.
[11] AGA at s 32(5).
[12] AGA at s.32(3.2).
[13] Section 10 of the *Guardianship Act 1987* (NSW).
[14] See s 3F of the *Guardianship Act* 1987 (NSW) for defined parties to applications.
[15] Cl 6(1) of Sch 6 of the *Civil and Administrative Act 2013* (NSW).

The Tribunal must observe the principles in section 4 of the *Guardianship Act*. These principles state that everyone exercising functions under that Act with respect to people with a disability has a duty to:

- give the person's welfare and interests paramount consideration;
- restrict the person's freedom of decision and freedom of action as little as possible;
- encourage the person, as far as possible, to live a normal life in the community;
- take the person's views into consideration;
- recognise the importance of preserving family relationships and cultural and linguistic environments;
- encourage the person, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs;
- protect the person from neglect, abuse and exploitation; and
- encourage the community to apply and promote these principles.

Whilst these principles were formulated well before the introduction of the UN Convention, they have guided the Tribunal for many years to make decisions which, in my view, are largely in compliance with the Convention.

In NSW, like most Australian jurisdictions, an order appointing a substitute decision-maker is a last resort[16]. An order will only be made if there is no other option, and if so made, will be limited to that aspect of the person's life where the order is required. For example, the Tribunal would frequently make orders appointing a guardian to decide a person's accommodation needs, but otherwise all other decision-making authority would remain with the person, meaning they would make the decisions themselves or through informal support mechanisms. Whilst the legislation permits the Tribunal to make a plenary guardianship order, that is, an order of "full guardianship" for a person, the Tribunal has not made any such orders for many years. Only limited guardianship orders are made providing the appointed guardian with the prescribed authority that the evidence before the Tribunal indicated was necessary.

An area of variation between the Canadian and Australian systems, as one would expect, is the terminology used for certain concepts. The concept of Committeeship or the use of the term patient in relation to decision-making incapacity is no longer used in most Australian jurisdictions, including NSW. Further, even where the same terminology is used, there may be differing roles or authority attached. For example, unlike a statutory property guardian who can be appointed under the AGA to

[16] See s 4(b) and 14(2)(d) of the *Guardianship Act 1987* (NSW). See also *Re L* [2000] NSWSC 721; *Re R* [2000] NSWSC 886; *SH v Protective Commissioner and Ors* [2006] NSWADTAP 4; *EB & Ors v Guardianship Tribunal & Ors* [2011]; *CZ v Public Guardian & ors* [2008] NSWADTAP 42.

manage a person's financial affairs[17], like other Australian jurisdictions, in NSW, the appointment of a guardian for an adult only provides authority to the person appointed to make personal decisions, such as where to live and what medical treatment to receive. Guardianship orders cannot provide any authority to manage a person's financial or legal affairs. This is a separate appointment regime involving the appointment of a financial manager. In some Australian jurisdictions other than NSW, the term used is administrator. Whilst the same individual may be appointed as a person's guardian and financial manager, these are distinct concepts, involving separate applications, separate legal tests for appointment and different oversight mechanisms.

Where there is a suitable person, such as a family member or a friend, able and willing to be appointed as the substitute decision-maker for the person, the Tribunal must consider that person for appointment. Where there is no such person available or it would not be in the best interests of the person to appoint a private person, then the Tribunal must appoint the Public Guardian for guardianship matters and the confusingly named NSW Trustee and Guardian for financial matters, both statutory office holders that unlike the Public Guardian and Trustee ("PGT") in British Colombia, are separate organisations. Australia does not currently have a system of appointing volunteers or professionals who are unknown to the person as substitute decision-makers. Apart from Trustee corporations appointed as financial managers, the general rule is that guardians and financial managers perform their role gratis, that is, they cannot claim any remuneration.

