



**New South Wales
Law Reform Commission**

Review of the Guardianship Act 1987

Question Paper 2

Decision-making models



**New South Wales
Law Reform Commission**

**Review of the
Guardianship Act 1987**

Question Paper 2

Decision-making models

**November 2016
www.lawreform.justice.nsw.gov.au**

QP 2 Decision-making models

© New South Wales Law Reform Commission, Sydney, 2016

Copyright permissions

You may copy, distribute, display, download and otherwise freely deal with this publication for any personal or non-commercial purpose, on condition that you include proper acknowledgment on all uses.

However, you must obtain permission from the NSW Law Reform Commission if you wish to:

- § charge others for access to the publication (other than at cost);
- § include all or part of the publication in advertising or a product for sale; or
- § modify the publication.

Disclaimer

While this publication has been formulated with due care, the NSW Law Reform Commission does not warrant or represent that it is free from errors or omission, or that it is exhaustive.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Readers are responsible for making their own assessment of this publication and should verify all relevant representations, statements and information with their own professional advisers.

Other publication formats

The NSW Law Reform Commission is committed to meeting fully its obligations under state and Commonwealth anti-discrimination legislation to ensure that people with disabilities have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission on 02 8346 1284 or email nsw_lrc@justice.nsw.gov.au.

Contact details

NSW Law Reform Commission

GPO Box 31
Sydney NSW 2001 Australia

DX 1227 Sydney

Phone: 02 8346 1284

Email: nsw_lrc@justice.nsw.gov.au

Internet: www.lawreform.justice.nsw.gov.au

Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISBN 978-1-922254-17-7 (electronic)

Make a submission

We seek your responses to this question paper. To tell us your views you can send your submission by:

Email: nsw_lrc@justice.nsw.gov.au

Post: GPO Box 31, Sydney NSW 2001

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call 02 8346 1284.

The closing date for submissions on Question Paper 2 is 31 January 2017.

We intend to release further question papers in February 2017.

Use of submissions and confidentiality

We generally publish submissions on our website and refer to them in our publications.

Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular, we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

In other words, we will do our best to keep your information confidential if you ask us to do so, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform, in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:
<http://www.lawreform.justice.nsw.gov.au>.

Table of contents

Make a submission	iii
Participants.....	vi
Terms of reference.....	vii
Recent Australian reviews of guardianship laws	viii
Questions.....	ix
1. Introduction and overview	1
Why we are reviewing the <i>Guardianship Act</i>	1
Our approach	2
Background Paper	2
Question Papers	2
Final report.....	3
This Question Paper	3
Key terms used in this paper.....	4
2. An overview of different decision-making models.....	5
What is substitute decision-making?	5
What is supported decision-making?	6
What is co-decision-making?	7
Formal and informal decision-making arrangements	8
3. Alternative decision-making frameworks in NSW.....	9
The <i>Guardianship Act</i> and related legislation.....	9
The <i>Aged Care Act</i>	10
National Disability Insurance Scheme.....	10
4. The emergence of supported decision-making.....	13
Convention on the Rights of Persons with Disabilities	14
Recent law reform recommendations.....	15
2010: NSW Legislative Council Standing Committee on Social Issues	15
2012: Victorian Law Reform Commission	16
2014: Australian Law Reform Commission	16
2016: ACT Law Reform Advisory Council.....	17
Supported decision-making pilots	18
South Australia.....	18
Australian Capital Territory.....	18
New South Wales	18
Victoria	20
Cross-jurisdictional.....	20

Formal supported decision-making frameworks.....	20
Alberta, Canada.....	20
British Columbia, Canada	22
Ireland.....	23
Texas, United States of America.....	24
Statutory frameworks that recognise or promote informal supported decision-making	24
5. A formal supported decision-making model for NSW?	27
Our view.....	27
Should NSW introduce a formal supported decision-making model?	28
Potential advantages of a formal model.....	28
Will introducing elements of formal supported decision-making impair informal arrangements?.....	30
Will formal arrangements increase the risk of abuse, neglect and exploitation?	30
Possible key features of a formal decision-making model.....	31
Formal supporters – personal and tribunal appointments	31
Formal co-decision-makers – personal and tribunal appointments	32
Registration of personal agreements	33
Should NSW retain substitute decision-making as an option?	33
6. Supporters and co-decision-makers	37
When should a supporter or co-decision-maker be appointed?	37
Who should be able to act as a supporter or a co-decision-maker?	39
Eligibility criteria	39
Specific exclusions.....	40
Number of supporters and co-decision-makers	41
Public agencies as supporters or co-decision-makers	41
Paid supporters and co-decision-makers	42
Community volunteers as supporters or co-decision-makers	44
What powers and functions should supporters and co-decision-makers have?.....	45
Supporters	45
Co-decision-makers	48
What duties and responsibilities should supporters and co-decision-makers have?.....	50
Appendix A Preliminary submissions.....	52

Participants

Commissioners

Mr Alan Cameron AO (Chairperson)
The Hon Justice Paul Brereton AM, RFD
Ms Tracy Howe

Law Reform and Sentencing Council Secretariat

Ms Erin Gough, Policy Manager
Mr Joseph Waugh PSM, Senior Policy Officer
Dr Jackie Hartley, Policy Officer
Mr James Hume, Policy Officer
Ms Nandini Bajaj, Graduate Policy Officer
Ms Katherine Lilly, Graduate Policy Officer
Mr Andrew Roberts, Graduate Policy Officer
Ms Anna Williams, Librarian

Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and
 - The *NSW Trustee and Guardian Act 2009* (NSW)
 - The *Powers of Attorney Act 2003* (NSW)
 - The *Mental Health Act 2007* (NSW)
 - other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.
7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

QP 2 Decision-making models

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

[Reference received 22 December 2015]

Recent Australian reviews of guardianship laws

In this Question Paper, we refer extensively to a number of recent Australian reviews:

- § NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010).
- § Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) – reflected in part in the Guardianship and Administration Bill 2014 (Vic) which the Victorian Parliament did not pass.
- § Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).
- § ACT Law Reform Advisory Council, *Guardianship Report* (2016).

Questions

5. A formal supported decision-making framework for NSW?

Question 5.1: Formal supported decision-making

- (1) Should NSW have a formal supported decision-making model?
- (2) If there were to be a formal supported decision-making model, how can we ensure there was an appropriate balance between formal and informal arrangements?
- (3) If there were not to be a formal supported decision-making model, are there any ways we could better recognise or promote informal supported decision-making arrangements in NSW law?

Question 5.2: Key features of a formal supported decision-making model

- (1) Should NSW have formal supporters?
- (2) If so, should NSW permit personal or tribunal appointments, or both?
- (3) Should NSW have formal co-decision-makers?
- (4) If so, should NSW permit personal or tribunal appointments, or both?
- (5) What arrangements should be made for the registration of appointments?

Question 5.3: Retaining substitute decision-making as an option

- (1) If a formal supported decision-making framework was adopted, should substitute decision-making still be available as an option?
- (2) If so, in what situations should substitute decision-making be available?
- (3) Should the legislation specify what factors the court or tribunal should consider before appointing a substitute decision-maker and, if so, what should those factors be?

Question 5.4: Other issues

Are there any other issues about alternative decision-making models you would like to raise?

6. Supporters and co-decision-makers

Question 6.1: When supporters and co-decision-makers can be appointed

- (1) What requirements should be met before a person needing support can appoint a supporter or co-decision-maker?
- (2) What requirements should be met before a court or tribunal can appoint a supporter or co-decision-maker?

Question 6.2: Eligibility criteria for supporters and co-decision-makers

What, if any, eligibility criteria should potential supporters and co-decision-makers be required to meet?

Question 6.3: Characteristics that should exclude potential appointees

What, if any, characteristics should exclude particular people from being supporters or co-decision-makers?

Question 6.4: Number of supporters and co-decision-makers

What limits, if any, should there be on the number of supporters or co-decision-makers that can be appointed?

Question 6.5: Public agencies as supporters or co-decision-makers

- (1) What are the advantages and disadvantages of allowing public agencies to be appointed as supporters or co-decision-makers?
- (2) In what circumstances should public agencies be able to act as supporters or co-decision-makers?

Question 6.6: Paid workers and organisations as supporters and co-decision-makers

- (1) What are the advantages and disadvantages of allowing paid care workers to be appointed as either supporters or co-decision-makers?
- (2) In what circumstances should paid care workers be appointed as supporters or co-decision-makers?
- (3) What are the advantages and disadvantages of allowing professional organisations to be appointed as either supporters or co-decision-makers?
- (4) In what circumstances should professional organisations be appointed as supporters or decision-makers?

Question 6.7: Volunteers as supporters and co-decision-makers

- (1) What could be the advantages and disadvantages of appointing community volunteers as supporters?
- (2) What could be the advantages and disadvantages of appointing community volunteers as co-decision-makers?
- (3) In what circumstances do you think community volunteers should be appointed as supporters or co-decision-makers?

Question 6.8: Powers and functions of supporters

- (1) What powers and functions should the law specify for formal supporters?
- (2) What powers or functions should the law specifically exclude for formal supporters?

Question 6.9: Powers and functions of co-decision-makers

- (1) What powers and functions should the law specify for formal co-decision-makers?
- (2) What powers and functions should the law specifically exclude for formal co-decision-makers?

Question 6.10: Duties and responsibilities of supporters and co-decision-makers

- (1) What duties and responsibilities should the law specify for formal supporters?
- (2) What duties and responsibilities should the law specify for formal co-decision-makers?
- (3) What duties and responsibilities should the law specifically exclude for formal supporters and formal co-decision-makers?

1. Introduction and overview

In brief

There are different types of alternative decision-making models in guardianship systems in Australia and overseas. We seek your views about the different models and your ideas about what features of these models we should have in NSW law.

Why we are reviewing the <i>Guardianship Act</i>	1
Our approach.....	2
This Question Paper	3
Key terms used in this paper.....	4

- 1.1 The NSW Attorney General has asked us to review the *Guardianship Act 1987* (NSW) ("*Guardianship Act*"). This document (Question Paper 2) is part of a series of papers in which we seek your views on whether aspects of the *Guardianship Act* need to change.
- 1.2 Currently, the law in NSW allows a formal decision-maker to be identified or appointed to make personal, financial and medical decisions for someone who cannot make their own decisions. This is a model of alternative decision-making known as "substitute" decision-making.
- 1.3 However, recently there has been a growing preference for a different model – namely, a "supported" decision-making model. This model emphasises that all people have the right to make decisions for themselves but recognises that some people may need or want support in reaching their decision. The level or nature of that support will vary from person to person. Also, the support that one person needs or wants may change over time and may even depend upon the type of decision.
- 1.4 In this Question Paper, we consider the different types of alternative decision-making models and seek your views about what features of these models we should adopt in NSW.

Why we are reviewing the *Guardianship Act*

- 1.5 When the *Guardianship Act* became law almost 30 years ago, it reflected new ideas about the different needs of people with disability. There was also a growing awareness of the rights of people with disability to live in the community rather than in an institution.¹
- 1.6 Since then, the way people think about disability has shifted again. This is partly due to developments in human rights law, in particular the United Nations *Convention on the Rights of Persons with Disabilities* (UN *Convention*).² The

1. N O'Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [5.4.1].
2. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

QP 2 Decision-making models

principles of the UN *Convention* include the right of people with disability to dignity, autonomy, full and active participation in society and equal recognition before the law.

- 1.7 Like many of the guardianship laws in other places, the *Guardianship Act* could better reflect these developments. Many places have recently reviewed their guardianship laws, just as we are doing now.
- 1.8 Another reason we are reviewing the *Guardianship Act* is that the profile of people in the guardianship system has changed a lot. In the past, the largest group affected was people with intellectual disability. Now cases involving people with dementia are most common and the number of cases involving people with a mental illness or brain injury is significant.³

Our approach

Background Paper

- 1.9 We released a Background Paper on 30 June 2016. The Background Paper outlines our approach to this review, describes what the *Guardianship Act* does, introduces some key concepts and provides an overview of the landscape in which our laws operate.

Question Papers

- 1.10 We are also releasing a series of question papers to promote discussion and seek your ideas about guardianship law.
- 1.11 Each question paper deals with different elements of guardianship:
 - § **Question Paper 1:** Preconditions for alternative decision-making arrangements [released 22 August 2016]
 - § **Question Paper 2:** Decision-making models [released 1 November 2016]
 - § **Question Paper 3:** The role of guardians and financial managers: who can act in these roles, their powers and functions, and decision-making principles they must observe [released 1 November 2016] (We note that we have reframed the content of this paper since we described it in Question Paper 1).
 - § **Question Paper 4:** Safeguards, procedures and the role of key agencies (including safeguards and procedures concerning orders, appointments and the actions of guardians and financial managers). (We note that we have reframed the content of this paper since we described it in Question Paper 1).
 - § **Question Paper 5:** Medical and dental treatment and restrictive practices.
 - § **Question Paper 6:** Other issues, including:
 - interaction with other laws. For example: NSW power of attorney, trustee and guardian, mental health and criminal laws, Commonwealth aged care

3. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014–2015* (2015) 41.

legislation and the National Disability Insurance Scheme, and the recognition of interstate and overseas equivalent orders

- language of the *Guardianship Act*, and
- the age at which people can come under the *Guardianship Act*.

Final report

- 1.12 Following these question papers and other forms of consultation, we will write a final report that contains our findings and recommendations for reform.
- 1.13 All publications for the guardianship review will be available on our website: www.lawreform.justice.nsw.gov.au. We will also publish easy-read versions of all our publications for this review.

