INTRODUCTION

9.1 In the previous chapter, the Commission recommended the introduction of a new legal arrangement—the appointment of a supporter—to provide more options to people who need decision-making assistance.

9.2 In this chapter, we consider another alternative to substitute decision making: the appointment of a ‘co-decision maker’. This reform involves the appointment of someone to make decisions jointly with a person with impaired decision-making ability. This differs from the appointment of a guardian or an administrator who makes decisions on behalf of the represented person, rather than with them jointly.

9.3 Like the appointment of a ‘supporter’, the appointment of a co-decision maker recognises that while a person may struggle to make decisions alone, they may be able to make decisions with assistance from a trusted family member or friend. However, the appointment of a co-decision maker is more restrictive than the appointment of a supporter. Under a co-decision-making arrangement, the person loses some autonomy because they must make decisions about particular matters jointly with a co-decision maker. Under this arrangement, a decision made by the person alone would not be legally valid.

9.4 Some Canadian provinces now permit co-decision making. The Commission believes that co-decision-making arrangements should also be available to assist some Victorians with impaired decision-making ability.

CURRENT LAW

9.5 As we noted in Chapter 8 Victorian guardianship law does not provide for co-decision making. While a guardian, administrator or attorney can informally make joint decisions with the represented person, this practice is not legally recognised. The existing mechanisms authorise decision making by the substitute decision maker on behalf of the represented person, not with them. The substitute decision-maker is the only person recognised as having authority to make the relevant decisions, and may act without the agreement of the represented person.

OTHER JURISDICTIONS

CANADA

9.6 Since the mid 1990s, some Canadian jurisdictions have taken the lead by incorporating various models of assisted decision making into their guardianship legislation.

9.7 Recent changes to the guardianship laws in the Canadian provinces of Alberta and Saskatchewan have influenced the Commission’s proposals for co-decision making.

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1 First in the province of Saskatchewan: see The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3, and subsequently in the province of Alberta: see Adult Guardianship and Trusteeship Act SA 2008, c A-4.2.
2 See Guardianship and Administration Act 1986 (Vic) ss 24, 25, 48.
4 Adult Guardianship and Trusteeship Act SA 2008, c A-4.2.
5 The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3.
Co-decision making has been available in Alberta since October 2009. These joint decision-making appointments are made by a court. Unlike guardianship orders, co-decision-making orders must be made with the consent of the person with the decision-making impairment. Co-decision-making orders in Alberta apply to non-financial decisions only, and operate by requiring the appointed ‘co-decision maker’ and the person with impaired capacity to work together and agree before proceeding with a decision that is covered by the order.

These arrangements 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. Co-decision making allows a person to retain greater control over their personal circumstances than does guardianship, because they are still legally responsible for making their own decisions, albeit with another person. If there is a disagreement between decision makers, the decision of the person with impaired capacity takes precedence. The co-decision-making order can specify that a contract is voidable without the signature of the assisted adult and their co-decision maker, 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’.

The co-decision maker is usually a family member or close friend of the person with impaired capacity. The Public Guardian of Alberta cannot be appointed co-decision maker.

The Public Guardian of Alberta suggests that co-decision-making arrangements have the greatest potential to assist people with relatively stable, long-term cognitive impairments. However, even for people with a deteriorating condition such as dementia, the Public Guardian argues that there may be a long period where the person could benefit from a co-decision-making arrangement.

The Public Guardian of Alberta argues that the success of co-decision making is highly dependent on there being a stable, trusting relationship, and is unlikely to be successful where there are fractured family relationships and conflict. The Public Guardian’s observations are that people involved in these relationships have generally had a clear idea of the role, and that concerns about the potential for co-decision making to blur into substitute decision making have not been realised.
Chapter 9

Co-decision making

Saskatchewan—co-decision-making orders for personal and financial decisions

9.13 The Saskatchewan Adult Guardianship and Co-decision-making Act has been in operation since 2001. Like Alberta’s legislation, it allows for ‘co-decision-making’ orders to be made by a court (but not by personal appointment). However, the Saskatchewan legislation goes further than that of Alberta by providing for the appointment of ‘property co-decision makers’ who make decisions in relation to financial matters in conjunction with the person with the impairment. Unlike in Alberta, the consent of the assisted person is not required before a co-decision maker can be appointed, but the court is directed to appoint someone who has ‘a long-standing caring relationship with the adult’ where possible.

9.14 Personal and property co-decision-making orders authorise the co-decision maker to:

• advise the adult in relation to the relevant decisions
• share decision-making authority for those decisions
• do all things necessary to give effect to their authority.

9.15 However, the law also directs co-decision makers to ‘acquiesce in a decision made by the adult’. Further, where joint signatures of the adult and the co-decision maker are required, the co-decision maker must not refuse to sign the document if a reasonable person could have made the decision in question and no harm to the adult or loss to their estate is likely to result from the decision.

9.16 Both personal and property co-decision-making orders may be subject to regular review by the court, but further additional safeguards apply in the case of property co-decision makers. Upon appointment, property co-decision makers must lodge an inventory of the adult’s estate with the court and the Public Guardian and Trustee, and thereafter provide these bodies with annual accounts. The court may also require them to provide a bond.