Supervision of people appointed under the *Guardianship Act* differs between guardianship and financial management. Whilst private guardians are not supervised in their activities, the order appointing them must be regularly reviewed by the Tribunal through a further hearing at which time the activities and role of the appointed guardian are examined. This generally occurs one year after the initial appointment and then every three years thereafter or until the order is revoked. Financial management orders on the other hand are not regularly reviewed by the Tribunal[18]. Those appointed, however, must provide annual reports as to the status of the estate to the NSW Trustee and Guardian and must seek that organisation's approval before engaging in any major transactions on behalf of the person, such as buying or selling the person's home. Any person the subject of an appointment, or anyone with a genuine concern for such person, can make an application to the Tribunal at any time an appointment is in place seeking that the order be reviewed or revoked if they are of the view that the person is no longer incapacitated, or alternatively, that the appointment is no longer required, or is proving not to be in the person's best interests.

[17] AGA at s. 1.

[18] This is a point of variation – all jurisdictions in Australia require a regular review of financial management / administration orders except NSW.

The Tribunal has a statutory duty to seek out and recognise the views of the person the subject of an application wherever possible[19]. This focus on the interests and views of the person with the disability is reflected in both the work that the Tribunal's staff undertake before an application or review of an order is heard by the Tribunal[20] and during hearings before the Tribunal. Tribunal officers strive to involve the person with a disability in the pre-hearing case preparation process as much as possible. Tribunal staff use their experience and expertise in a range of disability fields to engage with the person with a disability to explain the Tribunal's role, seek the person's view about the case before the Tribunal, and strongly encourage them to attend and participate in the hearing process. Over the last year in 65% of hearings, the person the subject of an application has participated in the hearing either in person, by videoconference or by telephone.

In NSW, for an initial guardianship or financial management order to be made, the Tribunal must be constituted by three members, one being a barrister or solicitor who presides at the hearing, one being a health care professional (e.g. a psychologist or a geriatrician), and one being a community member, usually a person who identifies as a person with a disability, or is a carer or advocate for a person with a disability. This structure brings a wealth of knowledge and expertise to the Tribunal process and is designed to assist in the involvement of the person in the hearing. In my experience, the mandatory use of three member panels allows the Tribunal to draw on diverse expertise which contributes significantly to the quality of decision making, makes for a more effective and fairer hearing in highly conflicted or contentious matters, and reduces the likelihood that an aggrieved party will perceive that the Tribunal has been biased or has determined an application other than on the merits.

Whilst the Tribunal is not bound by the rules of evidence in matters before the Guardianship Division, the principles of procedural fairness do apply[21]. The Tribunal does not follow an adversarial approach and uses more inquisitorial methods than would be the case in court proceedings. Other aspects of hearings before the Tribunal that may be of interest include:

- Hearing duration – unless there is particular complexity in a matter, most hearings are allocated between one to two hours;
- Hearing location – hearings are held in the Tribunal's own hearing rooms in Sydney and other venues throughout NSW. Where possible and appropriate, the Tribunal will conduct hearings at hospitals, aged care facilities, and other venues to promote the involvement of the person the subject of the application;
- Accessibility – there are no fees to file an application in the Guardianship Division of the Tribunal, there is no requirements as to the form in which evidence may be provided, that is, evidence need not be in affidavit form, and

[19] See s 4, 14 and 40 of the *Guardianship Act.*
[20] Guardianship Tribunal, "24 years – empowering and protecting" Annual Report 2012/2013, p 21.
[21] Section 38(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

