



## Review of the Guardianship Act 1987

### Question Paper 2

#### Decision Making Models

#### Question 5.1: Formal supported decision making

##### (1) Should NSW have a formal supported decision making model?

A person can experience partial or fluctuating capacity. The person may have the capacity, with support, to make some decisions but not others.

Currently the law recognizes one mechanism of substituted decision making. A substituted decision maker makes a decision on behalf of the person, considering the best interest, and although the substitute decision maker considers their wishes they can override them.

A supported decision maker means that the person has been supported to make the decision themselves. The assisted person continues to be the person with authority to make decisions (with support).

The Seniors Rights Service is aware that supported decision making commonly takes place with respect to older people and their families on an informal basis where the older person demonstrates a gradual decline in capacity. Where there is no conflict in the family these informal arrangements can work well. The difficulty arises where family conflict occurs.

The Seniors Rights service receives a large volume of calls of families in conflict over an older person in situations where they have lost capacity to make decisions and no support would assist. In such situations a substitute decision maker is required to act for the older person and referrals are made to the NSW Civil and Administrative Tribunal.

There may be avenue for a model for supported decision making to assist in situations where the older person still demonstrates a level of capacity to make decisions with support but is being frustrated without the ability to clearly select a support person to assist them and being overridden by conflict in the family. Providing a method of

appointing a support person would make it clear to family members and other third parties (financial and legal institutions) who the person has chosen to assist them with their affairs. A formal appointment may also assist the support person to access information to help the support person make decisions.

The support person should be there to gather information, discuss options, and communicate the decision on behalf of the person lacking capacity.

A formal support person may also be useful where an older person has capacity and could prevent exposure to manipulation by outside parties by appointing a formal trusted support person in advance.

*For example our service received a call. The caller advised her grandfather was receiving an in-home care package. The caller did not know the name of the provider. The grandfather had cleaning assistance once per fortnight. Recently, he had a change of worker and the new worker was assisting him with his tax returns, and accepting documentation and advising him. The caller states her grandfather was a friendly and compliant man, and she was concerned he may be being manipulated and exploited financially. The caller was advised to find out the name of the aged care provider and inform the manager the staff member is working outside her brief. She was also advised to contact the NSW Civil and Administrative Tribunal for further assistance.*

If the grandfather had a suitable support person in place to assist with dealings with the provider he may have had protection from this form of undue influence by having a trusted person in a supporting role with authority to deal with the provider.

**(2) If there were to be a formal supported decision making model, how can we ensure there is an appropriate balance between formal and informal arrangements?**

If a formal model of supported decision making were introduced it should not be mandatory but at the option of the older person..

It is important that the older person be able to make decisions informally with family / carer support where this is working well, and still have this acknowledged by health care professionals and financial institutions.

The ability to appoint a support person formally should be at the option of the older person, with the consent of the older person, and the older person should understand the nature of the appointment. The older person should be able to revoke the appointment at any time.

It should be possible that some training for the support person be provided so that the support person does not think they can embark on conduct to make the decision maker accept the decision the support person wants. The support person should be providing information, including pros and cons of all the options the decision maker has and could reasonably choose from.

**(3) If there were not to be a supported decision making model, are there any ways we could better recognize or promote informal supported decision making arrangements in NSW.**

There should be greater awareness and training for financial and legal institutions and health institutions about the nature of capacity and that it is a decision specific test. In this regard we refer to the Attorney General Tool Kit NSW. People should be aware in accordance with Article 12 of the UN Convention on the Rights of People with Disabilities that if a person can be supported to make their own decision, then that decision needs to be respected.

The informal supports of a person are often critical to the welfare of the person in maintaining their autonomy. If an older person asks to have a support person present this should be respected after speaking with the older person on their own to ensure they are not being threatened or unduly influenced.

It could be legislated guidelines for dealing with older people of fluctuating capacity such as incorporation of the Australian Law Reform Commission National Decision Making Principals Proposals 3.1 to 3.9 into legislation.

**Question 5.2 Key Features of a Formal Supported Decision Making Model**

**(1) Should NSW have formal supporters?**

It is important such appointments are optional and that where an older person relies on informal supports and chooses not to make a formal appointment, these informal supports continue to be recognized and respected.