This Question Paper

- 1.14 The Terms of Reference ask us to consider, among other things:
- § the model or models of decision-making that should be employed for people who cannot make decisions for themselves
 - § the basis and parameters for decisions made under a substitute decision-making model, if such a model is retained, and
 - § the basis and parameters for decisions made under a supported decision-making model, if adopted, and the relationship and boundaries between this and a substituted decision-making model, including the costs of implementation.
- 1.15 We explore these questions in this Question Paper, with the exception of the costs question. We will consider the potential costs of implementing any proposed model later in our review.
- 1.16 In the following chapters we consider:
- § **Chapter 2:** the key features of substitute decision-making, supported decision-making and co-decision-making, and the difference between formal and informal decision-making arrangements.
 - § **Chapter 3:** alternative decision-making frameworks operating in NSW, including those under the *Guardianship Act* and related legislation, and the Commonwealth's *Aged Care Act 1997* (Cth) ("*Aged Care Act*") and National Disability Insurance Scheme ("NDIS").
 - § **Chapter 4:** the emergence of supported decision-making, including the UN *Convention*, recent law reform recommendations, recent supported decision-making pilots in Australia, and supported decision-making frameworks used overseas.
 - § **Chapter 5:** whether we should recommend introducing a formal supported decision-making framework and if so, what the elements of the framework should be.

- § **Chapter 6:** what the role of supporters and co-decision-makers should be under any proposed formal framework.
- 1.1 To promote discussion, we consider how a selection of other countries, States and Territories approach these issues. In addition, we outline options recommended by other law reform and review bodies in Australia. Finally, we draw upon ideas that a range of people and organisations expressed in preliminary submissions to our review. However, we encourage you to share your experiences and suggest other ideas.

Key terms used in this paper

- 1.2 We use a number of key terms in this paper, as follows:
- § **Alternative decision-making arrangements:** when someone other than the person themselves makes or is involved in reaching a decision about that person's financial or personal affairs. Such arrangements may include (but are not limited to) co-decision-making, substitute decision-making and supported decision-making.
- § **Co-decision-making:** we explain this term in Chapter 2 at [2.14].
- § **Co-decision-maker:** a person who, together with a person with impaired or reduced decision-making capacity, makes a decision that is treated as the decision of the person with impaired or reduced decision-making capacity.
- § **Legal capacity:** a person has legal capacity if they can participate in the legal system and assert their rights, for example, entering into a contract, enforcing rights in a court, or entering a defence in legal proceedings.
- § **Substitute decision-making:** we explain this term in Chapter 2 at [2.3].
- § **Substitute decision-maker:** a person who makes decisions on behalf of and instead of another person.
- § **Supported decision-making:** we explain this term in Chapter 2 at [2.6].
- § **Supporter:** a person who supports or helps another person to make his or her own decision.

2. An overview of different decision-making models

In brief

We outline the key features of three decision-making models – substitute decision-making, supported decision-making and co-decision-making. We also explain the difference between formal and informal decision-making.

What is substitute decision-making?	5
What is supported decision-making?	6
What is co-decision-making?	7
Formal and informal decision-making arrangements	8

- 2.1 In this Chapter, we outline the key features of the main types of decision-making models. This is to help readers understand the discussions about alternative decision-making both internationally and within Australia. It is important to note, however, that there is a great deal of disagreement about the features of the different models, as we will explore.
- 2.2 When thinking about the different decision-making models, it is also important to recognise that the different legal frameworks around the world do not always align precisely with one of these models. Sometimes a single framework will combine elements of more than one model.

What is substitute decision-making?

- 2.3 While substitute decision-making frameworks have many forms, their common characteristic is that a person has their decision-making capacity removed. Put another way, someone else makes decisions for them or on their behalf.
- 2.4 While there is some disagreement about the other characteristics of substitute decision-making,¹ the United Nations Committee on the Rights of Persons with Disabilities (“UN *Convention* Committee”) considers the two other key characteristics to be:
- § a substitute decision-maker can be appointed by someone other than the person concerned, and this may be done against their will, and
 - § any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own subjective will and preferences.²

1. See, eg, the definition proposed by a recent report of the Essex Autonomy Project. The authors of the report are of the view that only one of the two additional aspects in the UN *Convention* Committee definition is necessary for a regime to be considered a substitute decision-making regime: W Martin and others, *The Essex Autonomy Project: Three Jurisdictions Report: Toward Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, Position Paper (2016) 65.

2. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (2014) [27].

QP 2 Decision-making models

- 2.5 Substitute decision-making takes place under arrangements such as powers of attorney, guardianship and financial management.

What is supported decision-making?

- 2.6 As with substitute decision-making, there is a variety of supported decision-making frameworks. A key way in which supported decision-making differs from substitute decision-making is that the person retains their legal capacity and makes their own decision. They are provided with any support they need to make and communicate their decision.
- 2.7 Supported decision-making recognises that decision-making capacity depends on a variety of factors, including the nature and complexity of the decision. It also recognises that capacity can change from time to time. We discussed the concept of decision-making capacity in Question Paper 1.
- 2.8 Supported decision-making reflects the reality that most people make important decisions in their lives with some form of support. When it comes to making important personal decisions – about where to live, for example – people usually seek the advice of family and friends. With financial and medical decisions, people often seek the advice of professionals. Some people with impaired decision-making capacity may simply need additional support to make such decisions.
- 2.9 In order to comply with the UN *Convention*, the UN *Convention* Committee says that supported decision-making frameworks should all have certain key provisions, including the following:
- § Supported decision-making must be available to everybody. The level of a person's support needs should not be a barrier to obtaining decision-making support.
 - § All forms of support must be based on the will and preferences of the person, not on what is perceived as being in their objective best interests.
 - § A person's mode of communication must not be a barrier to obtaining support, even where this communication is non-conventional, or understood by very few people.
 - § Legal recognition of any supporters formally chosen by a person must be available and accessible.
 - § Governments must ensure that support is available at nominal or no cost. Lack of financial resources should not be a barrier to accessing support for a person exercising their legal capacity.
 - § The person must have the right to refuse support and terminate or change the support relationship at any time.³
- 2.10 Support for decision-making can take various forms and should ideally be tailored to the person's circumstances and the particular decision. Support may include:

3. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (2014) [29].

- § providing the person with information and advice so they can understand the nature of the decision
 - § spending time with the person to help them consider the options available and determine their preferences and wishes
 - § building informal relationships of support between a person and their social networks, and
 - § helping them communicate their decisions to others.
- 2.11 According to the UN *Convention*, for a supported decision-making model (or indeed any decision-making model) to be effective, safeguards need to be in place to ensure, for example, that:
- § the supporter assists the person to make decisions and does not substitute the person's will and preferences for their own
 - § the supporter respects the rights, will and preferences of the person being supported
 - § the type of support provided is proportionate to the person's needs, appropriate for those needs, and free from conflict of interest and undue influence, and
 - § an independent and impartial authority regularly reviews the support arrangements.⁴
- 2.12 We will be considering appropriate safeguards in Question Paper 4.
- 2.13 "Assisted decision-making" is a term that is sometimes used instead of supported decision-making. Ireland's *Assisted Decision-Making (Capacity) Act 2015* is an example of a law that uses this term. We understand them to be the same.

What is co-decision-making?

- 2.14 As with supported decision-making, co-decision-making recognises that, while a person may not be able to make a decision by themselves, they may be able to do so with some help.
- 2.15 The key feature of the co-decision-making model is that a co-decision-maker makes decisions jointly with the person.
- 2.16 With some co-decision-making models, a person gets to decide who to appoint as their co-decision-maker or at least must consent to the appointment. The person may also be able to terminate the agreement.⁵ However, not all models allow for this.⁶
- 2.17 In many of the discussions about alternative decision-making, co-decision-making is treated as a type of supported decision-making. This is presumably because the person who needs help with decision-making retains some agency in the decision-

4. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4).

5. See, eg, *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 17(9).

6. See, eg, *Adult Guardianship and Co-Decision-Making Act 2000* (Saskatchewan) s 14, s 40.

making process. As we discuss in Chapter 4, a number of places have introduced or recommended introducing formal co-decision-making arrangements at the same time as introducing formal supported decision-making arrangements.

- 2.18 In this paper, we similarly characterise co-decision-making as a type of supported decision-making, except where we are discussing specific co-decision-making schemes or specific features of co-decision-making. However, it is important to remember that under co-decision-making arrangements, a person's autonomy is not absolute. For this reason, co-decision-making has even been described as a more limited form of substitute decision-making.⁷

Formal and informal decision-making arrangements

- 2.19 In the sections above, we have talked about the different alternative decision-making models in the context of existing legal frameworks like the *Guardianship Act*. These legal frameworks are sometimes referred to as formal or statutory decision-making frameworks.
- 2.20 A formal decision-making framework will generally specify the conditions that must be present before a formal decision-maker or supporter can be appointed, who can be appointed, who can appoint them, the nature and scope of their role and duties, and safeguards to reduce the risk of abuse or exploitation.
- 2.21 However, a lot of alternative decision-making happens informally, without any reference to the law. An example is where a family member helps another family member to make and communicate an important decision, in circumstances where there is no formal arrangement or tribunal order in place to guide how they do this.
- 2.22 Informal decision-making arrangements are often a satisfactory way of supporting someone to make their own decisions. However, informal arrangements can also be open to abuse. Some stakeholders have said that a formal framework is necessary to ensure that people's rights and interests are protected. Others are concerned that formal arrangements needlessly interfere in people's affairs. There is clearly a balance to be achieved between necessary protections and unnecessary interference. How we achieve this balance is one of this paper's key concerns.

7. G Davidson and others, "An International Comparison of Legal Frameworks for Supported and Substitute Decision-Making in Mental Health Services" (2016) 44 *International Journal of Law and Psychiatry* 30, 32.

3. Alternative decision-making frameworks in NSW

In brief

The main alternative decision-making frameworks in operation in NSW are the *Guardianship Act* and related legislation, and the Commonwealth's *Aged Care Act* and National Disability Insurance Scheme.

The Guardianship Act and related legislation.....	9
The Aged Care Act	10
National Disability Insurance Scheme.....	10

- 3.1 In this Chapter, we discuss the alternative decision-making arrangements that currently exist in NSW.
- 3.2 Because there are a number of alternative decision-making laws, the reality is that people who have alternative decision-making arrangements under one law may also have alternative decision-making arrangements under another law. This can lead to confusion.
- 3.3 Changing the alternative decision-making arrangements that apply under the *Guardianship Act* might create further confusion. As the Mental Health Review Tribunal says in its preliminary submission, “some consumers, their advisors and practitioners may be faced with a confusing level of change and complexity, having to deal with multiple institutions, different legislation and different decision-making models”.¹
- 3.4 This is one reason why, when reviewing our decision-making frameworks, it is important that we consider how the different decision-making frameworks interact.

The *Guardianship Act* and related legislation

- 3.5 Like the guardianship laws in other Australian States and Territories, the *Guardianship Act* has substitute decision-making as a key feature.
- 3.6 Under the *Guardianship Act*, a person with decision-making capacity can appoint a person to make personal decisions on their behalf when they no longer have capacity to make their own decisions. The Act also enables the Guardianship Division of the NSW Civil and Administrative Tribunal (“Tribunal”) to appoint a substitute decision-maker for someone without decision-making capacity.
- 3.7 The orders the Tribunal can make under the *Guardianship Act* are guardianship orders (relating to personal decisions) and financial management orders (relating to financial decisions).² In considering whether to make a guardianship order, the Tribunal must consider the views of the person who is the subject of the order.³ This is not something the Tribunal must consider when making a financial management order.

1. Mental Health Review Tribunal, *Preliminary Submission PGA21*, 2.
2. See *Guardianship Act 1987* (NSW) pt 3, pt 3A.
3. *Guardianship Act 1987* (NSW) s 14(2)(a)(i).

QP 2 Decision-making models

- 3.8 The Act also identifies the “person responsible” for making decisions about a person’s medical and dental treatment if the person is deemed incapable of making their own decisions.
- 3.9 When performing decision-making functions under the *Guardianship Act*, substitute decision-makers must consider the person’s views, but must give “paramount consideration” to their “welfare and interests”.⁴
- 3.10 The *Guardianship Act* does not currently provide any formal mechanisms for supported decision-making or co-decision-making.
- 3.11 Related substitute decision-making frameworks exist in:
- § the *Powers of Attorney Act 2003* (NSW), which allows a person with capacity to appoint someone to make financial decisions on their behalf, and
 - § the *NSW Trustee and Guardian Act 2009* (NSW), which gives both the Supreme Court and the Mental Health Review Tribunal the power to make financial management orders (the Mental Health Review Tribunal can make these orders in relation to mental health patients only).
- 3.12 The majority of people who need help with decision-making do not have a court or tribunal appointed decision-maker. In practice, under the *Guardianship Act*, the Tribunal will only appoint a substitute decision-maker if there is no other option. If it does appoint someone, it will limit the order to the parts of the person’s life or finances where the order is required.⁵ This means that, in most cases, family, friends or carers informally support people to make decisions or informally make decisions on their behalf.