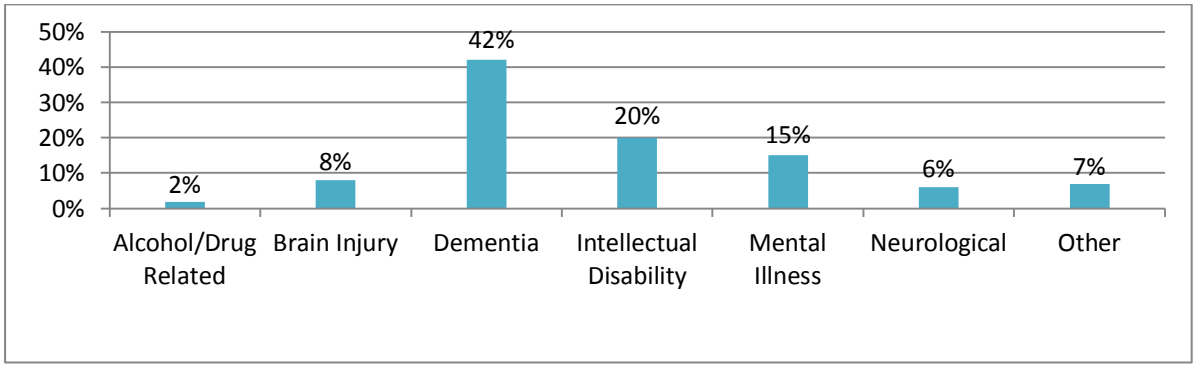
whilst evidence as to capacity from relevant health professionals is highly desirable, it is not mandatory before an order can be made;

- Legal representation – most parties represent themselves with legal representatives appearing in less than 5% of all applications;
- Interpreters – like Canada, Australia is a multi-cultural society with 26% of the population born overseas[22] and 21% speaking a language other than English at home[23]. Accordingly in 2016/2017, the Tribunal appointed 758 interpreters to assist in hearings in 57 different languages;
- Appeals – orders of the Tribunal can be appealed to either the Internal Appeals Division of NCAT or to the Supreme Court of NSW.

Guardianship Statistics – NSW

In the Financial year 2016/2017, 42% of the Tribunal's clients were people with dementia, only 20% of the Tribunal's clients were people with an intellectual disability, and a further 15% were people with a mental illness. Over 60% of the Tribunal's clients were over 65 years of age. The Tribunal attended to 10,569 applications or reviews of orders and conducted 8,330 hearings. Fortunately, we currently have 129 members assigned to the Guardianship Division to allow us to get through the workload. All of those members are part time apart from two principal members and myself. Most members would conduct hearings for the Tribunal on an average of three to four or more days per month.

In terms of our workload, the following graph depicts the distribution of applications received by the Tribunal in the 2016/2017 year, by disability:



Graph 1: Disability identified in the applications received in 2016-2017

Interestingly, the Tribunal's statistics above are distinctly different to the statistics in our "sister" jurisdiction, Hong Kong. I describe Hong Kong in this way because when the Guardianship Board of Hong Kong was established in 1999, it was provided with legislative authority and procedures which are very similar to that in NSW. In 2012, I

[22] Australian Bureau of Statistics, available at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/2071.0
[23] Ibid., available at: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features152016

was privileged to work with the Chairperson of the Guardianship Board of Hong Kong, Mr Charles Chiu, on the paper "*How does Culture Impact Upon Best Practices in Guardianship?: A Comparative Study of the Achievements and Challenges in Hong Kong and New South Wales, Australia*", which we presented at the 3rd International Congress on Guardianship in Washington DC. The comparisons between the two jurisdictions demonstrated that while the statistics from Hong Kong may be similar to NSW in terms of population, median age, and life expectancy, the workload in our two jurisdictions were vastly different.

At the time of our report in 2012, the Tribunal in NSW received 2,668 guardianship applications in that year while the Guardianship Board of Hong Kong received only 284 guardianship applications. We hypothesized that this may have been the result of the impact of key cultural differences between the two populations, such as differing views on reliance on Government services versus reliance on family, an individual rights-based perspective versus deeply rooted familial obligations, and the willingness to engage in formal legal dispute resolution versus a preference towards resolving disputes internally.

What does the future hold for the guardianship jurisdiction in Australia?