9.17 Although co-decision-making orders have been available in Saskatchewan for 10 years, few applications have been made. Possible explanations for this limited use include:

• the significant cost involved in making an application to the court for a co-decision-making or guardianship order in Saskatchewan
• a lack of public education about the availability of co-decision making
• the fact that many people who provide this kind of assistance do so informally, without the need for a court order.

OTHER AUSTRALIAN JURISDICTIONS

9.18 No other Australian jurisdiction currently recognises co-decision-making arrangements. As in Victoria, guardianship laws in other Australian states and territories encourage substitute decision makers to work with the represented person to make decisions, but at law, decision making remains the sole responsibility of the substitute decision maker.

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18 The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3.
19 Ibid pt III.
20 Ibid ss 14(3)(b), 40(3)(b).
21 Ibid ss 17(1), 42(1).
22 Ibid ss 17(2)(a), 42(2).
23 Ibid ss 17(2)(b), 42(2).
24 Ibid ss 22(1)(a), 47(1)(b).
25 Ibid ss 53, 54.
26 Ibid s 55.
28 Consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010).
New South Wales

9.19 New South Wales, like Victoria, does not have formalised support arrangements. However, when acting as a financial manager, the New South Wales Trustee and Guardian may allow a person to deal with part of their estate without intervention from the financial manager. The New South Wales Trustee and Guardian suggests that this power could be used in more cases to facilitate supported decision making.

9.20 The 2010 New South Wales Legislative Council Standing Committee on Social Issues report, Substitute Decision-making for People Lacking Capacity, recommended that: the NSW Government consider amending NSW legislation in which the issue of capacity in relation to decision-making is raised … to provide for the relevant courts and tribunals to make orders for assisted decision-making arrangements and to prescribe the criteria that must be met for such orders to be made.

9.21 The New South Wales Trustee and Guardian also intends to develop a supported decision-making trial together with the New South Wales Public Guardian, which is similar to the South Australian trial described in Chapter 8.

COMMUNITY RESPONSES

9.22 In the consultation paper, the Commission proposed the introduction of a new co-decision making appointment to help people in need of assistance with decision making. The Commission suggested that a co-decision maker could be empowered to make decisions jointly with the person, rather than on their behalf. Co-decision-making arrangements could apply to both personal decisions and financial decisions.

9.23 The Commission proposed that ‘co-decision makers’ could be appointed either through written agreement similar to a power of attorney, or through an order by the Victorian Civil and Administrative Tribunal (VCAT). The agreement or order appointing a co-decision maker could specify the areas of decision making covered.

9.24 As with the Commission’s proposal for supporters, the Commission suggested that the Public Advocate should not be a co-decision maker. This is because a co-decision making role is intended to be a personal role that draws upon the strengths of an existing relationship.

9.25 The Commission received a range of responses about the introduction of co-decision makers. While there was support for the proposal, more people expressed reservations about co-decision makers than about supporters.

9.26 Some groups supported the entire continuum of decision-making appointments proposed by the Commission, including co-decision makers. The Council on the Ageing stated: ‘We welcome the introduction of supported and co-decision making mechanisms which facilitate greater flexibility and choice for the donor, and enable a “continuum” of decision-making processes’.

9.27 Responses to our online forum were mixed, with some broadly supporting the idea of co-decision making, but querying how it may operate in practice.

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30 New South Wales Trustee and Guardian Act 2009 (NSW) s 71.
31 Submission CP 79 (NSW Trustee and Guardian).
32 Standing Committee on Social Issues, NSW Legislative Council, Substitute Decision-making for People Lacking Capacity (2010) 63.
33 Submission CP 79 (NSW Trustee and Guardian).
35 Submissions CP 19 (Office of the Public Advocate), CP 29 (STAR Victoria), CP 59 (Careers Victoria), CP 64 (Women with Disabilities Victoria), CP 65 (Council on the Ageing Victoria) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).
36 Submission CP 65 (Council on the Ageing Victoria).
Chapter 9

Co-decision making

9.28 Some organisations favoured the introduction of ‘supporters’, but not ‘co-decision makers’. The Mental Health Legal Centre indicated that while they initially supported the proposal for co-decision makers, negative consumer feedback and concerns about the potential for abuse had changed their view.

9.29 Victoria Legal Aid expressed concern that a co-decision-making arrangement has the potential to be an ‘uneven partnership’, where the co-decision maker may heavily influence the person with a disability to agree with a decision that the co-decision maker thinks is appropriate in the circumstances.

9.30 The Federation of Community Legal Centres shared Victoria Legal Aid’s concerns, and argued that ‘the co-decision making model … seems likely to increase complexity without much associated benefit’.

9.31 Some organisations opposed the introduction of both supporters and co-decision makers. State Trustees opposed the introduction of stand-alone co-decision-making arrangements, arguing that similar outcomes are available through adjustments to existing laws. As an alternative to co-decision-making orders, State Trustees proposed that a limited form of administration order could be made in some cases. Under this proposal, VCAT could be empowered, ideally with the consent of the individual, to make a variant of an administration order, under which the individual would only be deemed incapable of making his or her own decisions where the administrator (co-decision maker) actively notifies the relevant third party that a particular transaction or type of transaction does not have the administrator’s approval.