The Aged Care Act

- 3.13 Under the Commonwealth *Aged Care Act*, a person can represent an aged care recipient who, because of any “physical incapacity or mental impairment”, is unable to enter into agreements relating to residential care, home care, extra services, accommodation bonds and accommodation charges. The Act also states that a “person authorised to act on the care recipient’s behalf” can make an application or give information under the Act.⁶
- 3.14 Many people with impaired decision-making capacity live in facilities like nursing homes with only the informal consent of a family member or carer. The ALRC has noted that informal alternative decision-making for aged care recipients is “widespread and accepted”.⁷

National Disability Insurance Scheme

- 3.15 In July 2016, the Commonwealth Government rolled out the National Disability Insurance Scheme (“NDIS”) to most of Australia, including NSW. An objective of the

4. *Guardianship Act 1987* (NSW) s 4(d), s 4(a).

5. *Guardianship Act 1987* (NSW) s 4(b), s 15(4).

6. *Aged Care Act 1997* (Cth) s 96-5, s 96-6.

7. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (2014) [6.41].

NDIS is to provide people with disability greater choice and control over the disability services and support they receive.⁸ The scheme will progressively replace the existing disability arrangements.

- 3.16 Under the NDIS, eligible people are allocated funding for disability supports, rather than that funding going directly to providers of supports.

[E]ligible people will talk to a planner about their goals and what supports they need to meet their goals. An individual support plan will be drawn up and the person with disability, their guardian or nominee then chooses who will provide their supports and how, when and where they get delivered.⁹

- 3.17 There are many opportunities for personal decision-making under the NDIS. Decision-making arrangements are, therefore, a significant part of the NDIS framework. The *National Disability Insurance Scheme Act 2013* (“*NDIS Act*”) establishes a mix of decision-making arrangements. In some situations, participants are required to make their own decisions without any form of assistance. At other times, family and friends are relied upon to offer informal support. The *NDIS Act* explicitly provides that “the supportive relationships, friendships and connections with others of people with disability should be recognised”.¹⁰

- 3.18 The *NDIS Act* also provides for formal substitute decision-makers called “nominees”. Nominees can be appointed either at the request of the participant, or on the initiative of the CEO of the National Disability Insurance Authority (“*NDIA*”). However, the *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) provide that the CEO should only appoint a nominee as a last resort:

it will not be necessary to appoint a nominee where it is possible to support, and build the capacity of, participants to make their own decisions for the purposes of the NDIS.¹¹

- 3.19 If the CEO does decide to appoint a nominee, the CEO must consider “the wishes (if any) of the participant regarding the making of the appointment”¹² as well as a number of other matters.

- 3.20 Once appointed, nominees have a number of duties, including:

- § to ascertain the wishes of the participant and act in a manner that promotes the participant’s personal and social wellbeing, and
- § to consult, develop the participant’s capacity, and avoid or manage conflicts of interest.

- 3.21 A nominee appointed on the CEO’s initiative to help with a support plan can only act on behalf of the participant “if the nominee considers that the participant is not capable of doing the act”.¹³

8. *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e).

9. Australia, NDIS, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, Consultation Paper prepared for the Disability Reform Council (2015) 2.

10. *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e), s 5(e).

11. *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) r 3.1.

12. *National Disability Insurance Scheme Act 2013* (Cth) s 88(2)(b).

13. *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) r 5.5.

QP 2 Decision-making models

- 3.22 A plan nominee appointed at the participant's request has a duty to refrain from doing an act unless satisfied that: "it is not possible for the participant to do, or to be supported to do, the act himself or herself"; or it is possible, but the participant does not want to.¹⁴

14. *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) r 5.6.

4. The emergence of supported decision-making

In brief

Supported decision-making has emerged both in Australia and internationally through the UN *Convention* and some recent law reform recommendations that promote supported decision-making. There have been recent informal supported decision-making pilots in Australia and formal supported decision-making frameworks have been adopted in Victoria and overseas.

Convention on the Rights of Persons with Disabilities	14
Recent law reform recommendations	15
2010: NSW Legislative Council Standing Committee on Social Issues	15
2012: Victorian Law Reform Commission	16
2014: Australian Law Reform Commission	16
2016: ACT Law Reform Advisory Council	17
Supported decision-making pilots	18
South Australia.....	18
Australian Capital Territory	18
New South Wales	18
Victoria.....	20
Cross-jurisdictional.....	20
Formal supported decision-making frameworks.....	20
Alberta, Canada	20
Supported decision-making	21
Co-decision-making.....	21
British Columbia, Canada	22
Representation agreements	22
Ireland.....	23
Decision-making assistants	23
Co-decision-makers.....	23
Texas, USA.....	24
Supported decision-making	24
Statutory frameworks that recognise or promote informal supported decision-making	24

- 4.1 In recent years, there has been a growing preference for supported decision-making over substitute decision-making. A number of the preliminary submissions to this review favour the introduction of a formal supported decision-making model in the area of guardianship law and/or provisions that better facilitate the use of informal supported decision-making.¹ Some stakeholders want substitute decision-making removed from NSW legislation entirely.²

1. Mental Health Coordinating Council, *Preliminary Submission PGA08*, 5; Council on the Ageing NSW, *Preliminary Submission PGA10*, 5; NSW Council for Civil Liberties, *Preliminary Submission PGA19*, 3, 4; Disability Council NSW, *Preliminary Submission PGA26*, 11–12; NSW Young Lawyers, *Preliminary Submission PGA32* [1.2]; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 1, 9.

2. B Pace, *Preliminary Submission PGA09*, 8.

QP 2 Decision-making models

- 4.2 Currently in Australia, there are some laws that incorporate elements of supported decision-making within substitute decision-making frameworks.³ However, with the exception of the recent amendments to Victoria’s powers of attorney laws (discussed below at [4.15]), no State, Territory or Commonwealth law has yet introduced a formal supported decision-making framework.
- 4.3 In this Chapter, we chart the emergence of supported decision-making starting with the UN *Convention*. We then outline recent Australian law reform proposals about supported decision-making and reference the pilots and programs that have trialled informal supported decision-making in Australia. Finally, we outline a number of formal supported decision-making frameworks in overseas laws.

Convention on the Rights of Persons with Disabilities

- 4.4 While the concept of supported decision-making has been around for some time, the UN *Convention* has given it considerable momentum. Australia ratified the UN *Convention* in July 2008. By doing so, Australia committed in good faith to give effect to it.⁴
- 4.5 Article 12 of the UN *Convention* requires parties to the Convention to provide people with disability with the “support they may require in exercising their legal capacity”.⁵ The UN *Convention* Committee has interpreted article 12 as requiring governments to provide support to people with decision-making impairments to ensure that their will and preferences are respected and not overruled by action thought to be in a person’s objective best interests.⁶
- 4.6 The UN *Convention* Committee has called for a review of guardianship and trusteeship laws with a view to immediately replacing regimes of substitute decision-making with supported decision-making.⁷
- 4.7 A number of parties to the UN *Convention*, including Australia, have expressed concerns about this interpretation of article 12. While the Australian Government recognises that people with disability enjoy legal capacity on an equal basis with others in all aspects of life, it has reservations about removing substitute decision-making entirely. Australia has said that the Committee’s view does not acknowledge:

situations where no amount of support will assist, such as where a person may have a severe cognitive or psychiatric impairment and is unable to understand, make or communicate a decision.⁸

-
3. See, eg, *My Health Records Act 2012* (Cth) s 7, s 7A, which provides for the appointment of substitute decision-makers called authorised or nominated representatives. These representatives must give effect to the will and preferences of the person they represent wherever possible.
4. *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (entered into force 27 January 1980) art 26; *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 4.
5. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(3).
6. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (2014) [20]–[21].
7. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (2014) [28].

- 4.8 There has been a lot of discussion about those situations where working out a person's will and preferences could be difficult. For instance, complications can arise if:
- § the person's will and preferences are difficult (or even impossible) to work out or understand
 - § the person's current wishes do not reflect the views that they expressed before their decision-making capacity became impaired, or
 - § a decision based on the person's will and preferences could harm them or others.
- 4.9 When ratifying the UN *Convention*, the Australian Government reserved its right to allow States and Territories to retain substitute decision-making as a "last resort and subject to safeguards."⁹ We discuss the arguments about retaining substitute decision-making in Chapter 5.
- 4.10 Formal supported decision-making has still not been legislated in any significant sense, at either Commonwealth or State and Territory level. This is even though a number of standing recommendations from various Commonwealth and State review bodies favour such a change. We discuss some of these recommendations below.

Recent law reform recommendations

2010: NSW Legislative Council Standing Committee on Social Issues

- 4.11 The NSW Legislative Council Standing Committee on Social Issues reviewed some aspects of guardianship law as part of its inquiry into *Substitute Decision-Making for People Lacking Capacity*. The Committee did not recommend abolishing substitute decision-making. However, it did recommend changes to the *Guardianship Act* to:
- § state explicitly that the legislation supports the principle of supported decision-making
 - § provide that courts and tribunals can make orders for supported decision-making arrangements, and
 - § prescribe the criteria that must be met for such orders to be made.¹⁰
- 4.12 In response, the NSW Government acknowledged the informal use of supported decision-making that occurs in NSW and suggested that the legislation already upheld this form of decision-making:

[Supported decision-making already] occurs now in the context of families supporting and assisting other family members with disabilities, to make

-
8. Australia, *Views of the Australian Government on the Draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 12 of the Convention - Equal Recognition Before the Law* (2014) [9].
 9. *Multilateral Treaties Deposited with the Secretary-General*, Chapter IV [15] Declarations and Reservations: Australia.
 10. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 4, rec 5.

QP 2 Decision-making models

decisions. These arrangements are acknowledged and supported by the current guardianship legislation under which the formal appointment of a guardian is only made when necessary and not made if there are appropriate informal decision making mechanisms in place.¹¹

- 4.13 The Government also said developing a formal supported decision-making framework required further consideration, as did the possibility of public agencies supporting a person's decision-making.¹²

2012: Victorian Law Reform Commission

- 4.14 In 2012, the Victorian Law Reform Commission ("VLRC") completed a review of Victoria's guardianship laws.¹³ Like the NSW Standing Committee, it did not recommend abolishing substitute decision-making. Instead it recommended supplementing Victoria's substitute decision-making model with two additional measures:¹⁴

§ formal supported decision-making arrangements – designed to provide a supporter to help a person make their own decisions, as well as to communicate and implement those decisions. These arrangements could be made both personally and by the Victorian Civil and Administrative Tribunal ("VCAT").

§ formal co-decision-making arrangements – these would be made only by VCAT and would enable a person with a decision-making impairment to make a decision *with* another person, rather than having a decision made *for* them.

- 4.15 The Victorian Government drafted a bill to give effect to the VLRC's supported decision-making proposals in the law of guardianship but the bill lapsed when parliament was dissolved in 2014.¹⁵ However, in the law relating to powers of attorney, a person may now nominate a "supportive attorney" to assist them to make and give effect to their decisions.¹⁶

2014: Australian Law Reform Commission

- 4.16 The Australian Law Reform Commission ("ALRC") 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, proposed a model for supported decision-making across various areas of direct Commonwealth responsibility, such as aged care, social security and e-health.

- 4.17 The ALRC model includes four National Decision-Making Principles:

§ the right to make and have decisions respected

§ the right to be supported to make decisions

11. NSW, *Legislative Council Standing Committee on Social Issues, Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 3.

12. NSW, *Legislative Council Standing Committee on Social Issues, Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) 3.

13. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012).

14. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) ch 8, ch 9.

15. *Guardianship and Administration Bill 2014* (Vic).

16. *Powers of Attorney Act 2014* (Vic) pt 7.

- § supported decisions must be directed by the person’s “will, preferences and rights”, and
- § appropriate and effective safeguards must be provided.¹⁷

Guidelines attach to each principle.

- 4.18 The model also retains substitute decision-making as a last resort. As the report states, the proposed principles and guidelines “reflect a spectrum of decision-making, from fully independent to supported decision-making, including where a person needs someone else to make decisions on their behalf”.¹⁸
- 4.19 The ALRC intended that its principles and guidelines would inform States and Territories’ reviews of their own laws and policies.¹⁹
- 4.20 Among other things, the ALRC recommended including a formal supported decision-making mechanism in the *NDIS Act*. Under this recommendation, the NDIS nominee scheme (a substitute decision-making scheme) would be replaced with a scheme for “supporters” (supported decision-making) and “representatives” (substitute decision-making).²⁰

2016: ACT Law Reform Advisory Council

- 4.21 The ACT Law Reform Advisory Council released its *Guardianship Report* in October 2016. It recommends that the ACT Government replace its current “best interests”-based substitute decision-making model with a “will, preferences and rights”-based supported decision making model, to be contained in a new Supported Decision-Making Act. It also recommends adopting the ALRC’s four National Decision Making Principles as the principles for reform.²¹
- 4.22 Under the proposal, three forms of “assisted decision-making”, each based on the person’s will, preferences and rights, would be available:
 - § **Supported decision-making:** reviewable statutory guidelines would detail how such support would be best provided.
 - § **Co-decision-making:** available where specific decisions could carry an unreasonable risk of substantial harm for a decision-maker acting alone, but where, with sufficient support, the person can still exercise their decision-making ability.
 - § **Representative decision-making:** as a last resort when neither supported or co-decision-making can provide sufficient support for the person to make decisions for themselves. The person with impaired decision-making capacity or

17. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-1.

18. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [3.21].

19. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 10-1.

20. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [5.33].

21. ACT Law Reform Advisory Council, *Guardianship Report* (2016) rec 1, rec 3.

the ACT Civil and Administrative Tribunal would be able to appoint a representative.²²

Supported decision-making pilots

- 4.23 A number of Australian non-statutory projects and pilots have trialled different supported decision-making approaches. We outline some of these below.