Supported decision-making

Since 2010, the debate for reform in Australia has largely centred on the need for the implementation of supported decision-making over substitute decision-making, effectively requiring a paradigm shift from a 'best interests' model towards 'will and preferences' and 'human rights' models of decision making.

By some views, mechanisms for supported decision-making have been available in all Australian jurisdictions for many years – however, these mechanisms are generally only available to those assessed as having the requisite capacity to understand and otherwise execute the instruments of appointment.

Whilst terminology differs across the country, in NSW, a person with the requisite capacity can sign an instrument appointing an enduring Power of Attorney which will allow the person appointed to manage their financial and legal affairs if they become unable to do so at some future point, and similarly, can sign an instrument appointing an enduring guardian to make lifestyle and medical decisions if they become unable to do so. Whilst these appointments are regulated by legislation, and can be challenged or reviewed in tribunals and courts, there is no systemic oversight of those who perform these roles as attorneys or enduring guardians. These instruments, particularly instruments appointing a Power of Attorney, have become an important focal point for recent inquiries in Australia regarding elder abuse[24].

[24] Parliament of NSW, *Elder Abuse in New South Wales,* Report 44 (2016), available at https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2387#tab-reports, [accessed 16 August 2016]; Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, (2016).

The majority of Australians with a cognitive disability do not have a court or tribunal-appointed decision-maker. By default, most are supported informally by family, friends, or carers. Many would define this as supported decision-making. However, this form of support is unregulated, lacks any of the safeguards contemplated by Article 12.4 of the UN Convention, and leaves those who perform the support role without any guiding principles.

To date, the UN Convention has largely not been implemented into Australian domestic law as it pertains to Article 12. Having said this, it is clearly the driving force behind much policy reform. The most significant reform in this space is the implementation of the NDIS by the Federal Government. The NDIS is a major policy change in Australia concerning the way support and services are provided for eligible people with permanent and significant disability. The scheme is a lifetime disability insurance scheme funded by a 0.5% levy on all tax payers which shifts the model of service delivery from being government-funded by service provision to one of individualised support. Individuals can formulate their own support plans, to determine what form of support and services they receive and from whom. After trials in some pilot sites, the major roll out of the scheme across Australia commenced on 1 July 2016.

This move towards individual funding packages means eligible participants have more choice and therefore more decisions to make. For those who may have a cognitive impairment, the NDIS promotes supported decision-making over substitute decision-making whenever possible. There is, however, much ambiguity as to what this support entails, who provides and funds it, and safeguards are yet to be implemented[25]. In those circumstances, there is likely to be, at least in the short-term, an increase in the applications for the appointment of formal substitute decision-makers.

In Australia, while the debate has focused on the implementation of supported decision-making over substitute decision-making and the various methodologies that could be legislated to allow this, there has been little discourse about how supported decision-making would be practically implemented "on the ground". There are several research projects currently underway designed to evaluate the quality and effectiveness of different models of supported decision-making. One such study, led by Professor Terry Carney of the University of Sydney and other investigators from across the country, is designed to test the hypotheses that supporters who are provided extensive training on how to perform a support role to a person with a cognitive disability together with structured principles, will show significantly superior

[25] For example, see decision of NCAT in *KCG* [2014] NSWCATGD 7 at [64] to [73]. For further information see: Fougere C "*Guardianship, financial management and the NDIS: NCAT's experience"* available at http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20170323_paper_fougere_agac_hobart.pdf

outcomes in measures of decision-making support[26]. As noted in the background paper to this research project:

> *"Over 1 million Australian (5% of the population) have some form of cognitive impairment due to intellectual disability or acquired brain injury (AIHW 2013) and require significant levels of support for decision-making. To date, however, the range and quality of support available has been poor, often tending toward undue paternalism, with deleterious consequences for the individual's sense of identity and quality of life. Efforts to rectify this situation have recently been championed by law reform commission, which have focused on establishing new legal structures for support with decision-making. These structures are very welcome, but the crucial issue of how decision-making support is delivered in practice – in terms of quality and effectiveness – remains severely neglected."*[27]