9.32 The person under the administration order would retain decision-making autonomy except when the administrator opposed a particular transaction.

THE COMMISSION’S VIEWS AND CONCLUSIONS

9.33 The Commission has refined its initial co-decision-making proposal in light of both community responses and further research into the operation of these mechanisms in Canada. The major change to the initial proposal has been to recommend that these appointments should be available only when made by a tribunal.

INTRODUCTION OF CO-DECISION MAKERS INTO VICTORIAN GUARDIANSHIP LAWS

9.34 The Commission believes that new guardianship laws should permit ‘co-decision-making’ appointments. These arrangements seek to enable people with some impairment to their decision-making ability to participate in decisions that affect their lives to the greatest possible extent without exposing them to potential harm. Together with the availability of ‘supporters’ recommended in Chapter 8, the availability of co-decision-making appointments would provide a new continuum of decision-making arrangements that better reflect the different levels of assistance various people require when making important decisions.

9.35 Though co-decision making would limit the decision-making autonomy of a person with impaired decision-making ability, the appointment would expand possibilities for their participation because it would allow the person to remain involved in the decision-making process. Co-decision making requires the agreement of the person
with impaired decision-making for any decision made pursuant to the order to be valid. The appointment recognises that impaired decision-making ability does not mean the person should lose all opportunity to participate in decision making. A person with impaired decision-making ability who is assisted by a co-decision-making arrangement is able to control outcomes of decisions affecting them to a far greater degree than a person under a substitute decision-making order. They are also recognised by others as being legal participants in their own decision making.

9.36 As with supporters, the Commission believes the appointment of co-decision makers will better reflect the reality of many people’s lives. This will be particularly so where a person is already jointly making decisions with another person on an informal basis.

9.37 The innovation of new legal arrangements such as co-decision making is consistent with increasing local and international moves towards supported and assisted decision making. Support is building for these types of tiered decision-making practices to be incorporated into modern guardianship regimes.

9.38 For some people, co-decision making will be an effective alternative to the appointment of a guardian or an administrator and more useful than a supporter will be when a person’s ability to make their own decisions is questionable. For example, a person in the early stages of dementia may have a trusted life partner appointed as a financial co-decision maker to make decisions with them, rather than have their partner appointed as a financial administrator to make decisions on their behalf.

9.39 In other situations, the appointment of a co-decision maker might add legal certainty to a supportive arrangement that has been operating informally. For example, a daughter who has been supporting her father to manage his financial affairs during the early stages of dementia may be better able to deal with banks and other organisations if this relationship is formally recognised.

9.40 Co-decision making recognises that while the legal concept of capacity is based on the assumption that there is a clear dividing line between those people ‘with capacity’ and those who ‘lack capacity’, the reality is quite different. There is increasing recognition of a continuum of decision-making abilities, and of the difficulty in defining the boundaries of ‘capacity’. There is also increasing recognition of the fact that decision-making ability is not solely dependent on the person’s cognitive abilities, but may also be affected by their environment and, in particular, the availability of appropriate support.

**POTENTIAL CHALLENGES OF CO-DECISION MAKING**

9.41 There are a number of important issues to address when considering the introduction of a new co-decision-making arrangement for some people with impaired decision-making ability.

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45 Surtees, above n 29, 89.
47 See, eg, Leslie Salman, ‘Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act’ (2010) 81 University of Colorado Law Review 157. In the Australian context, the Public Guardian of South Australia has established a ‘supported decision making research trial’: see South Australian Supported Decision Making Project, Report of Preliminary “Phase 1” (2011). The NSW Trustee and Guardian is planning to establish a supported decision-making pilot program: see Submission CP 78 (NSW Trustee and Guardian).
49 In England and Wales, for example, a core principle of guardianship laws is that ‘a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success’: see Mental Capacity Act 2005 (UK) s 1(3).
Co-decision making

Complexity and abuse

9.42 One of the main concerns is the added complexity, and potential confusion, these new legal appointments could create. The same concern was expressed in relation to the Commission’s proposal to introduce the appointment of ‘supporters’ in Chapter 8. This concern is greater for co-decision makers because the relationship itself is more complex. Defining the meaning of a ‘joint’ decision, identifying the potential users of these arrangements, and describing the responsibilities of third parties who transact with co-decision makers are all important challenges.

9.43 Although co-decision making establishes a joint decision-making mechanism, the co-decision maker may be in a position to exert significant influence over a person with impaired decision-making ability. This creates the potential for abuse. In circumstances where a person’s decision-making ability fluctuates considerably, it may also be difficult for co-decision makers to determine whether a decision has been jointly made, or whether it is really a substitute decision.

9.44 While concerns about added complexity are legitimate, they are not sufficiently compelling to prevent introduction of this new mechanism. The Commission believes that much can be done to educate the public about these new arrangements.