South Australia

- 4.24 Between November 2010 and 2012, the South Australian Office of the Public Advocate, together with the Julia Farr MS McLeod Benevolent Fund, ran a supported decision-making project aimed at enabling people with decision-making impairments to make decisions about health, accommodation and lifestyle.
- 4.25 The project involved a person with a decision-making impairment appointing one or more “supporters” through a decision-making agreement. The supporter was either a family member, a close friend, or a “community agency willing to develop these networks and trusting relationships where they are lacking”.²³ The parties also entered into an agreement with an independent monitor who would keep track of how the arrangement was going.
- 4.26 The evaluation of this project indicated that participants felt an increased level of confidence in making decisions, and felt support networks grew, but that the infrastructure was not developed enough to make this a viable alternative to the guardianship system.²⁴

Australian Capital Territory

- 4.27 In 2013, the Australian Capital Territory (“ACT”) Disability, Aged and Carer Advocacy Service tested a version of the South Australian model through close analysis of the experience of six people under guardianship. Each was offered various types of capacity-building support. Key findings of the pilot included the need to tailor decision-making support to the individual and the importance of generating cultural change among family members, support workers, guardians and the wider community.²⁵

New South Wales

- 4.28 In 2013–14, the NSW Trustee and Guardian, the NSW Public Guardian and the NSW Department of Family and Community Services (“FACS”) Ageing Disability and Home Care (“ADHC”) conducted a small-scale pilot project. Twenty-six people with disability were assigned a supporter to help them make small everyday decisions as well as major life decisions. Supporters were family members, friends,

22. ACT Law Reform Advisory Council, *Guardianship Report* (2016) rec 5.

23. South Australia, Office of the Public Advocate, *South Australian Supported Decision Making Project: Report of Preliminary “Phase 1”* (2011) 10.

24. M Wallace, *Evaluation of the Supported Decision Making Project* (South Australia, Office of the Public Advocate, 2012) 4–5, 45.

25. ACT, Disability, Aged and Carer Advocacy Service, *Spectrums of Support: A Report on a Project Exploring Supported Decision Making for People with Disabilities in the ACT* (2013) 55–6.

paid service providers or paid advocates. Written resources were developed for participants and their supporters. Project team facilitators assisted with establishing decision-maker/supporter relationships and provided training and access to decision-making tools.²⁶

4.29 Findings of the pilot included the following:²⁷

§ It is important that both decision-makers and their supporters understand the supported decision-making process and their roles and rights within it.

§ Resources and training can help.

§ People with disability and their supporters need time to understand supported decision-making and to put it into practice.

§ Barriers to supported decision-making are not intrinsic to the decision-maker but to others around them. These include the general life circumstances of people with disability, such as social isolation, lack of power and lack of familiarity with making decisions.

§ Trust between the person with disability and their supporter is critical to building decision-making capacity.

§ Volunteers, advocates and disability service workers can support decision-making if the person with disability is socially isolated or if conflicts of interest emerge with family or friends acting as supporters.

4.30 As a result, FACS has facilitated six additional projects with the aim of building supported decision-making capacity among people with disability and their networks.²⁸

4.31 One of the projects FACS is currently funding is a 12-month project based with the Public Guardian. The project will operate in two parts:

§ One team will create, deliver and evaluate a supported decision-making trial program with people under financial management, and identify and help develop financial literacy skill building models.

§ Another team will develop training and resources for non-government organisations, disability advocates and private guardians to incorporate supported decision-making principles into policy and practice.

The project will be evaluated in early 2017.²⁹

26. NSW, Family and Community Services, *My Life, My Decision: An Independent Evaluation of the Supported Decision Making Pilot* (2015): <www.adhc.nsw.gov.au/_data/assets/file/0009/346194/sdm_pilot_project_evaluation_report.pdf>

27. NSW, Family and Community Services, *My Life, My Decision: An Independent Evaluation of the Supported Decision Making Pilot* (2015), [9]-[15]: <www.adhc.nsw.gov.au/_data/assets/file/0009/346194/sdm_pilot_project_evaluation_report.pdf>

28. NSW, Family and Community Services, "Supported Decision Making Projects" (14 January 2016) [42]-[77]: <www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making/sdm-projects>.

29. J Bullen, K Johnson and C Purcal, *Supported Decision Making Project, Phase Two Evaluation: Evaluation Plan* (Social Policy Research Centre, 2016) 7.

Victoria

- 4.32 In 2013, the Victorian Office of the Public Advocate started an 18-month pilot supported decision-making program, in which trained volunteer decision-making supporters assisted people with cognitive impairments to make important decisions. The volunteers did not know the people they were assisting prior to the pilot. Both participants and volunteers reported benefits from being involved in the project but the project was considerably more time-intensive than anticipated and it was discontinued.³⁰
- 4.33 In September 2015, the Victorian Office of the Public Advocate began a 12-month collaborative supported decision-making project with Victorian Advocacy League for Individuals with Disability Inc (“VALID”).³¹
- 4.34 Funded by the NDIA, the project aims to recruit, train and match volunteer supporters with 60 socially isolated people with decision-making disabilities who want help with making decisions about their NDIS support plans. Volunteers will assist participants to build their capacity to make autonomous and informed decisions about their NDIS support plan.³²
- 4.35 The project also aims to develop a “model of practice” for supported decision-making, which includes resources and tools for participants and supporters.

Cross-jurisdictional

- 4.36 Another active study is being led by academics from Melbourne, Brisbane and Sydney, including Emeritus Professor Terry Carney of the University of Sydney. The aim of the project is to develop and evaluate the effectiveness of an education program that trains people who provide decision-making support so that the quality of their support improves and results in better outcomes for the person who requires decision-making assistance.³³

Formal supported decision-making frameworks

- 4.37 In this section, we outline some examples of overseas formal supported decision-making frameworks and their key features.

Alberta, Canada

- 4.38 The *Adult Guardianship and Trusteeship Act 2008* (Alberta) provides for “supported decision-making authorisations” and “co-decision-making orders”.

30. Victoria Law Foundation, “Victorian Trial of Supported Decision-Making” (9 February 2016) <www.victorialawfoundation.org.au/grants/victorian-trial-supported-decision-making>.

31. Victoria, Office of the Public Advocate, “Supported Decision Making” <www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making>.

32. Victoria, Office of the Public Advocate, “Supported Decision Making” <www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making>.

33. Australian Research Council Funded Linkage Project, *Effective Decision-Making Support for People with Cognitive Disability* (2016) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/430999/Effective-decision-making-support.pdf>

Supported decision-making

- 4.39 Supported decision-making authorisations allow a person with capacity to appoint one or more people to help them make personal decisions (but not financial decisions). Under an authorisation the supporter is able:
- (a) to access, collect or obtain or assist the adult in accessing, collecting or obtaining from any person any information that is relevant to the decision and to assist the adult in understanding the information;
 - (b) to assist the adult in making the decision;
 - (c) to communicate or assist the adult in communicating the decision to other persons.³⁴
- 4.40 A supported decision is the decision of the supported person for all purposes. However, a third party may refuse to recognise the decision in certain circumstances, for example, in cases of undue influence, fraud or misrepresentation.³⁵ A supported person can terminate a supported decision-making authorisation at any time.³⁶
- 4.41 This model is based on similar supported decision-making arrangements in the Yukon, Canada, although in the Yukon agreements may also relate to financial decisions.³⁷

Co-decision-making

- 4.42 A court makes Alberta's co-decision-making appointments but only with the consent of the person with the decision-making impairment.³⁸ Like supported decision-making authorisations, they apply only to personal decisions.³⁹
- 4.43 Before making a co-decision-making order, the court needs to be satisfied that:⁴⁰
- § the person's capacity to make the relevant decisions is significantly impaired
 - § the person would have the capacity to make the relevant decisions if provided with appropriate guidance and support
 - § less intrusive and restrictive measures have been considered and are not likely to be effective, and
 - § it is in the person's best interests to make the order.
- 4.44 Among other things, the Court is required to consider a report prepared by a "review officer". This is a ministerial appointment, and the report for the Court must include

34. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(2).

35. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 6.

36. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 7(1).

37. *Adult Protection and Decision Making Act*, s 4 in *Decision Making, Support and Protection to Adults Act 2003* (Yukon) sch A.

38. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 13(4).

39. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 12.

40. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 13(4).

QP 2 Decision-making models

information about the person’s “views and wishes” as well as the review officer’s assessment of the suitability of any potential co-decision-makers.⁴¹

- 4.45 The VLRC used these laws as the basis for their co-decision-making proposals.⁴²
- 4.46 Another Canadian co-decision-making model is set out in Saskatchewan’s *Adult Guardianship and Co-Decision-Making Act*. It allows for the appointment of “property co-decision-makers” who can make financial decisions together with the person. A key distinction between these laws and Alberta’s is that the consent of the person is not required before a co-decision-maker is appointed.⁴³

British Columbia, Canada

Representation agreements

- 4.47 In British Columbia, a person can enter into a standard “representation agreement”, appointing one or more representatives to help them make decisions related to a limited list of matters – including certain personal, health or financial matters – or make those types of decisions on their behalf.⁴⁴
- 4.48 A standard representation agreement retains substitute decision-making as an option, but only if the person chooses that option themselves. Regardless of whether the person chooses to appoint someone as a supporter or a substitute decision-maker, the agreements place significant emphasis on respecting the person’s wishes, beliefs and values.
- 4.49 A person can enter into a standard agreement without needing to prove they have capacity to enter into a contract or manage their personal, health or financial affairs.⁴⁵ Instead, the emphasis is on proving a trusting relationship between the person and their representative. This aspect of the law has been described as one of the scheme’s most significant innovations.⁴⁶ The law provides the following examples of factors relevant to determining whether a person can make or vary a representation agreement:⁴⁷
- § whether the person communicates a desire to have a representative make, help make or stop making decisions
 - § whether the person demonstrates choices and preferences and can express feelings of approval or disapproval of other choices
 - § whether the person is aware that making or varying the agreement means that the representative may make, or stop making, decisions that affect them, and
 - § whether the person has a trusting relationship with the representative.

41. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 5(b), s 81.

42. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.14].

43. *Adult Guardianship and Co-Decision-Making Act 2000* (Saskatchewan) s 14, s 40.

44. *Representation Agreement Act 1996* (British Columbia) s 7(1).

45. *Representation Agreement Act 1996* (British Columbia) s 8(1).

46. A Byrnes and others, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*, Handbook for Parliamentarians No 14 (United Nations, 2007) 90.

47. *Representation Agreement Act 1996* (British Columbia) s 8(2).

- 4.50 A person can also enter into a non-standard representation agreement, unless they are incapable of understanding the nature and consequences of the agreement. A non-standard agreement can confer a wider range of powers but only permits substitute decision-making.⁴⁸
- 4.51 The Act requires that, when making decisions, representatives must comply with (in the following order):⁴⁹
- § the person's current wishes, unless it is unreasonable to do so or the representation agreement provides that the representative need only comply with the instructions or wishes the person expressed while capable
 - § any instructions or wishes previously expressed by the person, if current wishes are unreasonable or cannot be obtained
 - § the person's known beliefs and values, or
 - § the person's best interests, if the person's beliefs and values are unknown.
- 4.52 When the decisions are financial ones, the legislation provides additional safeguards to guard against the financial abuse of vulnerable people.⁵⁰

Ireland

Decision-making assistants

- 4.53 Ireland's *Assisted Decision-Making (Capacity) Act* allows a person who considers that their capacity is in question, or may shortly come into question, to appoint a "decision-making assistant" under a decision-making assistance agreement to assist them to access information, or to understand, make or express personal and financial decisions.⁵¹
- 4.54 As with decisions made under a supported decision-making authorisation in Alberta, the decision-making assistant does not make decisions on behalf of the person. Instead, the decisions are taken to have been made by the person only. A decision-making assistance agreement can be revoked at any time by either party, or changed at any time with the consent of both parties.⁵²

Co-decision-makers

- 4.55 Another option for someone who has doubts about their present or future capacity is to appoint a "co-decision-maker" to make personal and financial decisions jointly with them by entering into a "co-decision-making agreement".⁵³
- 4.56 The Act defines a suitable co-decision-maker as a relative or friend with whom the person has a relationship of trust built up over a period of personal contact and who can perform the role's duties.⁵⁴

48. *Representation Agreement Act 1996* (British Columbia) s 9–10.

49. *Representation Agreement Act 1996* (British Columbia) s 16.

50. *Representation Agreement Act 1996* (British Columbia) s 12.

51. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(1).

52. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(3).

53. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(1).

QP 2 Decision-making models

- 4.57 The fact that any decision is made jointly by the person and the co-decision-maker is the primary difference between Ireland’s co-decision-making agreement and decision-making assistance agreements.
- 4.58 A co-decision-making agreement must be registered by the Director of the Decision Support Service within five weeks of signing and does not come into force until it is registered.⁵⁵
- 4.59 The terms of a co-decision-making agreement may be changed with the consent of both parties and the approval of a designated third-party. A registered co-decision-making agreement may be revoked at any time, either wholly or in part, by either party.⁵⁶

Texas, United States of America

Supported decision-making

- 4.60 Texas has recently introduced a law that allows an adult to enter voluntarily into a supported decision-making agreement with a supporter.⁵⁷ Under this agreement, the “adult with a disability” can authorise a supporter to do any or all of the following:
- § help them understand the options, responsibilities and consequences of their life decisions, without making those decisions on their behalf
 - § help them access, collect and obtain information relevant to making those decisions and in understanding that information, and
 - § help them communicate their decisions.
- 4.61 Anyone can be a supporter. To be valid, both parties must sign the agreement and those signatures must be witnessed or notarised. It does not need to be registered or filed in a court. Either party can terminate the agreement. The agreement is also terminated if the Department of Family and Protective Services finds that the supporter has abused, neglected, or exploited the adult with disability, or the supporter is found criminally liable for this type of conduct.