From 'best interests' to 'will and preferences'

Several inquiries or reform initiatives have occurred, or are currently on-going in Australia, in relation to the disability sector. Reform inquiries that have been completed have all concluded that there is a need for greater empowerment of the person with the disability in the decision making process. This would involve a shift away from a 'best interests' model of substitute decision-making towards one that 'promotes and safeguards the adult's rights, interests and opportunities'[28] or acknowledges that 'people with impaired decision making disabilities have wishes and preferences that should inform decisions made in their lives'[29] and 'act in consultation with the person, giving effect to their wishes'[30].

Commonwealth – National Decision Making Principles

One of the most notable reform initiatives was the Australian Law Reform Commission's enquiry into '*Equality, Capacity and Disability in Commonwealth Laws*' ('ALRC report')[31].

The ALRC report recommends that reform of Commonwealth, state, and territory laws and legal frameworks concerning individual decision-making should be guided by the four National Decision Making Principles (and associated Guidelines), namely:

1. Everyone has an equal right to make decisions and to have their decisions respected.

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[26] Australian Research Council Funded Linkage Project, *Effective Decision-Making Support for People with Cognitive Disability*, (2016).
[27] Op. cit., at [1].
[28] Queensland Law Reform Commission, *A review of Queensland's Guardianship Laws*, Chapter 4, 2010 available at http://www.qlrc.qld.gov.au/publications [Accessed 9 September 2015].
[29] Victorian Law Reform Commission, *Guardianship* Final Report 24, January 2012, at xxxv.
[30] Ibid., at xviii.
[31] Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws', ALRC Report 124, available at http://www.alrc.gov.au/publications/equality-capacity-disability-report-124

2. Persons who need support should be given access to the support they need in decision making.
3. A person's will, preferences, and rights must direct decisions that affect their lives.
4. There must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.

A person's 'will, preferences and rights' is explained by the ALRC as follows:

> *Article 12(4) of the CRPD uses the formulation 'rights, will and preferences'. The ALRC formulation follows the spectrum of decision-making based on the will and preferences of a person, through to a human rights focus in circumstances where the will and preferences of a person cannot be determined. The inclusion of 'rights' is the crucial safeguard. In cases where it is not possible to determine the will and preferences of the person, the default position must be to consider the human rights relevant to the situation as the guide for the decision to be made.*
>
> *The emphasis should be shifted from 'best interests' to 'will and preferences' approaches. Even in those examples of approaches where 'best interests' are defined by giving priority to 'will and preferences',[46] the standard of 'best interests' is still anchored conceptually in regimes from which the ALRC is seeking to depart.*

It remains to be seen whether these recommendations will be taken up by the Federal or state governments. However, we are already seeing a contest of ideas occurring within civil society. The NSW Council for Intellectual Disability (CID), a peak advocacy group for people with Intellectual Disabilities, has expressed concern about the move towards a human rights-based model of substitute decision-making where a substitute decision-maker is still required[32]. CID questions whether the particular linguistic and cultural background of the person will be appropriately reflected in the decision-making process and expresses concerns that a sophisticated understanding of human rights will be necessary in order to make a substitute decision which is in keeping with a person's human rights. CID puts forward the view that such a standard could exclude family members from the substitute decision-making role, as there may not be the sophisticated level of understanding of human rights amongst the family of a person in need of a substitute decision-maker.

New South Wales – Review of the Guardianship Act

In November 2015, the then Attorney General of NSW requested that the Law Reform Commission of NSW ('the Commission') conduct a review into the *Guardianship Act*, the legislation which underpins the jurisdiction of the Guardianship

[32] Council for Intellectual Disability, 'Supported decision making YES! But what role for substitute decision-making?', Blog, 25 June 2015, available at http://nswcid.blogspot.com.au/2015/06/supported-decision-making-yes-but-what.html

Division of the Tribunal in NSW[33]. The Commission has been asked to have regard to a number of matters in conducting the review, including the UN Convention, the desirability of introducing a supported decision-making scheme, and whether the language of "disability" remains appropriate to the guardianship jurisdiction or is a focus on "decision-making capacity" more appropriate?

