

# 3

## Part 3

### Supported Decision Making

In Chapter 5 the Commission proposes new principles to inform guardianship laws. Those principles emphasise the participation of people with impaired decision-making capacity in decisions that affect them. Supported decision making is one important way of promoting participation.

In this part, we discuss new legal mechanisms to support people who are able to make their own lifestyle or financial decisions with some assistance. We look at supported decision-making models in other jurisdictions and consider how supported decision-making mechanisms might work in Victoria.

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## Chapter 7

# Supported Decision Making

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## INTRODUCTION

- 7.1 Supported decision making is a concept of growing significance to people with an interest in guardianship laws. It seeks to enable people with impaired decision-making capacity to participate in community life by creating new mechanisms that support them in making and implementing their own decisions.
- 7.2 In this chapter, we consider how supported decision-making mechanisms could complement existing arrangements to create a broader array of decision-making mechanisms to assist people with impaired decision-making capacity. We examine international developments in supported decision making and identify options for reforming Victorian law.

## BACKGROUND

### WHAT IS SUPPORTED DECISION MAKING?

- 7.3 Supported decision making is an emerging concept that has been given considerable impetus by the United Nations' *Convention on the Rights of Persons with Disabilities* (the Convention).
- 7.4 Some of the things people mean when they talk about decision-making support include:
- providing and explaining information to someone in a way they can understand
  - spending time with a person to help them consider the options available to them, and the consequences of these options
  - providing advice about which options the person might choose
  - spending time with the person to ascertain their wishes, preferences and choices
  - helping the person to communicate their decisions to others
  - taking action to ensure the person's decisions are respected and implemented.
- 7.5 The law has traditionally viewed decision-making 'capacity' as an absolute concept. Either a person has decision-making capacity or they lack capacity, which causes them to be effectively disqualified from participating in a broad range of activities. Because the law has not recognised a state of partial or fluctuating capacity, it has provided only one mechanism—substitute decision making—to assist people with impaired capacity.
- 7.6 Although this historical approach is understandable because of the value our legal system places on certainty and finality, it does not reflect reality. Many people have a level of decision-making capacity that may fluctuate significantly over time and depend on the context in which the decision is made. As Darzins, Molloy and Strang point out, capacity is difficult to measure and involves more than purely 'functional' tests, measuring scores of memory, concentration, attention and orientation.<sup>1</sup>
- 7.7 Supported decision making emphasises the interdependent nature of most people's lives. The important decisions we all make are often made with personal support (such as advice from family, friends or mentors) or perhaps professional support (for example, lawyers or accountants). Some people with disabilities may simply need additional support to make decisions.

## HOW DOES SUPPORTED DECISION MAKING DIFFER FROM SUBSTITUTE DECISION MAKING?

- 7.8 Supported decision making differs from ‘substitute decision making’—discussed further in Part 5—in two important ways:
- A substituted decision is made on behalf of a person with impaired decision-making capacity, whereas a supported decision requires the participation and consent of the person concerned.
  - A substitute decision maker is authorised to make a decision for the represented person, which is deemed to be the decision of the represented person.<sup>2</sup> By contrast, in supported decision-making arrangements, the assisted person continues to be the person authorised to make decisions, either alone (but with support) or together with a co-decision maker. The assisted person retains either sole or joint legal responsibility for their own decisions.
- 7.9 Appointing a substitute decision maker provides third parties such as banks, medical professionals and other service providers with certainty when dealing with a person with impaired decision-making capacity. Whether formalised models for supported decision making could provide a similar level of certainty, while enhancing the person’s participation in the decision-making process, is a challenge we will consider further in this chapter.

## CURRENT LAW

### LACK OF FORMAL RECOGNITION OF SUPPORTED DECISION MAKING

- 7.10 Victoria’s guardianship laws do not contain any supported decision-making mechanisms. In practice, support relationships currently operate informally in Victoria.
- 7.11 Although supported decision making is not formally recognised in Victorian law, the principles in the *Guardianship and Administration Act 1986* (Vic) (G&A Act) reflect some of the goals of supported decision making. For example, when exercising their powers, both guardians and administrators are required to encourage and assist the represented person to become capable of making decisions, and to consult with the person, taking into account their wishes as far as possible.<sup>3</sup>

### BEST PRACTICE BY THE PUBLIC ADVOCATE AND STATE TRUSTEES

- 7.12 At times, the Public Advocate utilises her power to advocate on behalf of a person with impaired decision-making capacity<sup>4</sup> as an alternative to being appointed as that person’s guardian. This practice may be characterised as a form of supported decision making.
- 7.13 State Trustees runs a ‘Financial Independence Program’ for some of its clients. The program is designed to allow people under administration to have greater involvement in managing their affairs, and work towards gaining financial independence.<sup>5</sup> This practice may also be characterised as a form of supported decision making.

### PROPOSED REFORMS OF THE DRAFT MENTAL HEALTH BILL

- 7.14 The Department of Health’s review of the *Mental Health Act 1986* (Vic) has also considered the role of supported decision making in relation to mental health treatment decisions.

1 Peteris Darzins, Dr William Molloy, Dr David Strang (eds), *Who Can Decide?—The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 6–7.

2 See, eg, *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3), 48(3).

3 *Ibid* ss 28(2)(c)(e), 49(2).

4 *Ibid* ss 16(1)(e)–(f).

5 See State Trustees Ltd, *Financial Independence Program* (2010) <[http://www.statetrustees.com.au/uploads/content/113-PFS-FinIndepProg-FS\\_web01110.pdf](http://www.statetrustees.com.au/uploads/content/113-PFS-FinIndepProg-FS_web01110.pdf)>.



- 7.15 As outlined in Chapter 5, the Exposure Bill released by the Department in late 2010 includes principles which require that a person with a mental illness must, as far as reasonably possible in the circumstances:
- be consulted in the making of decisions about their mental illness
  - be supported to make their own decisions
  - be provided with the support and information necessary to exercise their rights under the Act
  - have their preferences and wishes considered in the making of decisions that affect them.<sup>6</sup>
- 7.16 The draft Bill proposes to increase patient participation in decision making by:
- providing formal recognition of advance statements in relation to mental health treatment, and requiring that people making decisions in relation to mental health treatment that are inconsistent with that statement provide reasons for doing so<sup>7</sup>
  - establishing a nominated person scheme, allowing a person with capacity to nominate a person to receive information, be consulted about their treatment and represent their interests.<sup>8</sup>
- 7.17 We discuss formal recognition of advance statements more generally in Chapter 9.