Statutory frameworks that recognise or promote informal supported decision-making

- 4.62 Some statutory frameworks do not go so far as to formalise supported decision-making but do engage with supported decision-making in other ways, for example by:
- § specifically recognising the existence of informal supported decision-making networks, and/or

54. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(2).

55. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 21, s 22.

56. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 28, s 29.

57. *Supported Decision-Making Agreement Act*, 1357 Estates Code § 1357.002–1357.003, § 1357.051–1357.056.

- § specifically requiring informal supported decision-making options to be explored before a substitute decision-maker is appointed.
- 4.63 The *NDIS Act* is an example of a law that does both these things.⁵⁸ The UK’s *Mental Capacity Act* is another. One of the core principles of the *Mental Capacity Act*, generally referred to as the “supported decision-making principle”,⁵⁹ requires 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.⁶⁰
- 4.64 However, the principle’s formulation has been recently criticised:
- Although the principle appears at the head of the Act, it receives no elaboration or articulation in the remainder of the statute. Perhaps a more serious problem is that the principle is expressed in the passive voice. It indicates that steps should have been taken, but it fails to indicate anyone in particular who has the positive obligation to take them!⁶¹
- 4.65 A similar principle in Northern Ireland’s new *Mental Capacity Act (Northern Ireland) 2016* arguably works better because the Act:
- § includes details about what type of support must be provided, and
- § clearly states that any substitute decision-making otherwise authorised under the Act will only be lawful if “all practicable help and support to enable the person to make a decision about the matter have been given without success”.⁶²

58. See Chapter 3, [3.17]-[3.18].

59. House of Lords Select Committee on the *Mental Capacity Act 2005*, *Mental Capacity Act 2005: Post Legislative Scrutiny*, Report (2014) [79].

60. *Mental Capacity Act 2005* (UK) s 1(3).

61. W Martin and others, *The Essex Autonomy Project: Three Jurisdictions Report: Toward Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, Position Paper (2016) 26.

62. *Mental Capacity Act (Northern Ireland) 2016* (UK) s 5, s 1(4).

5. A formal supported decision-making model for NSW?

In brief

We consider whether we should adopt a formal supported decision-making model and ask what features a formal decision-making model should have. We also ask whether we should retain substitute decision-making as an option.

Our view	27
Should NSW introduce a formal supported decision-making model?	28
Potential advantages of a formal model.....	28
Will introducing elements of formal supported decision-making impair informal arrangements?.....	30
Will formal arrangements increase the risk of abuse, neglect and exploitation?.....	30
Possible key features of a formal decision-making model.....	31
Formal supporters – personal and tribunal appointments.....	31
Formal co-decision-makers – personal and tribunal appointments.....	32
Registration of personal agreements.....	33
Should NSW retain substitute decision-making as an option?	33

Our view

- 5.1 The Terms of Reference for this review require us to consider whether NSW should adopt a supported decision-making model and, if so, what its basis and parameters should be.
- 5.2 In Chapter 3, we discussed the current *Guardianship Act* framework, which has substitute decision-making as a key feature. Under the *Guardianship Act*, the Tribunal can formally appoint a person to make decisions on behalf of someone else, and that person must give “paramount consideration” to the “welfare and interests” of the person for whom they are making decisions.¹ Importantly, the Tribunal will only appoint a substitute decision-maker if there is no other option, meaning that informal alternative decision-making arrangements can continue if they are working well.
- 5.3 As the pilots and programs already operating throughout Australia show, supported decision-making need not engage the law at all. It may be better to develop the supported decision-making skills of existing informal support networks, and rely on service protocols, health and welfare professional standards and other processes to provide the necessary oversight.
- 5.4 Nevertheless, fortified by the NSW Standing Committee Report,² the ALRC Report³ and Australia’s accession to the UN *Convention*, we have reached the tentative conclusion that there is scope for NSW to do more through our laws to encourage

1. *Guardianship Act 1987* (NSW) s 14, s 4.

2. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010).

3. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).

and promote supported decision-making. We seek your views on how best to approach this task.

- 5.5 As the variety of supported decision-making frameworks and proposed frameworks show, no two frameworks are the same. Each has its own features and each balances informal and formal aspects of supported decision-making differently.
- 5.6 There is also limited evidence about what actually works. Evaluation of the existing statutory models has been limited, and the informal pilots have generally been small and limited in scope.⁴ Some might say we should wait until the formal frameworks overseas have been more comprehensively evaluated before designing our own.
- 5.7 However, looking to what works in other places can never tell us everything we need to know, since we must design our law for NSW's social, political, legal and professional landscapes. With the UN *Convention* in place, various formal supported decision-making models in operation in other places, numerous reform proposals already developed and pilots operational across the country, we are in a good position to frame recommendations for reform.
- 5.8 In this Chapter, we begin by considering whether we should introduce a formal framework for supported decision-making. We then consider key features of any such scheme and seek your views about them.

Should NSW introduce a formal supported decision-making model?

Potential advantages of a formal model

- 5.9 As we have discussed, informal supported decision-making already occurs in NSW when families and friends support people to make decisions, and when supported decision-making pilots and programs are trialled. While the *Guardianship Act* has substitute decision-making as a key feature, the Tribunal must only appoint guardians when necessary and its practice has been not to if appropriate informal decision-making arrangements are in place.
- 5.10 For these reasons, some might say that there is no need to introduce formal supported decision-making arrangements. As an alternative to formalising supported decision-making, informal measures could be specifically recognised and/or promoted in the legislation, as they are in the *NDIS Act* and *Mental Capacity Act 2005* (UK).⁵
- 5.11 On the other hand, it might be that formal arrangements are necessary to ensure people with impaired decision-making capacity are adequately protected, supporters understand their role and responsibilities, and the number of people in substitute decision-making arrangements is kept at a minimum. It is worth noting that the ALRC has recommended that the *NDIS Act* include formal supported decision-making⁶, and a review of the *Mental Capacity Act 2005* (UK) has found

4. T Carney, "Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?" (2015) 4 *Laws* 37, 41.

5. See Chapter 4, [4.63].

6. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-1 [4.11].

that substitute decision-making still prevails despite the intention of the lawmakers to encourage the use of supported decision-making.⁷

5.12 Of course, the benefits that formal frameworks can deliver depend on their features. Possible advantages of formalising supported decision-making include:

§ **Providing a formal alternative to substitute decision-making.** Currently there are no formal alternatives to guardianship and financial management for people who need some decision-making support. Some people may not be receiving the level of decision-making support they need because guardianship and financial management are considered too restrictive. In other cases, it is possible guardianship and financial management orders are being made unnecessarily because less restrictive options are not available. Depending on its design, a formal supported decision-making model could also ensure a person without an informal support network can access appropriate support.⁸

§ **Providing certainty about the nature and limits of existing support relationships.** Informal supported decision-making is a part of life for many people. However, without an appropriate framework there is a risk that these relationships are not operating effectively, and that the people involved are not adequately protected. In its preliminary submission, the NSW Department of Family and Community Services says:

Family members often support people with disability to make decisions, but FACS staff also play a significant role as “supporters”. A formal framework to manage these relationships (and potential or perceived conflicts) may benefit not only FACS staff, but all disability service providers.⁹

§ **Providing certainty when dealing with third parties.** Where privacy and confidentiality arrangements prohibit, for example, an informal supporter from being present at a consultation at a doctor’s surgery, legal office or bank, having a formal supported decision-making arrangement that authorises the supporter to have access to certain information might overcome this barrier.

§ **Providing further guidance in the law to supporters about their role and responsibilities.**

§ **Promoting the practice of supported decision-making.**

§ **Formally acknowledging the value of the preferences and abilities of people with impaired capacity.**

§ **Recognising the value of existing support relationships.** The Seniors Rights Service says in its preliminary submission:

[I]f there is conflict in the family, it enables the [person with impaired capacity] to be empowered by formally choosing who is to fulfil that role for them. It also enables the supported decision-maker to be empowered

7. House of Lords Select Committee on the *Mental Capacity Act 2005*, *Mental Capacity Act 2005: Post Legislative Scrutiny*, Report (2014) [89].

8. Disability Council NSW, *Preliminary Submission PGA26*, 13.

9. NSW Family and Community Services, *Preliminary Submission PGA54*, 3.

by demonstrating to third parties they have been formally appointed under this role and have authority to assist.¹⁰

Will introducing elements of formal supported decision-making impair informal arrangements?

- 5.13 The preliminary submissions to this review make it clear there is concern a formal framework could:
- § over-formalise support arrangements that are already working well¹¹
 - § impose onerous duties on informal supporters who may be reluctant to continue providing decision-making support,¹² and
 - § make people who are being supported lose control of the process because the law is too prescriptive.¹³
- 5.14 Clearly, the right balance needs to be struck between informal arrangements that allow for autonomy and flexibility on the one hand, and formal arrangements that ensure an appropriate level of oversight and certainty on the other.
- 5.15 All of the overseas formal supported decision-making frameworks we have looked at retain a mix of informal and formal supported decision-making arrangements, and require certain conditions to be met before a formal decision-making arrangement is put in place. For example, in Alberta, before making a co-decision-making appointment, the court needs to be satisfied that less intrusive and restrictive measures have been considered and are not likely to be effective.¹⁴ NSW could adopt similar provisions to ensure successful informal arrangements are allowed to continue.

Will formal arrangements increase the risk of abuse, neglect and exploitation?

- 5.16 Another concern is that formal supported decision-making arrangements could increase the risk of abuse, neglect or exploitation where formal supporters exceed their duties and effectively become substitute decision-makers.
- 5.17 One preliminary submission says:
- There is a very real danger that the term “supported decision-making” can and will be used as a thinly veiled mechanism by which substitution of personhood will still occur.¹⁵
- 5.18 Alzheimer’s Australia NSW gives the following example of what could happen if supported decision-making is formalised:

10. Seniors Rights Service, *Preliminary Submission PGA07*, 20.

11. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 2–3.

12. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 3.

13. Disability Council NSW, *Preliminary Submission PGA26*, 14.

14. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 13(4)(a)(iii).

15. B Pace, *Preliminary Submission PGA09*, 8.

[A] person with early stage dementia may appoint a supported decision maker but when capacity is lost, this person in effect turns into a substitute decision maker and there would be no formal recognition or acknowledgement of this, leaving an individual potentially open to abuse.¹⁶

- 5.19 It is likely such scenarios are already playing out in the informal decision-making sphere. Arguably, the key to preventing them in both formal and informal spheres is to design appropriate rules and safeguards to ensure supporters act appropriately.

Question 5.1 Formal supported decision-making

- (1) Should NSW have a formal supported decision-making model?
- (2) If there were to be a formal supported decision-making model, how could we ensure there was an appropriate balance between formal and informal arrangements?
- (3) If there were not to be a formal supported decision-making model, are there any ways we could better recognise or promote informal supported decision-making arrangements in NSW law?

Possible key features of a formal decision-making model

Formal supporters – personal and tribunal appointments

- 5.20 A key feature of all formal supported decision-making models we have looked at is the provision for the formal appointment of supporters. Where the models differ is on the question of who can make the appointment.
- 5.21 The most common model is that the person needing decision-making support can personally appoint a supporter under a formal authorisation or agreement. None of the models currently in operation also allow for a court or tribunal to appoint a supporter.
- 5.22 By contrast, the VLRC proposed tribunal-appointed supporters in addition to personally appointed supporters. It recommended that the consent of both parties should be a prerequisite. The VLRC gave two reasons for recommending tribunal appointments:¹⁷
- § it would provide an alternative to the appointment of a substitute decision-maker where the Tribunal finds there is a need for a supporter but a substitute decision-maker is unnecessary, and
 - § it would allow formal support arrangements to be made in situations where the person wants support but cannot enter into a supported decision-making agreement themselves.

16. Alzheimer's Australia NSW, *Preliminary Submission PGA14*, 4.

17. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.78]–[8.87]. This recommendation was not adopted by government, in a bill that in turn was not enacted.

Formal co-decision-makers – personal and tribunal appointments

- 5.23 Ireland and some Canadian Provinces have formal co-decision-making schemes in addition to formal supported decision-making and substitute decision-making schemes. Having co-decision-making as part of the formal decision-making mix would provide a greater range of options.
- 5.24 A potential disadvantage we see with co-decision-making is that it could effectively become the “compromise” position in cases where substitute decision-making is unnecessary but there is concern that supported decision-making will provide insufficient safeguards, be unworkable or too difficult. Having co-decision-making as an option could reduce the number of cases where supported decision-making arrangements are applied, despite them being the most suitable option.
- 5.25 Another potential disadvantage is that co-decision-making could lead to an unequal partnership, with co-decision-makers using their influence inappropriately and effectively becoming substitute decision-makers. In Alberta this risk is mitigated by requiring a review officer to report on any information relating to the suitability of a proposed appointee.¹⁸
- 5.26 Some commentators have also said that the concept of co-decision-making is difficult for a lay person to understand, which could lead to problems in its application.¹⁹
- 5.27 If NSW decides to introduce formal co-decision-making, we must also decide whether co-decision-makers should be personally appointed or tribunal appointed.
- 5.28 In Alberta, co-decision-makers can only be appointed by a court. The VLRC recommended a similar model.²⁰ In Ireland, co-decision-making agreements are personal agreements that must be registered to have effect.²¹
- 5.29 A benefit of personal appointments is that the person who needs decision-making help has greater freedom of choice. They can decide who to appoint as a formal supporter, when to appoint them, and in what circumstances.
- 5.30 However, it is possible to imagine situations where people have not planned ahead and their capacity to make a personal appointment is in question. In these cases, it may be better for a court or tribunal to have the power to make an appointment to ensure the arrangement is appropriate and reflects the person’s wishes. This was the reason for the VLRC’s recommendations that the tribunal appoint both supporters and co-decision-makers. So that the person with decision-making impairment retains some level of autonomy, the VLRC recommended that an appointment should only be made with the person’s consent and the person should be able to revoke the order at any time.²²

18. *Adult Guardianship and Trusteeship Regulation 2009* (Alberta) s 38(2)(b), s 46(2)(b).