9.45 Education of co-decision makers and regular review of orders by the tribunal will safeguard against abuse, as will rigorous scrutiny by the tribunal of the person appointed to this role, and the ability of any person with concerns to apply to the tribunal for review of the order.

9.46 The Public Guardian of Alberta has argued that there is a need for flexibility in co-decision making. Some decisions may require substantial support, and may come close to substitute decision making, but this does not necessarily undermine the arrangement provided the co-decision maker involves the person in the decisions and treats them with respect.

Amending existing mechanisms instead

9.47 It is important to consider whether the introduction of a new legal relationship will meaningfully assist people with impaired decision-making ability.

9.48 The Commission believes that there is value in formally recognising the ability of a person to participate jointly with a trusted family member or friend in the decision-making process. While this can occur under a substitute decision-making arrangement, these arrangements:

- do not require the decision maker to work together with the person to the same extent
- allow the substitute decision maker to make decisions that are opposed by the represented person
- represent to the world at large that the person with impaired decision-making ability does not have the capacity to make the specified decisions.

9.49 Co-decision making is qualitatively different to substitute decision making because the person with impaired decision-making ability continues to have legal responsibility for decisions about their own affairs, even though those decisions require the agreement of another person.

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50 The experience in Alberta, where a significant information and education campaign has been embarked upon, suggests this is possible: teleconference with Brenda Lee-Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada (19 May 2011). This is in contrast to the experience in Saskatchewan, where education has been limited, and uptake of co-decision making has been lower: see Surtees, above n 29, 91; consultation with Public Guardian and Trustee, Saskatchewan (27 August 2010).

51 Teleconference with Brenda Lee-Doyle, Provincial Director, Office of the Public Guardian, Alberta, Canada (19 May 2011).
In Chapters 10, 12 and 17 the Commission discusses reforms to the role of substitute decision maker to emphasise the importance of both involving the person as much as possible, and making decisions that are consistent with the person’s wishes, views, beliefs and values. These reforms complement the introduction of new supported and co-decision-making arrangements.

**HOW SHOULD CO-DECISION MAKERS BE APPOINTED?**

In our consultation paper, the Commission proposed that co-decision makers could be appointed either by personal appointment or by tribunal order.

Upon further consideration, the Commission believes that co-decision-making appointments should be made by tribunal order only. In both Alberta and Saskatchewan, co-decision makers can be appointed by court order only.

**Reasons why co-decision makers should not be personally appointed**

There are two main reasons why the Commission believes it is inappropriate for a co-decision maker to be personally appointed:

- A person who needs a co-decision maker will have impaired decision-making ability.
- Co-decision-making appointments are not an ideal future planning mechanism.

If a person needs a co-decision maker, they will have diminished ability to make their own decisions. The person’s ability to make a sound choice to enter into a co-decision-making arrangement and to appoint a responsible person to undertake that role may be in question. Because of a person’s inherent vulnerability in these circumstances, protective considerations are important.

A person who wishes to have a co-decision maker, or any other person with a genuine interest in that person’s affairs, should be able to apply to VCAT for an order. Tribunal oversight of the proposed arrangement provides appropriate external scrutiny as well as a mechanism for ongoing review of any co-decision-making appointment. It would also assure third parties that the arrangement is appropriate in the circumstances.

Co-decision making is generally not an effective future planning mechanism because it seeks to assist a person with their current decision-making needs. For example, a co-decision-making order may assist a person in the early stages of dementia, or someone with an acquired brain injury who needs support with certain decisions.

Co-decision making requires an acknowledgment that a person might struggle to make important decisions alone but could make those decisions quite ably in combination with another person. A personal appointment of a co-decision maker might place too much responsibility upon the co-decision maker to determine whether the person with impaired decision-making ability is no longer able to make their own decisions about some (or all) matters but could do so with the assistance of another person.

**RECOMMENDATION**

Introduce co-decision-making orders in Victorian law

64. VCAT should be able to appoint a co-decision maker to assist a person in need of decision-making support.
Chapter 9

Co-decision making

Criteria for tribunal appointments

9.58 Legislative criteria should guide VCAT in making co-decision-making appointments.

9.59 Before making a co-decision-making order, VCAT should be satisfied that the person’s decision-making ability in relation to relevant decisions is impaired but that the person could make those decisions jointly with another trusted person. The tribunal should also be satisfied that there is a need for the appointment and that other arrangements, such as the appointment of a supporter, would be insufficient to meet the person’s requirements.

9.60 As with the appointment of supporters, the ongoing consent of the person concerned is of fundamental importance. This is especially true for co-decision makers, as the person and the co-decision maker need to be able to work together and reach agreement to make the relevant decisions. If the person does not consent to the arrangement, it will not work effectively.

9.61 The availability of an appropriate co-decision maker is also crucial.

9.62 VCAT should be satisfied that the appointment will promote the personal and social wellbeing of the person before it makes an appointment. This is consistent with the approach proposed by the Commission in relation to all other tribunal appointments.