### UNITED NATIONS' CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

- 7.18 The Convention is one of the most significant developments in the shift in focus towards supported decision making. At its core, the Convention promotes the dignity and equality of people with disabilities and their participation in society on an equal basis with others.<sup>9</sup> The Convention fundamentally repositions international understandings of people with disabilities—moving away from viewing people with disabilities as objects of care and protection towards the view that people with disabilities are equal members of society, with the same human rights as any other person.<sup>10</sup>

#### Article 12—Equal recognition before the law

- 7.19 Article 12 of the Convention, which recognises the right of people with disabilities to equal recognition before the law, has direct relevance to guardianship laws:

##### **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.

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.<sup>11</sup>

7.20 Article 12(2) asserts the right of people with disabilities to enjoy legal capacity on an equal basis with other members of society. Article 12(3) recognises that there may be circumstances where a person needs support in their exercise of legal capacity, and obliges Australia, as a signatory, to provide access to such support. Article 12(4) provides further detail on how support should be provided, requiring that such support measures:

- 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
- are subject to regular review by a competent, independent and impartial authority.<sup>12</sup>

7.21 The somewhat ambiguous language of Article 12(2) has led to a variety of interpretations about its meaning. Article 12 is generally interpreted as promoting greater autonomy for people with disabilities in decisions that affect their lives and imposing an obligation on states to provide decision-making support that is proportionate and tailored to their individual circumstances.<sup>13</sup> Some commentators have gone further, arguing for an interpretation of article 12(2) that prohibits substitute decision making altogether, and focuses solely on the promotion of supported decision making.<sup>14</sup>

7.22 As outlined in Chapter 3, Australia declared when ratifying the Convention that it interprets article 12 to allow for the continuation of substitute decision making, subject to appropriate safeguards:

*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.*<sup>15</sup>

6 Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cl 7(4).

7 Ibid pt 10 div 1.

8 Ibid pt 10 div 2.

9 See *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 ('*Convention on the Rights of Persons with Disabilities*').

10 Volker Lipp, 'Autonomy and Guardianship—Foes or Friends?' (paper presented at World Congress on Adult Guardianship, Yokohama, 2 October 2010).

11 *Convention on the Rights of Persons with Disabilities* art 12.

12 Ibid art 12(4).

13 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 89–91.

14 See, eg, Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with CRPD' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010) 151, 156–9.

15 See United Nations Treaty Collection, *Chapter IV: Human Rights, 15; Convention on the Rights of Persons with Disabilities* (6 December 2010), 2 <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20IV/Chapter%20IV/IV-15.en.pdf>>.

7.23 Canada made a similar declaration:

*Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.*

*To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12(4) Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review and appeal.<sup>16</sup>*

7.24 The United Nations acknowledges that establishing support networks in order to properly implement the Convention will require effort and financial investment, but also points out that substitute decision making can be equally expensive. Therefore, supported decision making might involve a redistribution of existing resources available for guardianship laws rather than additional expense.<sup>17</sup>

## OTHER JURISDICTIONS

### INTERNATIONAL SUPPORTED DECISION-MAKING MECHANISMS

#### Canada

7.25 The Canadian provinces have adult guardianship laws that are broadly similar to those in Australia. However, in recent years several Canadian provinces have introduced mechanisms intended to facilitate and encourage supported decision-making arrangements, and provide alternatives to guardianship and administration.<sup>18</sup>

7.26 The Commission has examined supported decision-making laws in Alberta, Saskatchewan and British Columbia.

#### Alberta—supported decision-making agreements and co-decision-making orders

7.27 In October 2009 the *Adult Guardianship and Trusteeship Act* became law in Alberta.<sup>19</sup> This Act retained and modernised a system of adult guardianship and ‘trusteeship’ (administration) in Alberta, but also introduced two mechanisms intended to expand the range of decision-making options. These mechanisms are:

- supported decision-making authorisations<sup>20</sup>
- co-decision-making orders.<sup>21</sup>

7.28 Supported decision-making authorisations, based on similar laws in the Yukon, Canada,<sup>22</sup> are personal appointments that allow a person with capacity to appoint one or more other people, known as ‘supporters’, to assist them when making a lifestyle decision.<sup>23</sup> To make this personal appointment, the person must understand the nature and effect of the agreement.<sup>24</sup> The supporter does not have the power to make legally enforceable decisions on behalf of the person, but a decision made or communicated with the assistance of a supporter is considered to be a decision of the person.<sup>25</sup>

7.29 A third party may refuse to recognise a decision communicated by the supporter if they reasonably believe there has been undue influence, fraud or misrepresentation.<sup>26</sup> Supporters may also be given the authority to obtain the personal information they need to assist the person to make a decision.<sup>27</sup> This includes documents such as medical records, which might otherwise be protected by laws concerning confidential relationships and information privacy.



7.30 Co-decision-making orders are state appointments for joint decision making which are made by a court.<sup>28</sup> Unlike guardianship, co-decision-making orders must be made with the consent of the person with the decision-making impairment.<sup>29</sup> Co-decision-making orders apply to non-financial decisions only,<sup>30</sup> and operate by requiring the appointed ‘co-decision maker/s’ and the person with impaired capacity to work together and agree before proceeding with a decision that is covered by the order.