19. T Carney and F Beauport, “Public and Private Bricolage – Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making” (2013) 36 *UNSW Law Journal* 175, 184.

20. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012), ch 9.

21. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 21, s 22.

22. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.81], [8.87], [9.104]–[9.105].

Registration of personal agreements

- 5.31 In some places, the formal agreements through which a person appoints someone to help them make decisions must be registered. In Ireland, personal co-decision-making agreements must be registered by the Director of the Decision Support Service (a government position) within five weeks of signing.²³ The VLRC recommended that co-decision-making orders should be registered to take effect.²⁴
- 5.32 Registration is not required for personal decision-making agreements made under other frameworks we have looked at, although in Texas, supported decision-making agreements must be witnessed or notarised.²⁵ In British Columbia, a charitable organisation operates a registry where people can register their representation agreements if they want to.²⁶

Question 5.2 Key features of a formal supported decision-making model

- (1) Should NSW have formal supporters?
- (2) If so, should NSW permit personal or tribunal appointments, or both?
- (3) Should NSW have formal co-decision-makers?
- (4) If so, should NSW permit personal or tribunal appointments, or both?
- (5) What arrangements should be made for the registration of appointments?

Should NSW retain substitute decision-making as an option?

- 5.33 Even if we decide to recommend formal supported decision-making as the preferable statutory model, it is possible to envisage situations where working out what a person's decision is may prove very difficult, if not impossible: for example, when a person is in a vegetative state, or in a coma and a decision must be made immediately.
- 5.34 Supportive technologies have made it easier than it once was to understand the will and preferences of some people with disability. There are also many ways of arriving at an understanding of a person's values, views and beliefs when a person is not in a position to express those things through words or gestures, or at a particular point in time.
- 5.35 Nevertheless, there will be people whose will and preferences are impossible to determine at the time a decision must be made. It is therefore necessary to consider whether we should maintain some form of substitute decision-making to ensure that people are adequately protected.
- 5.36 A number of the preliminary submissions that favour introducing supported decision-making say that substitute decision-making should continue to be available

23. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 21.

24. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [9.101]–[9.103].

25. *Supported Decision-Making Agreement Act*, 1357 Estates Code §1357.056.

26. See *Nidus: Personal Planning Resource Centre and Registry* (2016) <<http://www.nidus.ca>>.

QP 2 Decision-making models

as a last resort.²⁷ The circumstances in which stakeholders say that substitute decision-making should still be available include:

§ where the person is incapable of understanding the full nature and consequences of their decisions²⁸

§ where the person does not have the capacity to articulate their wishes²⁹

§ where the person would prefer a substitute decision-maker to be appointed³⁰

§ where there are likely risks or real evidence of serious financial loss, harm, neglect, overprotection or exploitation under a supported decision-making model,³¹ and

§ where urgent action is needed because a person's own decisions or the influence of others puts their safety and well-being at imminent risk.³²

5.37 The UN *Convention* Committee has called for a review of guardianship and trusteeship laws with a view to immediately replacing regimes of substitute decision-making with supported decision-making.³³ However, some argue that the UN *Convention* itself does not call for the abolition of substitute decision-making and there is evidence that this was deliberate.³⁴

5.38 The ALRC says that arguments against substitute decision-making have focused too heavily on the type of model without closely considering the proposed features of the model. In its view, the UN *Convention* principally condemns the objective "best interests" approach to decision-making.³⁵ The ALRC believes that if we do decide there are situations where appointing someone to make decisions on behalf of someone else is necessary, the focus should be on the standards by which a decision-maker acts and the nature of their appointment.³⁶

5.39 Similarly, in a recent UK report, experts have said that the key question should not be what we call the decision-making model, but rather:

27. Council on the Ageing NSW, *Preliminary Submission PGA10*, 2; Alzheimer's Australia NSW, *Preliminary Submission PGA14*, 3; BEING, *Preliminary Submission PGA22*, 3; Disability Council NSW, *Preliminary Submission PGA26*, 16; Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 2.

28. Seniors Rights Service, *Preliminary Submission PGA07*, 8.

29. Alzheimer's Australia NSW, *Preliminary Submission PGA14*, 3; B Ripperger and L Joseph, *Preliminary Submission PGA31*, 11.

30. Alzheimer's Australia NSW, *Preliminary Submission PGA14*, 3.

31. Alzheimer's Australia NSW, *Preliminary Submission PGA14*, 1; NSW Disability Network Forum, *Preliminary Submission PGA05*, 2; Disability Council NSW, *Preliminary Submission PGA26*, 15; NSW Trustee and Guardian, *Preliminary Submission PGA50*, 5.

32. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 4.

33. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (2014) [28].

34. See, eg, W Martin and others, *The Essex Autonomy Project: Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, Position Paper (2016) 11, 57.

35. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.96].

36. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [2.106].

What measures should be taken to support the exercise of legal capacity, *both* by supporting persons with disabilities to make decisions themselves wherever possible, *and* by supporting their ability to exercise their legal agency even in circumstances when they lack the ability to make requisite decisions themselves?³⁷

- 5.40 Commentary from the UN *Convention* Committee arguably supports this view. In its 2014 General Comment, the Committee does envisage situations where, after significant efforts have been made, it is still not practicable to work out a person's will and preferences. According to the Committee, it is important in such situations that a third party's "best interpretation" of a person's will and preferences is used instead of a "best interests" test.³⁸
- 5.41 If substitute decision-making is to be available as an option of last resort, the challenge remains to ensure that it is *only* used as a last resort and in situations when supported decision-making is genuinely inappropriate.
- 5.42 The current provisions of the *Guardianship Act* already go some way to ensuring this by requiring that:³⁹
- § the person must be "in need" of a guardian before an order is made
 - § the person's "freedom of decision and freedom of action should be restricted as little as possible"
 - § in appointing a guardian, the Tribunal must consider the person's views, and
 - § when making a decision, a guardian must take the person's views into account.
- 5.43 The ALRC Safeguards Guidelines stipulate that any appointment of a substitute decision-maker ("representative") should be:
- § a last resort and not an alternative to appropriate support
 - § limited in scope, proportionate, and for the shortest time possible, and
 - § subject to review.⁴⁰
- 5.44 Taking a similar approach, the Intellectual Disability Rights Service in its preliminary submission says that a substitute decision-maker should only be appointed after:
- § actively considering what decisions are necessary
 - § actively considering whether supported decision-making options are available and appropriate
 - § being satisfied that adequate attempts have been made to put appropriate decision-making supports in place

37. W Martin and others, *The Essex Autonomy Project: Three Jurisdictions Report: Towards Compliance with CRPD Art 12*, in *Capacity/Incapacity Legislation across the UK*, Position Paper (2016) 13.

38. United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (2014) [20]–[21].

39. *Guardianship Act 1987* (NSW) s 4, s 14.

40. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-4.

QP 2 Decision-making models

- § being satisfied that decision-making supports that are available, or could reasonably be put in place, will be insufficient, and
- § being satisfied that informal substitute decision-making that has been occurring will be insufficient or is inappropriate in all the circumstances.⁴¹

Question 5.3 Retaining substitute decision-making as an option

- (1) If a formal supported decision-making framework is adopted, should substitute decision-making still be available as an option?
- (2) If so, in what situations should substitute decision-making be available?
- (3) Should the legislation specify what factors the court or tribunal should consider before appointing a substitute decision-maker and, if so, what should those factors be?

Question 5.4 Other issues

Are there any other issues about alternative decision-making models you would like to raise?

41. Intellectual Disability Rights Service, *Preliminary Submission PGA44*, 3.

6. Supporters and co-decision-makers

In brief

We consider the possible role of formal supporters and co-decision-makers, including when they should be appointed, who should be able to act, what powers and functions they should have, and what duties and responsibilities they should have.

When should a supporter or co-decision-maker be appointed?	37
Who should be able to act as a supporter or a co-decision-maker?	39
Eligibility criteria	39
Specific exclusions.....	40
Number of supporters and co-decision-makers	41
Public agencies as supporters or co-decision-makers.....	41
Paid supporters and co-decision-makers.....	42
Community volunteers as supporters or co-decision-makers	44
What powers and functions should supporters and co-decision-makers have?.....	45
Supporters	45
Nature of the supporter role.....	45
The types of decisions supporters can help with	46
General functions and powers.....	46
Powers to access information.....	47
Exclusions	48
Co-decision-makers.....	48
Nature of the co-decision-maker role.....	48
General functions and powers.....	49
Types of decisions.....	49
Exclusions	50
What duties and responsibilities should supporters and co-decision-makers have?.....	50

- 6.1 In this Chapter, we consider what the role of formal supporters and co-decision-makers should be if supported decision-making and co-decision-making are formalised.

When should a supporter or co-decision-maker be appointed?

- 6.2 Different places have different requirements that must be met before a formal supporter or co-decision-maker can be appointed. The requirements will depend on who is making the appointment. Examples of requirements for personal appointments include that the person making the appointment, agreement or authorisation:

§ is 18 years or older¹

§ understands the nature and effect of the arrangement²

1. See, eg, *Supported Decision-Making Agreement Act*, 1357 Estates Code § 1357.051; *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(1).

QP 2 Decision-making models

- § is not “incapable” of entering into such an arrangement³
 - § considers their capacity to be in question or considers it may shortly be in question⁴
 - § has a disability⁵
 - § has acted voluntarily, without undue influence or coercion.⁶
- 6.3 The requirements that must be met before a court can appoint a co-decision-maker in Alberta include:⁷
- § the person needing support or an interested person has applied to the court for an order
 - § the person’s capacity to make decisions covered by the order is significantly impaired
 - § the person could make decisions covered by the order if given appropriate guidance and support
 - § less intrusive and less restrictive measures have been considered and found unsuitable
 - § it is in the person’s best interests for the order to be made
 - § the proposed supporter or co-decision-maker consents to the appointment, and
 - § the person needing support consents to the appointment and the order.
- 6.4 In its 2012 recommendations for tribunal-appointed co-decision-makers, the VLRC recommended similar requirements to Alberta’s.⁸

Question 6.1: When supporters and co-decision-makers can be appointed

- (1) What requirements should be met before a person needing support can appoint a supporter or co-decision-maker?
- (2) What requirements should be met before a court or tribunal can appoint a supporter or co-decision-maker?

2. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(1).
3. *Representation Agreement Act 1996* (British Columbia) s 4.
4. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(1), s 17(1).
5. *Supported Decision-Making Agreement Act*, 1357 Estates Code § 1357.051.
6. *Supported Decision-Making Agreement Act*, 1357 Estates Code § 1357.051.
7. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 13(4).
8. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 65.

Who should be able to act as a supporter or a co-decision-maker?

Eligibility criteria

6.5 Eligibility criteria for appointees can provide important safeguards for people who require support. They can also help to ensure that supporters and co-decision-makers are suitable. Some of the eligibility criteria used elsewhere for supported and co-decision-making include:

- § **The person must be above a certain age.** Supporters and co-decision-makers must usually be 18 years old.⁹
- § **The person must consent to taking on the role.** The Victorian Bill proposed that a supporter must consent to the appointment.¹⁰ In Alberta, both personally appointed supporters and court-appointed co-decision-makers must consent to undertaking the role.¹¹
- § **The person must be able to act in the other person’s “best interests” or give effect to their “will and preferences”.** The Victorian Bill stated that VCAT should be satisfied that a supportive guardian would “promote the personal and social wellbeing” of the person concerned.¹² In Alberta, the Court must be satisfied that a co-decision-maker “will act in the adult’s best interests”. In deciding this, the Court may consider evidence of any matter (including potential conflicts of interest) “that might create a substantial risk that the proposed co-decision-maker would not act” in the “best interests” of the person concerned.¹³
- § **The person must be suitable.** Formal supported decision-making regimes often require the person to be “suitable” for the proposed role.¹⁴ Common factors to be considered when determining suitability include:¹⁵
 - the views and wishes of the person in need of support
 - the desirability of preserving the family and other relationship that are important to the person in need of support
 - the person’s availability to meet and communicate with the person in need of support and their ability to perform their functions, including to assist the person to make decisions
 - whether the person will act honestly, diligently and in good faith, and

9. See, eg, *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(1), s 17(10); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(1), s 14(1).

10. *Guardianship and Administration Bill 2014* (Vic) cl 97.

11. *Adult Guardianship and Trusteeship (Ministerial) Regulation 2009* (Alberta) cl 2(a); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 14(1).

12. *Guardianship and Administration Bill 2014* (Vic) cl 97(a).

13. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 14(1)(a), s 14(2).

14. *Guardianship and Administration Bill 2014* (Vic) cl 97(b); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 36; *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 14(1)(b).

15. *Guardianship and Administration Bill 2014* (Vic) cl 98; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 36, rec 66; *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 14(1)(b); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(2)(b).