RECOMMENDATION

Criteria for tribunal appointments

65. VCAT should be able to appoint a co-decision maker to assist a person if it is satisfied that:

(a) the person’s ability to make the relevant decisions is impaired and it is unlikely that the person will have the capacity to make relevant decisions alone

(b) the person would have the capacity to make decisions jointly with the proposed co-decision maker about the matters referred to in the order

(c) the proposed co-decision maker is suitable to act in the role and consents to the appointment

(d) there is a need for an appointment to be made

(e) the person freely and voluntarily consents to:

(i) the appointment of the individual who is proposed to be appointed as a co-decision maker

(ii) all other aspects of the order

(f) the person’s needs could not be met through informal arrangements or through the appointment of a supporter

(g) the appointment of the co-decision maker will promote the personal and social wellbeing of the person.

The identity of the co-decision maker

9.63 VCAT should be guided by specific criteria when determining whether a particular person is an appropriate co-decision maker. These criteria should include:

- the person’s wishes
- the nature of the relationship between the person and the proposed co-decision maker
• the ability of the co-decision maker to assist the person to make decisions
• the likelihood that the co-decision maker will put the interests of the person first.

9.64 Some people might not have a family member or close friend who is willing and able to be a co-decision maker.

Professional co-decision makers should not be appointed

9.65 Because of the very personal nature of the arrangement, the Public Advocate, State Trustees or other professional administrators should not be appointed as a co-decision maker. This is consistent with the Commission’s recommendation in relation to supporters discussed in Chapter 8.

9.66 In Chapter 8, the Commission recommended that the Public Advocate should establish a pilot program linking people in need of decision-making support with appropriate volunteers. The Commission does, however, have some reservations about recommending the establishment of a volunteer co-decision making program. Co-decision making is likely to be a challenging role that requires the ability to work with the person to reach agreement about decisions. It is a very personal, trusting relationship that may prove difficult for a volunteer. The Commission suggests that the Public Advocate consider whether a volunteer co-decision maker program should be implemented when there is more evidence of its need and practicality.

9.67 Though a person may have multiple supportive relationships in their life, the Commission believes that to be workable, only one co-decision maker should be available for appointment in respect of each decision.

RECOMMENDATIONS

The identity of a co-decision maker

66. In determining whether a person is suitable to act in the role of co-decision maker, VCAT must consider:
   (a) the wishes of the person
   (b) the desirability of preserving existing family relationships, and other relationships of importance to the person
   (c) the nature of the relationship between the person and the proposed co-decision maker, and in particular whether the relationship is characterised by trust
   (d) the ability and availability of the proposed co-decision maker to assist the person to make decisions about the matters to be referred to in the order
   (e) whether the proposed co-decision maker will act honestly, diligently and in good faith in the performance of their role
   (f) whether the proposed co-decision maker has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts.

67. The Public Advocate should not be able to be appointed as a co-decision maker.

68. Co-decision makers should not receive any financial remuneration for the performance of their role.

69. No more than one co-decision maker should be appointed in relation to each type of decision to be made.
Chapter 9

Co-decision making

TYPES OF DECISIONS COVERED BY CO-DECISION-MAKING ARRANGEMENTS

9.68 The Commission believes that co-decision-making orders should be able to cover the full range of decisions which may be available for personal guardians and financial administrators. We consider those powers in more detail in Chapters 10 and 13.

9.69 Because a person may not need support with all types of decisions, VCAT orders should clearly indicate those matters where co-decision-making arrangements will apply. For instance, a co-decision-making order could indicate that the arrangement will govern all real property transactions or all health care decisions.

9.70 Further detail might be appropriate in some instances. For example, a financial co-decision-making order might specify that investment decisions involving particular sums of money should fall within the scope of the co-decision-making order, but everyday expenditure decisions should not be included as the person is capable of managing these decisions without formal assistance.

RECOMMENDATIONS

Types of decisions covered by co-decision-making arrangements

70. A co-decision maker should be given the power to assist a person to make decisions in relation to any of the financial or personal matters that a substitute decision maker can be authorised to decide on behalf of another person.

71. The co-decision-making order should specify the types of decisions for which the person needs support.

72. The order may also specify any conditions or limitations upon the appointment.

Financial decisions

9.71 Co-decision-making arrangements should be available for both personal and financial decisions.

9.72 Co-decision-making arrangements are an effective means of complying with the United Nations’ Convention on the Rights of Persons with Disabilities (the Convention) obligation to provide people with disabilities with ‘the support they may require in exercising their legal capacity’. For some people, co-decision making will be a more appropriate means to support them in exercising their legal capacity than substitute decision making.

9.73 The Commission acknowledges that it might take time for some third parties to become familiar with this new decision-making mechanism.

9.74 It is unlikely that financial co-decision-making arrangements are more susceptible to abuse than the existing mechanisms of an enduring power of attorney or an administration order. The main concern expressed in consultations and submissions was that a co-decision maker could coerce a person to make particular decisions. While this sort of behaviour is possible, the risk is no greater than with other appointments. The risk of coercion can be managed by:

• appropriate selection of co-decision makers by VCAT

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• the provision of information and education to appointed co-decision makers
• regular review of co-decision-making orders by VCAT
• the ability of any person to apply to VCAT for review of co-decision making orders
• appropriate penalties for abuse of powers.