7.31 They are designed for situations where the court is satisfied that the person’s capacity to make certain decisions is significantly impaired, but the person would be able to make these decisions if provided with appropriate guidance and support.<sup>31</sup> Co-decision making allows a person to retain greater control over their personal circumstances than guardianship, because if the person and the co-decision maker disagree, the person’s decision takes precedence.<sup>32</sup> The co-decision-making order can specify that a contract is voidable without the signature of the assisted adult and their co-decision maker/s,<sup>33</sup> and a co-decision maker cannot refuse to sign a contract if ‘a reasonable person could have made the decision and the decision is not likely to result in harm to the assisted adult’.<sup>34</sup>

7.32 Co-decision making is intended for family and close friends of the person with impaired capacity. The ‘Public Guardian’ in Alberta cannot be appointed co-decision maker.<sup>35</sup>

### Saskatchewan—co-decision-making orders for financial decisions

7.33 The *Adult Guardianship and Co-decision-making Act*<sup>36</sup> in Saskatchewan has been in operation since 2001. Like Alberta’s *Adult Guardianship and Trusteeship Act*, it allows for ‘co-decision-making’ orders. However, the Saskatchewan legislation goes further than Alberta by allowing for the appointment of ‘property co-decisions makers’ who make decisions in relation to financial matters in conjunction with the person with the impairment.<sup>37</sup> Further, unlike Alberta, the consent of the assisted person is not required before a co-decision maker can be appointed in Saskatchewan.<sup>38</sup>

16 Ibid.  
17 *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, above n 13, 91.

18 These provinces include the Yukon (*Decision Making, Support and Protection to Adults Act* SY 2003, c 21), Saskatchewan (*The Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3), Alberta (*Adult Guardianship and Trusteeship Act* SA 2008 c A-4.2) and British Columbia (*Representation Agreement Act* RSBC 1996, c 405). Manitoba has also included explicit recognition of supported decision making in the *Vulnerable Persons Living with a Mental Disability Act* SM 1993, c V90, s 6.

19 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2.

20 Ibid c A-4.2, div 1.

21 Ibid c A-4.2, div 2.

22 *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21. In the Yukon these arrangements are known as ‘supported decision-making agreements’, and the people who assist the person with impaired decision-making capacity are known as ‘associates’.

23 The number of supported decision-making authorisations in Alberta is currently unknown, however the Alberta Office of the Public Guardian has sent out over 1000 supported decision-making kits: consultation with Office of the Public Guardian, Alberta (16 March 2010).

24 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2, s 4(1).

25 Ibid c A-4.2, s 6(1).

26 Ibid c A-4.2, s 6(2).

27 Ibid c A-4.2, s 13(4)(i)–(ii).

28 When the Commission spoke with the Office of the Public Guardian, Alberta, in March 2010, we learned that there had not yet been any co-decision-making orders, however it was anticipated that up to 50 may be made in the first year of the *Adult Guardianship and Trusteeship Act*.

29 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2, s 13(4)(c).

30 Ibid c A-4.2, s 12. The terms of the order specify the areas of the decision making over which the order applies, and the Act outlines the types of decisions that can be specified in the order: see s 17(1)–(2).

31 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2, s 4(a).

32 See Government of Alberta, *Understanding Co-decision-making* (2010) <<http://www.seniors.alberta.ca/opg/Guardianship/Publications/OPG5633.pdf>>.

33 *Adult Guardianship and Trusteeship Act* SA 2008, c A-4.2, s 17(5).

34 Ibid c A-4.2, s 18(5).

35 Ibid c A-4.2, s 15.

36 *The Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3.

37 Ibid c A-5.3, pt III.

38 Ibid c A-5.3, ss 14, 40.



7.34 Although co-decision-making orders have been available in Saskatchewan for nine years, the Commission understands that only a handful of applications have been made.<sup>39</sup> One possible explanation for this is the significant cost involved in making an application to the Supreme Court for a co-decision-making or guardianship order in Saskatchewan.<sup>40</sup>

#### British Columbia—representation agreements

7.35 Since 2000, British Columbian law has allowed a person to make a personal appointment of one or more ‘representatives’ to make decisions on their behalf.<sup>41</sup> The agreement that creates this appointment is known as a ‘representation agreement’. The decisions the representative may assist the person with may be personal, medical or day-to-day financial decisions.

7.36 Representation agreements bear some similarity to powers of attorney because they confer decision-making authority on another person. However, their design arguably reflects a more participatory model of decision making than powers of attorney, by placing greater primacy on the person’s wishes.<sup>42</sup> They are also available to a broader range of people than powers of attorney, as a person can make a representation agreement even when they may not satisfy a common law test of capacity to make a power of attorney, or to make the types of decisions the agreement covers.<sup>43</sup>

7.37 The *Representation Agreement Act* presumes that everyone is able to make a representation agreement,<sup>44</sup> and provides the following examples of ‘relevant factors’ in determining whether a person can make or vary a representation agreement:

- whether the adult communicates a desire to have a representative make, help make, or stop making decisions
- whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others
- whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult
- whether the adult has a relationship with the representative that is characterised by trust.<sup>45</sup>

7.38 The Commission has heard that the focus of these laws is not to test whether someone ‘has capacity’, but to enable support to be provided where it is needed.<sup>46</sup> To safeguard against financial abuse of vulnerable people, the *Representation Agreement Act* requires that where financial powers are provided under the agreement, a monitor must be appointed to oversee the conduct of the representative unless:

- the representative is the adult’s spouse, the Public Guardian and Trustee, a trust company or a credit union
- two or more representatives have been appointed and are required to act unanimously
- the agreement has been made in the presence of a lawyer.<sup>47</sup>

7.39 The *Representation Agreement Act* contains quite explicit instructions that the representatives must consult with the person, and follow the person’s wishes if it is reasonable to do so. The Act requires that when making decisions, representatives must comply with:

- the person's current wishes unless it is unreasonable to do so
- if current wishes are unreasonable or cannot be obtained, any written instructions prepared by the person
- if there are no written instructions, then the person's known beliefs and values
- if the person's beliefs and values are unknown, then the person's best interests.<sup>48</sup>

7.40 Because registration of representation agreements is possible but optional in British Columbia,<sup>49</sup> the number of agreements made is unknown. It is estimated that several thousand representation agreements have been made.<sup>50</sup>

7.41 Representation agreements are often discussed as mechanisms that facilitate supported decision making, and as a result British Columbia has been praised by the United Nations as 'one of the leading jurisdictions in incorporating supported decision making into law, policy and practice'.<sup>51</sup> However, while representation agreements place a significant emphasis on the wishes, beliefs and values of the person, and provide alternatives to guardianship and administration, they continue to confer decision-making power upon a substitute. They are only partial instruments of supported decision making.

#### **SUPPORTED DECISION-MAKING MECHANISMS IN OTHER PARTS OF AUSTRALIA**

7.42 Although no Australian jurisdiction has reformed its guardianship laws to introduce supported decision-making mechanisms, there have been practical developments elsewhere that are of considerable interest.