The Commission released six discussion papers for the purposes of community consultation and is now in the phase of preparing an initial report as to recommendations for reform for further comment.

Some of the questions that the Commission has sought views on so far include:

- Should formal supported decision-making or co-decision-making schemes be introduced? If so, should only the person requiring support be able to make such appointments, or should a Court or Tribunal be empowered to order a support arrangement?
- Should substitute decision-making, that is the current jurisdiction of the Tribunal, be retained? If so, should there be a change in lexicon, with a movement away from concepts and terminology such as disability, incapacity, and guardians, and a subsequent movement towards an assessment of decision making ability and the appointment of supporters and representatives?
- If substitute decision-making is to be retained, should the current obligation on those appointed to make decisions in the "best interests" of a person be replaced with a requirement to give effect to the person's "will and preferences"?
- Should legislation be amended to provide specific considerations relevant to Aboriginal and Torres Strait Islander people?

We await with anticipation the final report of the Commission which is due to be released before the end of the year.

Conclusion

I have attempted to provide a brief overview of how questions of impaired decision-making capacity and decision-making arrangements are currently determined and how it is proposed that they may be answered in the future in Australia.

Whilst all Australian jurisdictions continue to operate legal frameworks entrenched in the appointment of a substitute decision-maker, there has been a significant policy shift encouraging those appointed to these roles to engage in supported decision-making whenever possible. This policy shift is not unique to Australia and is occurring in many countries throughout the world. In my view, this is a transition

[33] For more information: http://www.lawreform.justice.nsw.gov.au/

more than a destination. It is a transition that reflects society's ever developing views as to the capability and the rights of persons with disabilities.

In an Australian context, should the momentum that the disability sector is presently experiencing eventually lead to a change in the legal framework from one that emphasises substitute decision-making, to one of supported decision-making in accordance with a person's will, preferences, and rights, it will be important for the issues that have been raised in this presentation to be properly addressed. There will need to be a proper assessment of any risks associated with a move away from formalised substitute decision-making to ensure that what it is replaced with is a supported decision- making model that genuinely enables the person to make their own decisions, with support, rather than a *de facto* substitute decision-maker making decisions whilst standing in the shoes of a support person, without any oversight.

The title of this paper perhaps erroneously suggests I have particular lessons to share with Canada. Perhaps a more appropriate focus should be on a few principles both our countries can focus upon in developing and reforming the legal frameworks established for people with decision-making impairment.

There must be enhancements in all frameworks to ensure that the involvement of the person who may have impaired decision-making ability is a primary focus, that they are provided necessary supports to engage in any determinative process, judicial, quasi-judicial, or otherwise, that impact upon their right to self-determination and ensures that their views are heard and taken account of. Accessibility to the legal system is of paramount importance when engaging with the most vulnerable in our respective communities. In my view, a tribunal format with less formal means of evidence gathering and decision makers with particular expertise in cognitive incapacity and the disability sector, goes a long way in promoting the accessibility required.

The simplification and consolidation of legislation that regulates supported or substitute decision making would benefit all in both our nations. Further, as our populations become more mobile, greater harmonisation of terminology and concepts across provinces and territories in Canada, and across states and territories in Australia, would promote understanding and consistency.

In conclusion, jurisdictions, such as in Canada and Australia, can gain much through collaboration and learning from one another to promote the development and enhancement of our legal frameworks for people with decision making disabilities. It is also essential that any reform of our respective jurisdiction is undertaken by placing the people who are impacted the most, people with cognitive disabilities, front and centre in terms of consultation and development.