9.75 If a financial co-decision maker acts beyond the scope of their authority, or contrary to their responsibilities, the implications for third parties are no different to circumstances where an administrator or enduring attorney acts in this way. We discuss accountability measures, including remedies available for breach of fiduciary duties, in more detail in Chapter 18.

9.76 The issue of third party recognition of financial transactions entered into by co-decision makers is important. As joint decision-making arrangements have been used in commercial transactions for many years, the use of a broadly similar mechanism by some people with diminished decision-making ability should not cause significant legal and commercial problems. Dual signatory joint bank accounts, for example, are already a common feature of banking arrangements.

9.77 Third parties will need to decide how they wish to deal with co-decision makers. In most instances, the precise details of how an institution, such as a bank or a medical practice, wishes to record transactions with co-decision makers is best determined by that institution rather than by a VCAT order.

POWERS OF CO-DECISION MAKERS

9.78 The powers proposed for co-decision makers are similar to those of guardians and administrators, but are clearly limited by the requirement that all decisions should be made jointly.

9.79 As with supporters, co-decision makers should be permitted to collect information necessary to make the decision, provided this is done with the consent of the person. They should also discuss this information with the person and assist them to make the decision.

9.80 A co-decision maker’s primary function is to make decisions jointly with the represented person. In some cases this may involve compromise on the part of either the supported person or the co-decision maker. The law should specify that the co-decision maker is not permitted to make decisions on behalf of the person, and must act only with their consent.

9.81 Though decisions are made jointly, rather than on behalf of the person, the Commission believes that there should be a prohibition on co-decision makers being involved in conflict transactions unless these have been specifically authorised. This is consistent with the Commission’s proposals in Chapters 10 and 12.

9.82 Once a joint decision has been made, the co-decision maker will have the authority to do all things necessary to give effect to the decision. This may include signing relevant documentation. However, VCAT should also be able to specify in the co-decision making order that certain decisions require joint signatures.
RECOMMENDATIONS

Powers of co-decision makers

73. A co-decision-making order should authorise a co-decision maker to exercise the following powers, and to do the following things in relation to a decision:

(a) to access, collect or obtain or assist the person in accessing, collecting or obtaining from any person information that is relevant to assist the person to understand the information

(b) to discuss the relevant information with the person in a way they can understand and to assist the person in making the decision

(c) to make decisions of the type referred to in the order jointly with the person

(d) to do all things necessary to give effect to decisions of the person made with the co-decision maker.

VCAT may specify in the co-decision-making order that a contract in relation to any identified personal or financial matter is voidable if it is not in writing and signed by both the person and the co-decision maker.

74. To avoid doubt, the law should specify that a co-decision maker:

(a) is not authorised to make decisions on behalf of the person, and may not exercise their authority without the knowledge and consent of the person

(b) may not use their authority to access, collect or obtain information that the person could not legally have accessed, collected or obtained if able to do so

(c) may not enter into a conflict transaction together with the person, unless the transaction has been specifically allowed in the order.

RECOGNITION OF DECISIONS MADE UNDER CO-DECISION-MAKING ORDERS

9.83 To ensure the effectiveness of co-decision-making arrangements, the law should state that decisions made and actions taken by the co-decision maker and the represented person within the scope of their joint arrangement should be treated as if they were acts of the represented person with capacity.53

9.84 Ultimately, the responsibility to act within authority and with the consent of the person rests with the co-decision maker. It is a relationship of trust. The Commission does not believe it is reasonable to expect third parties such as medical professionals and financial service providers to investigate whether a co-decision maker is acting appropriately in every case. However, registration of the co-decision-making order will enable third parties to verify the existence of the order, its breadth and whether there are any important conditions that affect its use.

9.85 If a person has concerns about the conduct of a co-decision maker, including concerns they are acting without the represented person’s consent, they can make an application to VCAT to review the arrangement.

53 This is consistent with the current approach for decisions made by guardians or administrators under sections 24(4), 25(3) and 48(3) of the Guardianship and Administration Act 1986 (Vic).
RECOMMENDATION

Recognition of decisions made under co-decision-making orders

75. Any decision made, action taken, consent given or thing done by a co-decision maker together with the person in good faith within the authority of the order should be considered to have been made, taken, given or done by the person.

PERSON WITH IMPAIRED CAPACITY DEEMED TO BE INCAPABLE OF MAKING CERTAIN DECISIONS ALONE

9.86 Before making a co-decision-making order, VCAT must be satisfied that it is unlikely that a person has the capacity to make the relevant decisions alone, and is in need of a co-decision maker. It is therefore necessary that the law specify that the person is deemed to lack capacity to make the relevant decisions without the support of a co-decision maker. This will provide protection to the person under the order, and ensure clarity and certainty in the operation of the co-decision-making arrangement.

RECOMMENDATION

Person with impaired capacity deemed to be incapable of making certain decisions alone

76. The law should clarify that, to the extent that an area of decision making falls within the terms of a co-decision-making order, the person with impaired decision-making ability is deemed to be incapable of making that decision without the support and consent of the co-decision maker.