##### **South Australia**

7.43 The South Australian Public Advocate, together with the Julia Farr MS McLeod Benevolent Fund, is developing a pilot program that seeks to encourage and test supported decision making in South Australia.<sup>52</sup> The program will involve a person with a decision-making impairment appointing one or more 'supporters' to assist them to make decisions through a written 'supported decision-making agreement'. These agreements will not confer any substitute decision-making power, and are not specifically provided for under South Australian law, but are intended to provide structure and clarity around support relationships.<sup>53</sup>

7.44 Under the program, supporters will be drawn from the person's existing support network. Public Advocate staff will act as a resource to the agreement parties, but will not act as supporters.<sup>54</sup> The agreements will also appoint 'monitors' to oversee the supported decision-making process, and an 'agreement facilitator' will assist with the initial process of creating the agreement. The Supported Decision Making Committee ('the Committee') considers that the process of making the agreement is an opportunity for discussion and education, and is crucial to the project's goal of building the legal capacity of supported persons.<sup>55</sup>

7.45 As is the case with British Columbia's representation agreements, the supported person will not be required to satisfy a traditional test of capacity before making an agreement. The project will instead work from a presumption that all people are able to make an agreement and the focus will be on factors such as whether:

- the person expresses a desire to be supported in relation to certain decisions
- there is evidence of a trusting relationship between the person and the proposed supporter/s.

39 Consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010).

40 Ibid.

41 *Representation Agreement Act* RSBC 1996, c 405.

42 See, eg, *Representation Agreement Act* RSBC 1996, c 405, s 16, which outlines the duties of representatives.

43 *Representation Agreement Act* RSBC 1996, c 405, s 8(1).

44 Ibid c 405, s 3(1).

45 Ibid c 405, s 8(2).

46 Consultation with NIDUS Personal Planning Resource Centre and Registry (31 March 2010).

47 *Representation Agreement Act* RSBC 1996, c 405, s 12(1)-(2).

48 Ibid c 405, s 16.

49 This may be done through NIDUS Personal Planning Resource Centre and Registry. Further details are available at <<http://www.rarc.ca/>>.

50 Consultation with NIDUS Personal Planning Resource Centre and Registry (31 March 2010). For further statistical information around the use of representation agreements in British Columbia, see NIDUS Personal Planning Resource Centre, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) <[http://www.nidus.ca/PDFs/Nidus\\_Research\\_RA7\\_InAction.pdf](http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf)>.

51 *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, above n 13, 90.

52 See Office of the Public Advocate (South Australia), *Annual Report 2010* (2010) 91.

53 Meeting with Supported Decision Making Project Group, Adelaide, (9 August 2010).

54 See OPA (SA), *Annual Report 2010*, above n 52, 95.

55 South Australian Supported Decision Making Project Group, *Practice of Supported Decision Making: Draft Background Discussion Paper* (2010) 1.



- 7.46 The South Australian program's supported decision-making agreements differ from British Columbia's representation agreements, however, in that they will not provide the supporter with substitute decision-making powers, or any other legal authority. The project group believes the agreement will be sufficient to ensure that the support relationship is recognised and respected by others, and the supporter is involved in important decisions that affect the supported person.<sup>56</sup> However, the Committee anticipates that future widespread adoption of supported decision making in the community will be assisted by legislative recognition.<sup>57</sup>
- 7.47 The areas of decision making the agreement covers will be included in the supported decision-making agreement document. While financial and legal decision making have been excluded from the trial, the Committee recognises that many accommodation and lifestyle decisions have financial implications.<sup>58</sup>
- 7.48 The pilot will have two separate groups, with 20 participants in each group:
- 'alternatives to guardianship' group for people who might otherwise have a guardian appointed.
  - 'early intervention' group for young adults with a disability for whom guardianship is not currently contemplated, with the hope that problems and crises which might lead to guardianship in the future can be avoided.<sup>59</sup>
- 7.49 People with a deteriorating condition, such as dementia, have been excluded from the trial.<sup>60</sup> The project began in late 2010, and will run for two years.

### New South Wales

- 7.50 The New South Wales Legislative Council Standing Committee on Social Issues recently completed its report on 'Substitute Decision Making for People Lacking Capacity'.<sup>61</sup> This report considered, among other things, the 'paradigm shift' towards a more rights-based understanding of disability, which the Convention embodies.<sup>62</sup> It also looked at moves towards supported decision making, and recommended that New South Wales' substitute decision-making laws include an explicit statement to the effect that the legislation 'supports the principle of assisted decision making'.<sup>63</sup>
- 7.51 The Committee's report also considered legal instruments for supported decision making based on those in Alberta (discussed earlier in this chapter).<sup>64</sup> The Committee found that it had insufficient evidence available to make a recommendation to implement these kinds of mechanisms, but noted that
- the provisions for people lacking decision-making capacity in NSW would be improved if bodies such as the Guardianship Tribunal and the Mental Health Tribunal had specific assisted decision-making interventions available to them.*<sup>65</sup>

The Committee recommends that the New South Wales Government consider such instruments further.<sup>66</sup>

### LAW REFORM IN VICTORIA?

- 7.52 Our consultations revealed very strong community interest in the concept of supported decision making. There are clear benefits to supporting people with impaired capacity to participate in decisions that affect their lives because this step enhances their personal autonomy and acknowledges their human dignity.

7.53 The challenge in this area is turning ‘in principle’ community support for supported decision making into practical mechanisms that provide people with the support they need to make their own decisions and which become widely accepted as one way of making legally binding decisions.

## COMMUNITY RESPONSES

7.54 In this section, we consider community views about the benefits and disadvantages of introducing supported decision-making mechanisms. We also consider community ideas for possible supported decision-making models.

### Benefits of new supported decision-making mechanisms

#### Lack of alternatives to guardianship and administration

7.55 A number of consultation participants argued that there are no alternatives to guardianship and administration for people who need some decision-making support. This means that some people do not receive the level of decision-making support they need because guardianship and administration might be considered too restrictive in the circumstances. Conversely, guardianship and administration might also be used unnecessarily because there might be no other less restrictive means of ensuring the person’s needs are met.

7.56 The powers of attorney currently available in Victoria preserve a person’s autonomy to a greater extent than a VCAT appointed guardian or administrator, by allowing a person to choose whom they wish to make certain decisions on their behalf, and provide (non-binding) direction as to how this should be done. However, while they may be used as instruments of support in some circumstances, Victorian powers of attorney are substitute decision-making instruments.