QP 2 Decision-making models

- any potential conflicts of interest and the person's ability to respond to any conflicts appropriately.

6.6 The nature of the relationship between the people is also an important consideration. The importance of a trusting relationship is often emphasised.¹⁶ For example, the Irish Act specifies that a suitable co-decision-maker is “a relative or friend of the appointer who has had such personal contact with the appointer over such period of time that a relationship of trust exists between them”.¹⁷

Question 6.2: Eligibility criteria for supporters and co-decision-makers

What, if any, eligibility criteria should potential supporters and co-decision-makers be required to meet?

Specific exclusions

6.7 Some places list the characteristics that make a person ineligible to act as a supporter or a co-decision-maker. In both Ireland and Alberta, for instance, people who are themselves assisted under supported or substituted decision-making arrangements cannot act as supporters or co-decision-makers for somebody else.¹⁸

6.8 Some further circumstances that would exclude a person in Ireland are that the person:

- § has been convicted of certain offences¹⁹
- § is bankrupt²⁰
- § works at the facility where the person lives²¹
- § had acted as a supporter or co-decision-maker for the person but a court has decided they should not continue²²
- § was acting as a supporter or co-decision-maker in their capacity as the person's spouse, and that relationship has ended.²³

16. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(2)(a); Guardianship and Administration Bill 2014 (Vic) cl 98(c); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 36(c), rec 66(c).

17. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(2)(a).

18. *Adult Guardianship and Trusteeship (Ministerial) Regulation 2009* (Alberta) cl 2(b); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 20(6)(h).

19. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 11(1)(c), s 11(1)(g), s 18(1)(a), s 18(1)(c), s 18(1)(g).

20. *Assisted Decision-Making (Capacity) Act 2015* (Ireland), s 13(4)(c), s 18(1)(c).

21. Although certain family members may act as decision-making assistants, even though they are the owner or registered provider of a mental health facility where the appointer resides: *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 11(1)(f).

22. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 11(1)(h), s 18(1)(h).

23. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 13(1)–(3), s 20(2)–(4).

Question 6.3: Characteristics that should exclude potential appointees

What, if any, characteristics should exclude particular people from being supporters or co-decision-makers?

Number of supporters and co-decision-makers

- 6.9 The VLRC considered that for a co-decision-making scheme to be workable, no more than one co-decision-maker should be appointed for each type of decision.²⁴
- 6.10 Similarly in Ireland, only one co-decision-maker can be appointed for a decision.²⁵ However, multiple supporters can be appointed to help someone make a decision.²⁶
- 6.11 The ALRC model would allow a person to appoint more than one supporter.²⁷ In Alberta a person can appoint up to three supporters.²⁸ The court in Alberta can appoint multiple co-decision-makers and specify whether they are to act jointly, successively or separately for specified personal matters.²⁹

Question 6.4: Number of supporters and co-decision-makers

What limits, if any, should there be on the number of supporters or co-decision-makers that can be appointed?

Public agencies as supporters or co-decision-makers

- 6.12 The NSW *Guardianship Act* currently enables the Tribunal to appoint either a private person (such as a friend or family member), the Public Guardian, or the NSW Trustee and Guardian as a substitute decision-maker. Existing law and practice favours the appointment of a private person over a government agency, which should only be appointed as a last resort.³⁰
- 6.13 It is not clear whether this arrangement should also apply in a supported decision-making regime. In Alberta, for instance, neither the Public Guardian nor the Public Trustee can act as a supporter or co-decision-maker.³¹ Similarly, the Irish law provides that only relatives or friends can be appointed as co-decision-makers.³² The VLRC also recommended that the Victorian Public Advocate should not be eligible to act as either a supporter or a co-decision-maker.³³

24. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 69, [9.67].

25. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(1).

26. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(5).

27. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [4.48].

28. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(1).

29. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 16.

30. See, eg, *Guardianship Act 1987* (NSW) s 17(3).

31. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 5, s 15.

32. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(2)(a).

33. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 37, rec 67.

QP 2 Decision-making models

- 6.14 The ALRC took a different approach, saying “a person may appoint whomever they want as their supporter”,³⁴ including an agency.³⁵
- 6.15 There may be good reasons for excluding public agencies from supported decision-making roles. For instance, the resource implications of expanding the role of the Public Guardian to encompass support and co-decision-making functions would need to be considered carefully.
- 6.16 Public agencies may not be suited to support roles. As one preliminary submission observes, supporters “must have an in depth understanding of the subject person’s wishes and behaviours”.³⁶ An agency might not be able to develop this depth of understanding in the same way that a friend or family member can.
- 6.17 Some stakeholders have expressed concerns that, under the current system, public guardians are “not aware of the person’s life experiences, capacities, habits, likes and dislikes, aspirations and so on”.³⁷ On this view, public agencies might not be suitable as supporters or co-decision-makers.
- 6.18 Instead, agencies might be better placed to “support the supporters”. One submission suggests, “government should provide assistance to family and peers so that they can fulfil the role of a support person, where possible”.³⁸
- 6.19 However, difficulties might arise if the law excluded agencies from these roles. The NSW Ombudsman says, “it is important to recognise that many people who require decision making support do not have access to family or other informal supports, or may prefer to gain the support from independent parties”.³⁹
- 6.20 For this reason, excluding public agencies from performing these roles arguably would be inconsistent with Australia’s obligation to “take appropriate measures to provide access by persons with disabilities to the support that they may require”.⁴⁰

Question 6.5: Public agencies as supporters or co-decision-makers

- (1) What are the advantages and disadvantages of allowing public agencies to be appointed as supporters or co-decision-makers?
- (2) In what circumstances should public agencies be able to act as supporters or co-decision-makers?

Paid supporters and co-decision-makers

- 6.21 A related issue is whether paid professionals should be allowed to act as supporters and co-decision-makers.

34. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [4.48].

35. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [4.47], [4.60].

36. B Ripperger and L Joseph, *Preliminary Submission PGA31*, 10.

37. Confidential, *Preliminary Submission PGA33*, 2; B Pace, *Preliminary Submission PGA09*, 8–9.

38. B Ripperger and L Joseph, *Preliminary Submission PGA31*, 10.

39. NSW Ombudsman, *Preliminary Submission PGA41*, 5.

40. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(3).

- 6.22 Co-decision-makers in Alberta and Ireland are unpaid.⁴¹ The VLRC similarly recommended that supporters and co-decision-makers should not receive direct payment for performing their role.⁴² This would exclude the Victorian Public Advocate as well as professional financial supporters from acting in these roles.
- 6.23 There may be good reasons for limiting the roles of supporter and co-decision-maker to unpaid volunteers. For instance, this limitation may reduce the risk of conflicts of interest arising.⁴³ Furthermore, as the VLRC observed, support arrangements “are designed for close, personal relationships, which cannot be replicated by professional appointments”.⁴⁴
- 6.24 However, problems can arise when volunteers are not available to take on these roles. In 2014 and 2015, FACS ran a small supported decision-making pilot. Unexpectedly, participants in the program faced difficulties in identifying suitable supporters. In its evaluation report, FACS observed that family members might not always want to be a supporter. Even if they do, they will not necessarily be a “natural fit” for this role. As FACS observes, conflicts of interest can arise in family situations too.⁴⁵
- 6.25 Instead, FACS found that “[t]he willingness of paid staff to act as supporters was beneficial in assisting almost half of the individuals in the pilot to access supported decision making”.⁴⁶ This suggests that some people may be unable to find suitable supporters or co-decision-makers if these roles are limited to volunteers.
- 6.26 For this reason, different considerations might apply to paid care workers. The ALRC suggested that “there may be circumstances in which a paid carer may be appointed as a supporter, particularly where the person does not have family support or is socially isolated”.⁴⁷ Similarly, the VLRC did “not wish to preclude the possibility that an employee of an organisation such as an advocacy group may be appointed as a supporter in some cases”.⁴⁸ The availability of paid workers is likely to depend on the amount of funding available for these purposes.

Question 6.6: Paid workers and organisations as supporters and co-decision-makers

- (1) What are the advantages and disadvantages of allowing paid care workers to be appointed as either supporters or co decision-makers?

41. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 19(2); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 19(3).

42. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 38, rec 68.

43. NSW Family and Community Services, Department of Ageing, Disability and Home Care, *My Life, My Decision: An Independent Evaluation of the Supported Decision-Making Pilot* (2015) [9.2.2].

44. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.89], [9.65].

45. NSW Family and Community Services, Department of Ageing, Disability and Home Care, *My Life, My Decision: An Independent Evaluation of the Supported Decision-Making Pilot* (2015) [9.2.4].

46. NSW Family and Community Services, Department of Ageing, Disability and Home Care, *My Life, My Decision: An Independent Evaluation of the Supported Decision-Making Pilot* (2015) [9.2.2].

47. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [4.48].

48. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.90].

- (2) In what circumstances should paid care workers be appointed as supporters or co-decision-makers?
- (3) What are the advantages and disadvantages of allowing professional organisations to be appointed as either supporters or co-decision-makers?
- (4) In what circumstances should professional organisations be appointed as supporters or co-decision-makers?

Community volunteers as supporters or co-decision-makers

- 6.27 As discussed above, some people who require decision-making support may be unable to find a suitable supporter or co-decision-maker. One option to assist people in this situation may be to encourage members of the community to volunteer as supporters or co-decision-makers.
- 6.28 Victoria and Western Australia both have well-established volunteer community guardianship programs in place.⁴⁹ In 2010, the NSW Standing Committee considered a proposal by the NSW Public Guardian to establish a similar program in NSW.⁵⁰ Under this proposal, the Public Guardian would recruit the volunteers, train them, match them with people under guardianship and provide supervision.⁵¹ The Standing Committee decided to neither support nor reject this proposal. However, it recommended that the NSW Government “prioritise” its assessment.⁵²
- 6.29 In a similar way, community volunteers could act as supporters. The VLRC recommended that the Victorian Public Advocate should establish a pilot program to match people in need of support with volunteer supporters.⁵³ The VLRC modelled this proposal upon the existing community guardianship program, which the Office of the Public Advocate administers.
- 6.30 The idea of community volunteers received support in preliminary submissions. The NSW Trustee and Guardian suggests, “volunteers and public advocates as well as those who have an interest in the person’s individual care could be considered for appointment” as supporters.⁵⁴ The NSW Ombudsman also observed that:

It would also be useful to consider the merits of establishing a pool of volunteer decision supporters who could be matched with individuals who need more intensive decision making support, with the Public Guardian (or other appropriate body) providing training and support, and maintaining a register of supporters.⁵⁵

-
49. Victoria, Office of the Public Advocate, “Volunteer Programs” <www.publicadvocate.vic.gov.au/our-services/volunteer-programs>; Western Australia, Office of the Public Advocate, “Community Guardianship” (31 August 2016) <www.publicadvocate.wa.gov.au/C/community_guardianship.aspx>.
 50. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [10.35].
 51. On the elements of the proposed guardianship program, see NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [10.47]–[10.53].
 52. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 29.
 53. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 62–63.
 54. NSW Trustee and Guardian, *Preliminary Submission PGA50*, 8.
 55. NSW Ombudsman, *Preliminary Submission PGA41*, 5.

- 6.31 However, different concerns might arise about co-decision-makers. The VLRC observed that co-decision-making “may prove difficult” for a volunteer to engage in. This is because co-decision-makers must possess “the ability to work with the person to reach agreement about decisions”. Community volunteers and supported persons may be unable to establish the “personal, trusting relationship” that is required for co decision-making to succeed. For these reasons, the VLRC was less enthusiastic about the prospect of appointing community volunteers as co-decision-makers.⁵⁶

Question 6.7: Volunteers as supporters and co-decision-makers

- (1) What could be the advantages and disadvantages of appointing community volunteers as supporters?
- (2) What could be the advantages and disadvantages of appointing community volunteers as co-decision-makers?
- (3) In what circumstances do you think community volunteers should be appointed as supporters or co-decision-makers?

What powers and functions should supporters and co-decision-makers have?

- 6.32 As discussed in Chapter 2, supporters and co-decision-makers have different powers and functions. Supporters help a person reach their own decision, whereas co-decision-makers work with the person to reach a shared decision.
- 6.33 In this section, we consider possible options for defining the powers and functions of supporters and co-decision-makers in a formal supported decision-making model.

Supporters

Nature of the supporter role

- 6.34 The role of a supporter is to help the supported person to reach a decision. It is not to make decisions on their behalf. Ireland has chosen to state this clearly in its laws. The Victorian Bill took a similar approach, as did the ALRC.⁵⁷
- 6.35 In its preliminary submission, the NSW Trustee and Guardian similarly suggested that “the law should specify that the supporter is not authorised to make decisions on behalf of the supported person only to assist them in the decision making process.”⁵⁸

56. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [9.66].

57. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(2); *Guardianship and Administration Bill 2014* (Vic) cl 99(2); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-3, rec 4-4.