RESPONSIBILITIES OF CO-DECISION MAKERS

9.87 People who are parties to a co-decision-making arrangement should make decisions jointly. The precise manner in which this will be done will vary depending on the needs of the represented person.

9.88 Because of the nature of the relationship, co-decision makers should be obliged to act honestly, diligently and in good faith, and avoid conflicts of interest. These duties should be clearly set out in new guardianship legislation and drawn to the attention of the co-decision maker by a VCAT member before a formal appointment is made. To avoid doubt, the legislation should stipulate that the relationship is one that attracts fiduciary obligations and that the represented person is able to claim all of the general law remedies available for breach of a fiduciary obligation.

9.89 A responsibility to avoid conflicts of interest raises particular issues in the context of co-decision-making orders, which are intended for close personal relationships. There will inevitably be circumstances where, as a result of close personal circumstances, a co-decision maker has a conflict of interest in relation to a decision they are assisting the person with. Earlier in this chapter we argued that co-decision makers should be prohibited from entering into ‘conflict transactions’. Additionally, co-decision makers should have a general responsibility to identify and respond appropriately to conflicts of interest, even if these are not specifically ‘conflict transactions’.

9.90 As with guardians, the law should also specify that co-decision makers should respect the privacy and confidentiality of the person, and not use their authority to assist the person to conduct an illegal act.
Chapter 9

Co-decision making

RECOMMENDATION

Responsibilities of co-decision makers

77. The law should specify that in performing their role, a co-decision maker should:

(a) make the decisions referred to in the order jointly with the person

(b) act honestly, diligently and in good faith

(c) act within the limits of the order, and comply with any conditions, limitations or requirements set out in the order

(d) identify and respond to situations where the co-decision maker’s interests conflict with those of the person, ensure the person’s interests are always the paramount consideration, and seek external advice where necessary

(e) respect the privacy and confidentiality of the person by:

(i) only collecting personal information about the person in their capacity as co-decision maker to the extent this is relevant to and necessary for carrying out the co-decision maker’s role, and

(ii) only disclosing such information:

• with the consent of the person assisted under the co-decision-making order, and

• for a purpose that is relevant to and necessary for carrying out the co-decision maker’s role, or

• for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings, or

• with other lawful excuse.

(f) not use their authority to assist the person to conduct an illegal activity

(g) not coerce, intimidate or in any way unduly influence the person into a particular course of action.

DISAGREEMENTS BETWEEN A PERSON AND THEIR CO-DECISION MAKER

9.91 New guardianship legislation must cater for the possibility of disagreement between the person with impaired decision-making ability and their co-decision maker.

9.92 Where the person and the co-decision maker are unable to resolve a disagreement themselves or with informal assistance, it should be possible for either the person or the co-decision maker to seek resolution at VCAT. As a first step, VCAT should provide the person and the co-decision maker with the option of appropriate alternate dispute resolution such as mediation.

9.93 If the dispute is unable to be resolved through alternate dispute resolution, a VCAT hearing should be held to determine if the co-decision-making arrangement can continue, or be varied or revoked due to the disagreement.
RECOMMENDATIONS

Disagreements between a person and their co-decision maker

78. In the event of an irreconcilable disagreement between the person and the co-decision maker, either party should be able apply to VCAT for review of the order.

79. The co-decision maker should be responsible for informing VCAT if they believe the support relationship has broken down, or if it is no longer possible for the person to be supported under a co-decision-making arrangement.

REVIEW OF CO-DECISION-MAKING ORDERS BY VCAT

9.94 As with substitute decision-making orders, and consistent with the requirements of the Convention,54 co-decision-making orders should be subject to regular review by VCAT. This will be the main form of oversight for these arrangements.

9.95 The Commission believes that a requirement of an initial review within 12 months is appropriate, with VCAT having the discretion to extend the review period following the first year if it appears the arrangement is working well.

9.96 Where concerns are raised about the operation of the order, any person—including the co-decision maker and the person—should be able to apply to VCAT for review of the order. In reviewing these matters, VCAT should be guided by specified criteria.

RECOMMENDATIONS

Review of co-decision-making orders by VCAT

80. Co-decision-making orders should be reviewed by VCAT at least once within the first 12 months of making the order, and subsequently at least once every three years.

81. Any person with an interest in the affairs of either party to a co-decision-making arrangement should be able to apply for review of a co-decision-making order.

82. Applications to VCAT for review of co-decision-making orders should be possible on any of the following grounds:
   (a) the person no longer consents to the order
   (b) the person no longer has the capacity to participate in a co-decision-making arrangement
   (c) the co-decision maker no longer has the capacity to participate in a co-decision-making arrangement
   (d) the co-decision maker is acting in breach of their responsibilities
   (e) the order is no longer appropriate to the needs of the person
   (f) the order is contrary to the personal and social wellbeing of the person.

Powers of VCAT upon review

9.97 As with other appointments, the Commission believes that VCAT should have the full range of powers necessary to ensure the person’s needs are adequately met. This includes the power to continue, vary, or revoke the agreement or order.