#### Lack of recognition of supportive relationships

7.57 The Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee) report considered that, in the great majority of cases, supportive families would be unlikely to need a guardianship order to assist adults with impaired decision-making capacity.<sup>67</sup> Much has changed, however, since that report was submitted in 1982. It appears that service providers, government agencies and financial institutions do not always recognise informal support relationships,<sup>68</sup> perhaps because of risk management concerns about dealing with a person who has decision-making authority.<sup>69</sup>

7.58 Carers Australia (Victoria) noted that:

*there is no targeted literature to guide family carers on how to perform the role of informal substituted decision maker. Guardians and Administrators who are appointed by the Tribunal or under Enduring Powers by contrast have access to a framework that clearly articulates how to execute their roles.<sup>70</sup>*

7.59 Other submissions expressed concern about the fact that unregulated informal substitute decision making is a daily reality for people with impaired capacity who are living in supported accommodation.<sup>71</sup>

#### Guardianship laws are ‘crisis driven’

7.60 Under the current law, guardians and administrators are appointed only where there is a demonstrated ‘need’.<sup>72</sup> Many participants in our consultations felt that tribunal appointments could often have been avoided if proper planning and supports had been put into place earlier.

56 Meeting with Supported Decision Making Project Group, Adelaide (9 August 2010).

57 Email from Public Advocate (South Australia) to Victorian Law Reform Commission (18 December 2010).

58 OPA (SA), *Annual Report 2010*, above n 52, 94.

59 *Ibid* 91.

60 *Ibid* 94.

61 Standing Committee on Social Issues, New South Wales Parliament Legislative Council, *Substitute Decision Making for People Lacking Capacity* (2010).

62 *Ibid* 37–8.

63 *Ibid* 63, recommendation 4.

64 *Ibid* 52–3.

65 *Ibid* 55.

66 *Ibid* 63, recommendation 5.

67 Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982).

68 Consultations with carers in Hastings (8 April 2010), metropolitan carers (6 May 2010) and Gippsland Carers Association (25 May 2010). See also Submission IP 1 (Carers Australia (Victoria)) 9–10.

69 Former Public Advocate David Green, for example, has considered the rise of risk as a central organising principle in the field of health and welfare, and has argued that the demand on social workers to manage and control risk ‘is becoming a dominating factor shaping their practice’: David Green, ‘Risk and Social Work Practice’ (2007) 60 *Australian Social Work* 395, 395.

70 Submission IP 1 (Carers Australia (Victoria)) 10.

71 See, eg, Submission IP 7 (Stephanie Mortimer) 1.

72 *Guardianship and Administration Act 1986* (Vic) ss 22(1)(c), 46(1)(a)(iii).



### Community concerns about formal supported decision-making mechanisms

- 7.61 Some submissions to our information paper urged caution about making substantial changes to the law. Anita Smith, President of the Tasmanian Guardianship and Administration Board, stated:

*I have concerns that when people in an Australian context discuss 'supported decision making' they mean something quite different to their international colleagues. I believe that most guardianship appointments here operate very much like supported decision making would be understood in an international context (see for instance the requirements of an administrator or guardian in sections 49 and 28 of the Victorian Act). That is because international guardianship appointments are quite draconian, court based and often life-long. Guardianship in some jurisdictions implies a loss of legal status, blocking the way for appeal or review as the subject of the order has no legal rights.*

*My concern about some proposed models of supported decision making under discussion in Australia look like 'decision by committee,' will imply a loss of privacy and dignity and will inadvertently put power back into institutional hands rather than an approved and appointed decision maker with actual legal authority.<sup>73</sup>*

- 7.62 The Public Advocate, while in favour of the principle of supported decision making,<sup>74</sup> noted that:

*An unfortunate aspect of the current discussion about supported decision-making, in Australia as well as overseas, has been the denigration and criticism of guardianship that has frequently accompanied it, even in United Nations CRPD publications. Whilst serious accusations of human rights abuse can be levelled against guardianship in some countries, this is not generally the case in Australia.<sup>75</sup>*

- 7.63 Another concern identified by the Public Advocate was how supported decision-making models would work where a person had no family or support network to assist them.<sup>76</sup> Scope also identified this concern, and suggested that for people in these circumstances, supported decision-making models may be effective only to the extent that government and community organisations were willing to commit resources required to foster support networks.<sup>77</sup>

- 7.64 There was also debate about whether the nature and degree of some disabilities is such that some people would not be adequately assisted within a supported decision-making framework alone.<sup>78</sup>

- 7.65 Some submissions expressed concern that formalising supported decision-making arrangements might damage the personalised and individual character of some existing informal arrangements, and add little to the quality of the support provided.<sup>79</sup> A number of submissions suggested that there needs to be more research into formalising supported decision-making models in Victoria, including analysing the success of developments overseas, and considering how they might work in the Victorian context.<sup>80</sup> The notion that law reform should 'do no harm' to the emergence of supported decision making was an important theme that emerged from the Public Advocate's community forum on supported decision making.<sup>81</sup>

7.66 Concern was also expressed that supported decision making could leave some people open to abuse, neglect, exploitation, or undue influence. Similar concerns have been expressed in relation to the Canadian models for supported decision making.<sup>82</sup> The Victorian Equal Opportunity and Human Rights Commission argued that ‘any regime that permits another person to influence or determine critical life issues for another requires significant safeguards’.<sup>83</sup>

### Suggested models for supported decision making

7.67 There appears to be substantial community support for establishing new supported decision-making mechanisms.

#### Elements of a supported decision-making model

7.68 Our consultations indicated that some people want flexible support arrangements to ensure that they are most appropriate to the person’s needs and circumstances. A number of people spoke of the need for arrangements that recognise the ‘continuum’ of decision-making abilities, and provide differing options for support.<sup>84</sup>

7.69 There was some support for the idea of co-decision-making models—which require the agreement of the represented person and one or more others—as an alternative to substitute decision making.<sup>85</sup>

7.70 Scope emphasised the role of ‘circles of support’, and the need for a collaborative approach to supported decision making.<sup>86</sup> Others also emphasised the benefits of having more than one supporter, and where possible including someone who has had experience of disability as part of a support network.<sup>87</sup>

7.71 Advance directives were suggested as a possible mechanism for supporting people to realise their goals and have their wishes respected.<sup>88</sup> We discuss advance directives further in Chapter 9.