58. NSW Trustee and Guardian, *Preliminary Submission PGA50*, 9.

QP 2 Decision-making models

- 6.36 The VLRC additionally proposed an explicit prohibition on a supporter acting without the supported person’s knowledge and consent.⁵⁹

The types of decisions supporters can help with

- 6.37 A related question is whether the legislation should specify the types of decisions that supporters can help with. In particular, some laws distinguish between “personal” and “financial” decisions.
- 6.38 In Alberta, for example, supported decision-making is only available for “personal matters”. That is, a supporter can help with decisions about things like health care, accommodation, social activities, education, training, employment and their involvement in legal matters.⁶⁰
- 6.39 The Irish Act allows people to appoint a decision-making assistant to help them make decisions about their “personal welfare or property and affairs, or both”.⁶¹ Similarly, the Victorian Bill proposed empowering VCAT to make supportive guardianship orders in relation to “personal, financial or other matters”.⁶²
- 6.40 The VLRC recommended that supporters should be able to assist with personal or financial decisions. However, it also suggested allowing VCAT to appoint separate “financial supporters”.⁶³ The VLRC considered that this arrangement could be beneficial for people under financial management orders who have some capacity to manage their finances with assistance.⁶⁴

General functions and powers

- 6.41 An important question concerns the forms of assistance that a supporter should provide. One approach would be to enable the person or body that appoints a supporter to determine (on a case by case basis) the powers and functions of a particular supporter. These powers could be set out in the appointment order or any personal appointment document.⁶⁵
- 6.42 However, to provide clarity, there may be a need for a legislative statement of the powers and functions that supporters may exercise. For instance, the Alberta Act, Irish Act and the Victorian Bill each list the powers and functions of a supporter. The ALRC and the VLRC also prepared similar lists.⁶⁶ Although the details vary, these lists typically state that a supporter can help the supported person to:

§ obtain relevant information⁶⁷

59. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 45.

60. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 1(z)(bb), s 3.

61. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 10(1).

62. Guardianship and Administration Bill 2014 (Vic) cl 87, cl 99(1).

63. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 41, rec 42.

64. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.96].

65. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 39, rec 40, rec 43.

66. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 43; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-4.

67. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(2)(a); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(a); Guardianship and Administration Bill 2014 (Vic) cl 100(1).

- § understand this information and other considerations relating to the decision⁶⁸
 - § express their will and preferences⁶⁹
 - § make a decision⁷⁰
 - § let other people know about their decision, and⁷¹
 - § give effect to their decision.⁷²
- 6.43 The ALRC also proposed requiring a supporter to “assist the person to develop their own decision-making ability”.⁷³
- 6.44 In some instances, the supported person may not require assistance with all of these matters. The person or body making the appointment might want to give a supporter only some of these powers. To address this, legislation could allow the appointing person or body to state which of these powers a particular supporter can have.⁷⁴
- Powers to access information*
- 6.45 The legislation might also specify the kind of information that a supporter can access. It might also restrict the way such information can be used. This may be necessary to respect the person’s privacy, while also ensuring that the supporter can do their job.
- 6.46 For instance, the Victorian Bill proposed that a supportive guardian could access the supported person’s personal information that is both:
- § relevant to a supported decision, and
 - § may lawfully be collected or obtained by the supported person.⁷⁵
- 6.47 This reflected the VLRC’s recommendation that a supporter may not “use their authority to access, collect or obtain information” that is not legally available to the supported person.⁷⁶ The VLRC heard that many people “experience significant frustrations” accessing information when supporting family and close friends.⁷⁷

68. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(b); Guardianship and Administration Bill 2014 (Vic) cl 103(1)(e).

69. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(c).

70. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(2)(b); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(d); Guardianship and Administration Bill 2014 (Vic) cl 101.

71. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(2)(c); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(c)–(d); Guardianship and Administration Bill 2014 (Vic) cl 101(b).

72. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1)(e); Guardianship and Administration Bill 2014 (Vic) cl 102(1).

73. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 4-5, [4.53], [4.71].

74. Guardianship and Administration Bill 2014 (Vic) cl 99; *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 4(2); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 39, rec 40, rec 43.

75. Guardianship and Administration Bill 2014 (Vic) cl 100(1).

76. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 45(b).

77. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [8.101]–[8.102].

QP 2 Decision-making models

6.48 The Victorian Bill also proposed authorising others to disclose such personal information to the supporter. In addition, the Bill proposed allowing a supporter to disclose the information they receive:

- § in order to do anything relevant and necessary to carrying out their role
- § for any legal proceeding under the proposed Act, or
- § for any other lawful reason.⁷⁸

6.49 The Alberta Act contains further safeguards regarding the uses of the supported person's personal information. That is, the supporter:

- § may use and disclose the information only for the purpose of exercising the authority granted to them, and
- § is to take reasonable care to ensure the information is kept secure from unauthorised access, use or disclosure.⁷⁹

Exclusions

6.50 To safeguard the rights of a supported person, it may also be desirable to list specific powers that a supporter *cannot* exercise.

6.51 For instance, the VLRC recommended that the power of a supporter to communicate decisions should not authorise the supporter to enter into "significant financial transactions" (including those relating to investments) or signing documents that have legal effect.⁸⁰

Question 6.8: Powers and functions of supporters

- (1) What powers and functions should the law specify for formal supporters?
- (2) What powers or functions should the law specifically exclude for formal supporters?

Co-decision-makers

Nature of the co-decision-maker role

6.52 Unlike supporters, co-decision-makers are active participants in the decision-making process. Typically, a co-decision-maker works with a supported person to reach a shared decision. The final decision belongs to both of them. In practice, this means that both the supported person and the co-decision-maker must consent to the decision and sign any relevant documents. We set out the specific requirements below.

78. Guardianship and Administration Bill 2014 (Vic) cl 100(2)-(3).

79. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 9(3).

80. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 45(c). See also Guardianship and Administration Bill 2014 (Vic) cl 102(1).

General functions and powers

- 6.53 Co-decision-makers have similar powers in Alberta, Ireland and under the VLRC's proposed model.
- 6.54 In Alberta, a co-decision-maker must, subject to any conditions, limits or requirements set out in the order, assist the supported person to access relevant information and to discuss it with them. A co-decision-maker is entitled to access, collect or obtain personal information that is relevant to their authority and powers, and this information may be disclosed to the co-decision-maker. A co-decision-maker can do all that is necessary to give effect to a decision that they reach with the supported person. The Court may specify that any contract is voidable unless both the assisted adult and the co-decision-maker have signed it.⁸¹
- 6.55 In Ireland, co-decision-makers perform similar functions to make decisions jointly with a supported person. The Irish model also requires co-decision-makers to discuss "the known alternatives and likely outcomes of a relevant decision" with the person. Co-decision-makers are required to inform the Director of the Decision Support Service if they believe the person no longer has the capacity to make decisions with their assistance, or has developed the capacity to make relevant decisions without the help of a co-decision-maker.⁸²
- 6.56 In addition, where a decision requires a document to be signed, the decision will be null and void unless both the supported person and the co-decision-maker have signed the document.⁸³
- 6.57 The VLRC model also authorises co-decision-makers to access or obtain relevant information, discuss the information with the supported person, assist the person to make decisions, and do everything necessary to give effect to those decisions. In addition, the VLRC proposed that a co-decision-maker could not make decisions on behalf of the supported person or without their consent.⁸⁴

Types of decisions

- 6.58 In Alberta, co-decision-making applies only to specified "personal matters".⁸⁵
- 6.59 In contrast, the proposed VLRC model allows a co-decision-maker to assist with personal and financial matters.⁸⁶ The VLRC also recommended that the tribunal should specify the types of decisions that can be made, along with any limits to the co-decision-maker's authority.⁸⁷
- 6.60 In Ireland, a co-decision-making agreement may apply to the appointer's "personal welfare" and/or "property and affairs".⁸⁸

81. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 17(5), s 18(2), s 18(4), s 22(1)–(2).

82. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 19(1)(d), s 19(4).

83. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17, s 23(3).

84. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [9.78]–[9.82], rec 73, rec 74.

85. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 17(2).

86. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 106, rec 108.

87. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 71, rec 72.

88. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(1).

Exclusions

- 6.61 In Ireland, a co-decision-maker cannot make joint decisions about giving away the appointer's property.⁸⁹
- 6.62 The VLRC proposed a list of exclusions that would apply to all decision-makers, including making or revoking the person's will, managing their estate after they die, consenting to an unlawful act, voting on the person's behalf, entering into or ending a marriage or sexual relationship, and making decisions about adoption.⁹⁰

Question 6.9: Powers and functions of co-decision-makers

- (1) What powers and functions should the law specify for formal co-decision-makers?
- (2) What powers and functions should the law specifically exclude for formal co-decision-makers?

What duties and responsibilities should supporters and co-decision-makers have?

- 6.63 Several models include general decision-making principles that apply to anyone who makes decisions or takes action under the relevant law. Some principles may be particularly relevant to supporters and co-decision-makers. For example, the VLRC has recommended the following principles:⁹¹
- § The wishes and preferences of people with impaired decision-making ability should inform decisions made in their lives.
 - § People with impaired decision-making ability are entitled to take reasonable risks and make choices that other people might disagree with.
 - § Any limitations on the rights and freedoms of a person with impaired decision-making ability to make their own decisions must be justified, reasonable and proportionate.
- 6.64 The ALRC also proposed a number of "support guidelines", including:⁹²
- § People may choose not to be supported.
 - § A person's decision-making ability is to be assessed, not the possible outcomes of their decisions.
 - § A person's decision-making ability may evolve or fluctuate over time.
- 6.65 In Ireland, "interventions" must, among other things, "have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy

89. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 17(4).

90. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 107, rec 109.

91. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) rec 21.

92. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) rec 3-2.

and control over his or her financial affairs and property”. The guiding principles also provide that an “intervener”:

- § shall not attempt to obtain information that is not reasonably required for making a relevant decision
- § shall not use information other than for a relevant decision, and
- § shall take reasonable steps to ensure that information is kept secure from unauthorised access, use or disclosure and is safely disposed of when he or she believes it is no longer required.⁹³

Question 6.10: Duties and responsibilities of supporters and co-decision-makers

- (1) What duties and responsibilities should the law specify for formal supporters?
- (2) What duties and responsibilities should the law specify for formal co-decision-makers?
- (3) What duties and responsibilities should the law specifically exclude for formal supporters and formal co-decision-makers?

93. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(6)(b), s 8(10).

Appendix A

Preliminary submissions

PGA01	Maxwell Watts and Mareea Watts (15 February 2016)
PGA02	Lise Barry (23 February 2016)
PGA03	Dr John Carter (9 March 2016)
PGA04	Lina Sultana (10 March 2016)
PGA05	NSW Disability Network Forum (18 March 2016)
PGA06	[Confidential] (18 March 2016)
PGA07	Seniors Rights Service (18 March 2016)
PGA08	Mental Health Coordinating Council (18 March 2016)
PGA09	Bridgette Pace (19 March 2016)
PGA10	Council on the Ageing NSW (19 March 2016)
PGA11	Michael Cochran and Hilda Cochran (20 March 2016)
PGA12	Kellie Jefferson (20 March 2016)
PGA13	Legal Aid NSW (21 March 2016)
PGA14	Alzheimer's Australia NSW (21 March 2016)
PGA15	Supreme Court of NSW (21 March 2016)
PGA16	Medical Insurance Group Australia (MIGA) (21 March 2016)
PGA17	Carers NSW (21 March 2016)
PGA18	NSW Council for Intellectual Disability (21 March 2016)
PGA19	NSW Council for Civil Liberties (21 March 2016)
PGA20	Avant Mutual Group Limited (21 March 2016)
PGA21	Mental Health Review Tribunal (21 March 2016)
PGA22	BEING (21 March 2016)
PGA23	People with Disability Australia (21 March 2016)
PGA24	National Disability Services (21 March 2016)
PGA25	Peter Deane (21 March 2016)
PGA26	Disability Council NSW (21 March 2016)
PGA27	Jan Barham (21 March 2016)
PGA28	Department of Rehabilitation Medicine St Vincent's Hospital (21 March 2016)
PGA29	Vanessa Browne (21 March 2016)
PGA30	June Walker (21 March 2016)
PGA31	Bernhard Ripperger and Laura Joseph (28 March 2016)
PGA32	NSW Young Lawyers (29 March 2016)
PGA33	[Confidential] (29 March 2016)
PGA34	John Friedman (30 March 2016)
PGA35	Institute of Legal Executives (31 March 2016)
PGA36	[Confidential] (31 March 2016)
PGA37	Mary Lou Carter (1 April 2016)
PGA38	Our Voice Australia (1 April 2016)
PGA39	NSW Mental Health Commission (1 April 2016)
PGA40	The South Eastern Sydney Local Health District (SESLHD) Human Research Ethics Committee (HREC) (1 April 2016)

- PGA41** NSW Ombudsman Office (1 April 2016)
- PGA42** Nell Brown (3 April 2016)
- PGA43** Law Society of NSW (4 April 2016)
- PGA44** Intellectual Disability Rights Service (4 April 2016)
- PGA45** Craig Ward (1 April 2016)
- PGA46** [Confidential] (30 March 2016)
- PGA47** Australian Centre for Health Law Research (4 April 2016)
- PGA48** [Confidential] (4 April 2016)
- PGA49** NSW Health Commission (4 April 2016)
- PGA50** NSW Trustee and Guardian (7 April 2016)
- PGA51** Michael Murray (6 April 2016)
- PGA52** Australian Lawyers Alliance (8 April 2016)
- PGA53** Mental Health Carers Arafmi NSW Inc (18 April 2016)
- PGA54** NSW Family and Community Services (27 April 2016)



Justice
Law Reform
Commission

NSW Law Reform Commission
Level 3 Henry Deane Building
20 Lee Street
Sydney NSW 2000 Australia

GPO Box 31
Sydney NSW 2001 Australia

Phone: 02 8346 1284
Email: nsw_irc@agd.nsw.gov.au
Internet: www.lawreform.justice.nsw.gov.au

ISBN 978-1-922254-17-7