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### Recommendation

**Powers of VCAT upon review**

83. Upon hearing an application for review, VCAT should have the power to:
   - (a) continue the order in its current form
   - (b) amend or vary the order with the consent of the person
   - (c) revoke the order, and where appropriate replace it with a different order.

### Safeguards to protect people with impaired capacity

9.98 As with substitute decision-making appointments, the Commission believes the primary mechanism for oversight of co-decision-making appointments should be regular review by VCAT, and the ability of any person to apply for unscheduled review.

9.99 Registration of these orders will also make it easier for others to confirm the currency of the appointment, and the scope of the powers.

9.100 The Commission is concerned that excessive accountability requirements could prove burdensome for co-decision makers, and discourage people from taking on these roles. In the case of financial co-decision makers, however, VCAT should have a discretionary power to make the lodgement of annual accounts a condition of the order. This is consistent with the Commission’s proposal for financial administrators.

### Recommendation

**Safeguards to protect people with impaired capacity**

84. VCAT may require financial co-decision makers to lodge annual accounts for examination.

### Registration of co-decision-making orders

9.101 In Chapter 16, the Commission proposes the introduction of an online register of personal appointments and VCAT orders. The Commission believes that a register will provide greater certainty for third parties about the currency and authenticity of decision-making arrangements, facilitate decisions made under these arrangements, and provide added protection against abuse for the person.

9.102 Consistent with this general approach, the Commission believes that all co-decision-making orders should be included on the register, and should not come into force until they are registered.

9.103 Registration will enable third parties to quickly ascertain the existence and terms of a co-decision-making order.

### Recommendation

**Registration of co-decision-making orders**

85. Co-decision-making orders should be registered and should not take effect until they are registered.
REVOCATION OF CO-DECISION-MAKING ORDERS

9.104 The ongoing consent of the person supported under a co-decision-making order is crucial to the effectiveness of the arrangement. Without consent, it is difficult to imagine how the person could be properly supported and how decisions could be jointly made. For this reason, the person should be able to seek revocation of the order at any time through application to VCAT.

9.105 As it may be difficult for the person to seek revocation themselves, the co-decision maker should be responsible for notifying VCAT if the person indicates to them that they no longer consent to the arrangement, or if the co-decision maker otherwise believes that the person no longer agrees to the arrangement.

RECOMMENDATIONS

Revocation of co-decision-making orders

86. A person supported under a co-decision-making order should be able to apply to VCAT for revocation of the order at any time.

87. A co-decision maker should be required to notify VCAT if they believe the person no longer consents to the order.

88. Revocation should take effect once the revocation has been completed on the register.

FIDUCIARY DUTIES OF CO-DECISION MAKERS AND LIABILITY

9.106 The liability of co-decision makers is a challenging issue. Like guardianship, the co-decision-making relationship is fiduciary—a legal relationship of special trust and confidence. This relationship recognises the vulnerability of the person relative to the co-decision maker, and requires the co-decision maker not to profit from the relationship and to avoid conflicts of interest. The remedies available for breach of these fiduciary duties should be available to the person with impaired decision-making ability, as has been recommended in Chapter 8 if supporters fail to comply with their obligations.

9.107 However, because the role is an unpaid, altruistic one, the Commission believes that the law should provide legal immunity for co-decision makers who have acted in good faith, within the terms of their appointment, and in accordance with their legal responsibilities. Any claim or action arising out of a co-decision-making arrangement should ordinarily be a claim against the estate of the person supported under that arrangement.

9.108 This protection against liability is analogous to the liability limitation currently enjoyed by ‘limited partners’.55 Partnerships are a legal relationship in which partners are fiduciaries for one another, and have a power of agency with the outside world.56 However, it is possible for a person to become a ‘limited partner’, whose liability for the conduct of the partnership is limited to the extent of their registered investment in the partnership.57 In a similar way, the Commission believes that the liability of co-decision makers should be limited, and they should only be personally liable for decisions made under the co-decision-making arrangement when they act beyond their authority.

55 See Partnership Act 1958 (Vic) pt 3.
57 See Partnership Act 1958 (Vic) s 60.
Chapter 9

Co-decision making

9.109 For deliberate misuse or abuse of powers, the Commission believes that co-decision makers should be subject to the same civil and criminal penalties for abuse as substitute decision makers.

9.110 We discuss penalties and financial redress in cases of abuse of support and substitute arrangements in more detail in Chapter 18.

RECOMMENDATIONS

Fiduciary duties of co-decision makers and liability

89. To avoid doubt, new guardianship legislation should stipulate that the relationship between a co-decision maker and the person is one which imposes fiduciary obligations upon the co-decision maker.

90. The law should stipulate that co-decision makers are not personally liable for anything done or omitted in good faith while exercising the authority or carrying out the duties and responsibilities of the co-decision maker in accordance with their legal obligations.

91. Co-decision makers should be liable for the same penalties as substitute decision makers for misuse and abuse of their powers, in addition to any other criminal penalties or civil remedies that may be applicable.