## THE COMMISSION’S PROPOSALS

7.72 The Commission has identified some potential benefits and possible disadvantages in reforming the law to allow for supported decision-making arrangements.

### POSSIBLE BENEFITS OF NEW FORMALISED SUPPORT ARRANGEMENTS

#### Reflects reality

7.73 A key benefit of formalising support arrangements is that it reflects and facilitates the reality of decision making for many people with impaired capacity, which is often a collaborative process with important people in their lives. Seeking advice and support for important decisions is something nearly all people do, regardless of their decision-making capacity. However, formalising these arrangements for people with impaired capacity can provide added structure to the support. It also recognises that a person’s ‘capacity’ to make a decision is not an all or nothing question, and the capacity of a person to make a decision can be ‘built’ if the person is provided with sufficient support. A formalised relationship has the potential to promote the dignity and autonomy of the person by facilitating their involvement in decisions that affect their lives, which might be more difficult without the support arrangement.

#### Promotes supported decision making

7.74 In addition to reflecting and facilitating support arrangements, the availability of formal supported decision making might be used to promote the practice of supported decision making. In this sense, the availability of formal arrangements might be seen as having both a symbolically important role in recognising and valuing the preferences and abilities of people with impaired capacity, and a practical means by which to realise their participation in decision making.

- 73 Submission IP 53 (Anita Smith) 3.
- 74 Submission IP 8 (Office of the Public Advocate) 5.
- 75 Barbara Carter, Office of the Public Advocate (Victoria), *Supported Decision Making: Background and Discussion Paper* (November 2009), 4 <<http://www.publicadvocate.vic.gov.au/research/132/>>.
- 76 Submission IP 8 (Office of the Public Advocate) 5.
- 77 Submission IP 19 (Scope (Vic) Ltd) 16.
- 78 Submission IP 8 (Office of the Public Advocate) 5.
- 79 Submission IP 16 (Mark Feigan) 13.
- 80 Submissions IP 32 (NSW Guardianship Tribunal) 5, IP 47 (Law Institute of Victoria) 6 and IP 53 (Anita Smith) 3.
- 81 Magdalena McGuire, Office of the Public Advocate (Victoria) *Decision Making Forum 24 February 2010 Summary Report* (2010) 5 <<http://www.publicadvocate.vic.gov.au/research/133/>>.
- 82 Robert Gordon, ‘The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision Making’ (2000) 23(1) *International Journal of Law and Psychiatry* 61, 75.
- 83 Submission IP 37 (Victorian Equal Opportunity and Human Rights Commission) 6.
- 84 See, eg, consultations with Mental Health Legal Centre (7 April 2010) and mental health consumers (7 April 2010).
- 85 Consultations with Disability Advocacy Resource Unit (5 May 2010) and Julian Gardner (26 March 2010); Submission IP 8 (Office of the Public Advocate) 25.
- 86 Submission IP 19 (Scope (Vic) Ltd) 16.
- 87 Consultations with VALID Southern Region Client Network (20 April 2010) and people with acquired brain injuries (3 May 2010).
- 88 Submissions IP 58 (Mental Health Legal Centre) 38–48 and IP 30 (Victorian Aboriginal Legal Service) 9.



### **Provides an alternative to substitute decision making**

7.75 The availability of formal support mechanisms might also provide a practical alternative to a substitute decision-making appointment, particularly where VCAT is considering whether there is a 'need' to appoint a guardian or an administrator. For people who are planning their future, the appointment of one or more supporters might be a preferable alternative to appointing a person with full substitute decision-making powers through a power of attorney.

### **Certainty**

7.76 One of the most important benefits of formalising support relationships is that they would provide certainty for third parties about the nature and parameters of the support relationship. These arrangements would allow doctors, service providers, banks and others to deal with the person and their supporters with greater confidence, and allow people in support relationships to achieve outcomes they might not have been able to achieve by way of informal support.

### **Recognition**

7.77 Formalising a support relationship is an effective way of recognising the value of that relationship. This is symbolically important for many people. It also may assist other important people in the person's life to understand and recognise the significance of the support relationship.

### **Guidance for supporters**

7.78 Formalising support relationships would provide an opportunity to create principles for support relationships and devise guidelines to assist supporters in their roles. Carers Australia (Victoria) has argued that these things are presently lacking for informal supporters.<sup>89</sup>

## **POTENTIAL DISADVANTAGES OF NEW SUPPORT ARRANGEMENTS**

### **Arrangements could restrict, rather than enhance, autonomy**

7.79 A possible undesirable consequence of introducing supported decision-making mechanisms is that it could lead to more people being placed under legal arrangements that restrict their autonomy.

### **Increased complexity**

7.80 New supported decision-making arrangements would add another layer of complexity to a system that already contains three different personal appointments, and six different substitute decision-making arrangements in total.<sup>90</sup> The Public Advocate has suggested that rather than introduce new personal appointments, the current enduring powers could be amended to permit them to come into operation immediately upon creation (which is already possible for financial enduring powers of attorney), and to require attorneys to follow the wishes of the person whenever possible.<sup>91</sup>

### **Devaluing of informal arrangements**

7.81 Formal appointments of supporters may also have the effect of devaluing informal support relationships, making it even harder for informal supporters to assist a person on a regular basis.



## Risk of abuse, neglect and exploitation

7.82 Formal supported decision-making arrangements might increase opportunities for abuse, neglect, exploitation and undue influence of people with impaired capacity.<sup>92</sup> Our consultations indicated concerns about abuse of enduring powers of attorney (financial).<sup>93</sup> Without adequate safeguards, it is possible that formalised support arrangements, particularly private appointments, could be misused.

## POSSIBLE OPTIONS FOR REFORM

7.83 In this section, we consider how supported decision making might be recognised in guardianship laws.

7.84 To put supported decision making into practice, the Commission is considering mechanisms broadly modelled on developments in Canada. The aim of these options will be to better recognise the range of different decision-making abilities in our community, and provide more decision-making options for people whose capacity is impaired in some way.

## NEW SUPPORTED DECISION-MAKING MECHANISMS

7.85 The Commission believes that formal supported decision-making mechanisms merit close examination. They appear to be an effective way of recognising that people have different decision-making abilities and of providing more options for people whose capacity is impaired in some way.

7.86 Recent developments in Canadian guardianship law provide useful guidance. The Commission suggests that formal appointments of supporters might be made either personally, through an appointment similar to a power of attorney, or by VCAT order, in a manner similar to how guardians and administrators are currently appointed. The Commission also suggests that it should be possible to make both supported and co-decision-making appointments. The differences between supported decision-making arrangements and co-decision-making arrangements are explained below.

7.87 The Commission proposes four new appointments, described below.

### Personal appointments

- Supported decision-making agreements.
- Co-decision-making agreements.

### VCAT appointments

- Supported decision-making orders.
- Co-decision-making orders.

7.88 Personal appointments of 'supporters' and 'co-decision makers' are clearly preferable to a VCAT appointment, because they involve an exercise of choice by the person affected.

7.89 However, there will continue to be many circumstances where people have not planned ahead, and decision-making support is required. In these situations, the Commission believes it is important that VCAT has the ability to intervene to protect the rights of the person, and has the ability to make appointments other than guardianship and administration appointments.

89 Submission IP 1 (Carers Australia (Victoria)) 10–11.

90 These arrangements are: guardianship orders, administration orders, enduring power of attorney (financial), enduring power of attorney (medical), enduring power of guardianship, general power of attorney, and the person responsible under s 37 of the *Guardianship and Administration Act 1986* (Vic). Centrelink also has its own system of 'correspondence nominees' and 'payment nominees' under the *Social Security (Administration) Act 1999* (Cth).

91 Office of the Public Advocate (Victoria), *Supported Decision Making: Options for Legislative Recognition* (2010) 7–8 <<http://www.publicadvocate.vic.gov.au/research/132/>>.

92 Gordon, above n 82, 75.

93 State Trustees and Monash University have undertaken a three-year study of financial elder abuse in Victoria, which has included consideration of abuses of powers of attorney: See Jo Wainer, Peteris Darzins, Kei Owada, 'Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study' (Report No 2, State Trustees and Monash University, 10 May 2010). Evidence provided to the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney also indicated that organisations such as State Trustees, the Public Advocate and Seniors Rights Victoria have particular concerns about abuses of powers of attorney. See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 26–7.



- 7.90 In order to make a personal appointment, a person should be capable of understanding the nature and effect of the agreement. This requirement could exclude some people who need formal support, but are incapable of making such an agreement.<sup>94</sup> The availability of VCAT orders, made with the consent of the person, would allow for supporters and co-decision makers to be appointed in these circumstances, and provide a clear, less restrictive alternative to guardianship or administration.

### Personal appointments

#### Personally appointed supporters

- 7.91 This option would involve a person requiring decision-making support appointing one or more ‘supporters’ to assist them. The appointment would recognise the relationship between a person and their supporters, and provide the supporters with the authority necessary for them to assist the person.
- 7.92 In particular, the supporters might be entitled to access personal information that is required to assist the person (which might otherwise be protected by privacy laws), and communicate decisions on behalf of the person. In some ways, this authority would be similar to a Centrelink ‘correspondence nominee’, who can receive information and deal with Centrelink on behalf of a person.
- 7.93 To make the appointment, the person would need to be capable of understanding the nature and the effect of the agreement, and consent to it.
- 7.94 The advantage of this arrangement is that it is potentially quite empowering for the person and their supporter. It recognises and legitimises relationships of support, and has the potential to allow supporters to achieve more for the person than if the relationship remained purely informal. It also does not involve a loss of control for the person in need of support, as the supporter would not be given decision-making authority.
- 7.95 A framework of rights and responsibilities designed to assist supporters in the performance of their role and to protect the person could accompany supported decision-making agreements.

#### Personally appointed co-decision makers

- 7.96 This option would involve a person with capacity appointing someone close to them to make nominated decisions jointly. The power could take effect either immediately, or at some point in the future. It would require both the person with impaired decision-making capacity and their co-decision maker to agree to a course of action before that decision could be considered legally binding. The effect would be similar to co-decision-making orders in Alberta and Saskatchewan, but the appointment would be personal, rather than made by VCAT order.
- 7.97 Personally appointed co-decision makers are an option the Commission believes may be particularly useful for a person facing declining capacity (for example, someone in the early stages of Alzheimer’s disease) or fluctuating capacity (for example, someone with episodic mental illness), who recognises they will need significant decision-making support, but does not wish to lose decision-making autonomy. Co-decision-making agreements would be private appointments, meaning that the Public Advocate and State Trustees could not be appointed to this role.
- 7.98 The main advantage of this approach is that it could allow a person with impaired capacity to retain more control over their life than if they had a substitute decision maker appointed. The retention of decision-making control may encourage appointments among people who are fearful of losing control through creating a power of attorney.

7.99 There are a number of potential difficulties associated with co-decision-making agreements. To be effective, there would need to be fairly widespread community understanding of these arrangements. A co-decision-making arrangement is a new concept for the entire community. The ramifications for transactions involving money or property, where third parties quite rightly seek certainty and finality in their dealings with others, would need to be closely examined. The Commission will undertake this examination if the concept of co-decision-making agreements attracts support.

## VCAT appointments

### Supported decision-making orders

- 7.100 Under this option, VCAT would be able to make an order appointing one or more ‘supporters’ to assist a person with impaired capacity. The powers of VCAT appointed supporters would be the same as those of a personally appointed supporter, including accessing personal information and communicating decisions on behalf of the person where necessary. The VCAT order, like a personal appointment, would be individually designed to meet the particular needs of the person being supported. It is proposed that a VCAT order could not be made without the consent of both the supporter and the person being supported. The order would not confer substitute decision-making power on the supporter.
- 7.101 The Commission sees two main advantages of allowing VCAT to appoint supporters. Firstly, it would provide a clear alternative to the appointment of a guardian or administrator where VCAT finds that there is a need for support, but that a substitute decision maker is unnecessary in the circumstances. The Commission considers that VCAT should be required to consider the option of appointing a supporter before a substitute decision maker can be appointed.
- 7.102 Secondly, it would allow for the creation of formal support arrangements for people who show a desire for support, but are incapable of making a supported decision-making agreement. This would ensure that people with impaired capacity are not excluded from appointing people they trust to assist them, while also providing a measure of protection for the person through VCAT oversight of the appointment.

### Co-decision-making orders

- 7.103 This option would involve VCAT having the power to appoint co-decision makers, with the same powers as personally appointed co-decision makers. The VCAT co-decision-making order would mean that for decisions covered by the order, the person and the co-decision maker would have to agree for a decision to be legally binding. Like supported decision-making orders, the Commission believes that co-decision-making orders should require the consent of the person, and should be an option VCAT is required to consider before it appoints a guardian or administrator.
- 7.104 The Public Advocate has considered the circumstances under which a co-decision maker might be appointed. In Alberta, a co-decision maker may be appointed where an adult’s decision-making capacity is ‘significantly impaired’, but the court is satisfied that the adult could make the decision if provided with ‘appropriate guidance and support’.<sup>95</sup> In Saskatchewan, a personal or property co-decision maker may be appointed where the adult’s ‘capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions’ with respect to the relevant matters.<sup>96</sup>

94 The test for appointing a supporter in Alberta is the adult must understand ‘the nature and effect of a supported decision-making authorization’: *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 s 4(1).

95 *Adult Guardianship and Trusteeship Act* SA 2008 c A-4.2, s 13(4)(a)(ii).

96 *Adult Guardianship and Co-decision-making Act* SS 2000 c A-5.3, ss 14(1)(a)(i), 40(1)(a)(i).



- 7.105 To provide clearer criteria, the Public Advocate has suggested that a co-decision-making order should be available where a person meets the criteria for guardianship, but is found to have sufficient capabilities to contribute to guardianship decisions.<sup>97</sup> The Public Advocate has suggested that failure to agree should be grounds for revoking the order.<sup>98</sup>
- 7.106 The Commission repeats that it is mindful of the fact that co-decision-making arrangements for people with some impaired capacity is a new concept that will require close examination if it is to gain acceptance and operate effectively.



**Question 14** Do you agree with the Commission's proposal to introduce new supported decision-making arrangements?

**Question 15** Do you agree with any or all of the proposed roles of supporters and co-decision makers?

**Question 16** What steps would need to be taken in order to ensure that these appointments operated fairly and efficiently?

#### Who should take on the roles of supporters or co-decision makers?

- 7.107 Family and friends provide decision-making support for many people. As with enduring power appointments, the Commission believes that supporters and co-decision makers could be drawn from these networks. However, as some submissions identified, there are people in our community who do not have access to such support networks.
- 7.108 The Commission believes that the Public Advocate and professional administrators should not be asked to undertake these supported decision-making roles because they would require a level of continuity and time commitment that these organisations would be unable to provide. This has been the approach in Canada, where the Albertan Public Guardian and Public Trustee cannot be appointed as a supporter or co-decision maker,<sup>99</sup> and in Saskatchewan, where the Public Guardian and Trustee has decided not to accept co-decision-making appointments because it is considered an inappropriate role for the office.<sup>100</sup>
- 7.109 There may be a role for the Public Advocate and community-based organisations to establish trained volunteer support networks for people who need them. A similar approach has been taken with the 'community guardianship' program run by the Public Advocate, and a 'supporter' volunteer program could draw on this experience. We consider this option further in Chapter 20.



**Question 17** Do you agree that the Public Advocate should not be a 'supporter' or a 'co-decision maker'?

**Question 18** Do you think that the Public Advocate should play a role in training supporters and co-decision makers, and monitoring supported decision-making arrangements?

**Question 19** Should the Public Advocate establish and coordinate a volunteer support program to assist people who do not have family or friends willing and able to take on these roles?

## Supported decision-making for financial decisions

- 7.110 The Australian Bankers' Association expressed concerns about the possible introduction of formalised supported decision-making appointments for financial decisions.<sup>101</sup> It argued that these arrangements could create operational problems, and could expose individuals to liability and legal risks.<sup>102</sup>
- 7.111 State Trustees argued that formalised models of supported decision making in relation to property and financial affairs would be unworkable unless the model addressed concerns around:
- protecting the supporter from liability for unwise/imprudent decisions of the person
  - management of conflicts of interest
  - the requirements of parties to a support arrangement to prove the basis upon which decisions are made.<sup>103</sup>
- 7.112 The Commission acknowledges that third parties, such as banks, will need to have confidence in any new mechanisms in order for them to operate successfully. The potential legal liability of a supporter and a co-decision maker, as well as the person receiving assistance with financial matters, will require close consideration if these new mechanisms extend to financial decision making.



**Question 20** Should 'supporter' or 'co-decision-maker' arrangements apply to financial matters, or be limited to personal decision making?

## Safeguards against abuse

- 7.113 The Commission is very concerned that supported decision-making instruments do not facilitate the abuse, neglect or exploitation of people with impaired capacity in any way. We have particular concerns where the support arrangements are created by private appointment, and may not be subject to the same level of scrutiny as a VCAT appointment.
- 7.114 There may be a role for the Public Advocate in the training and monitoring of support arrangements. This might include:
- overseeing the creation of supported and co-decision-making agreements
  - providing training for people who are appointed as supporters or co-decision makers
  - investigating allegations of abuse or misuse of the role of supporter and co-decision maker
  - providing advice and guidance to supporters and co-decision makers as necessary
  - conducting regular reviews of how supported and co-decision-making arrangements are going.
- 7.115 We further consider an extended role and new powers for the Public Advocate in relation to preventing and taking action against abuse of vulnerable persons in Chapter 20.

- 97 *Supported Decision Making: Options for Legislative Recognition*, above n 91, 12.
- 98 *Ibid.*
- 99 *Adult Guardianship and Trusteeship Act SA 2008* c A-4.2, ss 5, 15.
- 100 Consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010).
- 101 Consultation with Australian Bankers' Association (18 March 2010).
- 102 Submission IP 44 (Australian Bankers' Association) 7.
- 103 Submission IP 59 (State Trustees) 4.

## Supported Decision Making



7.116 In Chapter 19, we consider accountability mechanisms for substitute decision makers. In that chapter, we discuss a ‘register’ for enduring powers. That register could also allow for registration of supported and co-decision-making agreements. ‘Monitors’ could also be appointed to oversee the conduct of supporters and co-decision makers.



**Question 21** Do you agree with the suggested training and monitoring roles for the Public Advocate? Are there any other functions the Public Advocate should perform in relation to supporters?

**Question 22** What safeguards do you think are necessary to protect supported people from abuse?