**(2) Is so, should NSW permit personal or tribunal appointments, or both?**

*Scope to Consider Supported Decision Making Order*

In Guardianship matters, when an application is brought before the Tribunal for a substitute decision maker, the Tribunal could first investigate whether a supported

decision making order is appropriate. The older person may have some capacity to make decisions but this is blurred by family conflict.

The older person would need to have a person that they trusted who they wanted to fulfill this role.

The Tribunal would require medical evidence on the capacity of the person to make decisions in certain areas. In such situations a Supported Decision Making Order may be appropriate with conditions in areas of decision making..

### Medical Evidence

There would need to be evidence before the Tribunal as to the types of decisions that the person had the capacity to make, with support. This would be required so that the Tribunal could specify in any order the areas of decision making that would be covered by the support agreement. Presumably the onus would be on the older person and support person to obtain the detailed medical report from the geriatrician or neuropsychologist as to areas of decision making to be covered.

### **(3) Should NSW have formal co-decision makers?**

A co-decision maker involves appointing someone jointly to make decisions with a person with impaired decision making ability. The appointment of a co-decision maker is more restrictive than the appointment of a supporter. Under a co-decision making arrangement, the person loses some autonomy because they must make decisions about particular matters jointly with a co-decision maker. A decision made by the person alone is not legally valid. This is the description of co-decision making provided by the Victorian Law Reform Commission.

The Seniors Rights Service is of the view that the implementation of co-decision making may not be appropriate as it could lead to problems in application.

- How would you be able to check that the person was being involved in the decision making and that it was not a substitute decision that was being made?

You would not be able to check with the older person as according to the definition of co-decision making they have insufficient capacity to make a legally valid decision on their own.

- How would you protect the older person from abuse and undue influence by a co-decision maker?

- What if the co-decision maker began to unduly influence the older person due to conflict in the family?
- What would be the guiding principles to guide a co-decision maker as to what they can do to aid in decision making whilst not taking away the older persons involvement?
- The concepts of co-decision making for people lacking capacity may be difficult for lay persons to understand.
- What measure of involvement is required by the older person in a decision before it becomes a substituted decision on behalf of the older person?

It is submitted that allowing a person to make their own decision where they have capacity to do so, with support, be the first approach. Substitute decision making orders be a last resort and only where necessary.

**(4) If so, should NSW permit personal or tribunal appointments, or both?**

We refer to our comments above in relation to co-decision making arrangements. We would not recommend implementation of formal co-decision making arrangements by appointment or the Tribunal for the reasons set out above.

**(5) What arrangements should be made for the registration of appointments?**

A register would be of assistance in that family members, health professionals, legal and financial institutions could ascertain the valid appointment of the support person and if the appointment had been revoked.

We note the observations of the Intellectual Disability Rights Legal Centre cautioning against formalizing a supporters role (at page 30 of the Question Paper).

*“...there is a concern a formal framework could:*

- *Over-formalize support arrangements that are already working well*
- *Impose onerous duties on informal supporters who may be reluctant to continue providing decision making support*
- *Make people who are being supported lose control of the process because the law is too prescriptive.*

We reiterate, it should not be a mandatory requirement for an older person to make a formal appointment if they have informal supports in place that are working well for them.

### **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.**

We support the UN Convention on the Rights of Persons with Disabilities, Article 12, to provide people with disability “the support they may require in exercising their legal capacity”.

It is important that older persons with diminished or fluctuating capacity, who rely on informal supports to make decisions in accordance with their will and preference, be allowed to continue to do so. It is their decision and they are able to own the decision with the requisite supports in place.

However, we also agree with the view of the Australian Government that in some situations there will be a need for substitute decision making. They made the observation in relation to the UN Committees interpretation of Article 12 that

*“There are some 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”.*

It is our view in such situations there is a need for a substitute decision maker.

#### **(2) If so, in what situations should substitute decision making be available?**

We support the reasons set out by Seniors Rights Service, Alzheimers Australia and Intellectual Disability Rights Service as to when substitute decision making arrangements may be preferable over supported decision making arrangements. We list these as follows (at pg 34 of the Question Paper):

- *Where the person is incapable of understanding the full nature and consequences of their decisions;*
- *Where the person does not have the capacity to articulate their wishes;*

- *Where the person has not trusted support person and wants a substitute decision maker appointed*
- *Where there are likely risks or real evidence of financial loss, harm, neglect, overprotection or exploitation under a supported decision making model;*
- *Where urgent action is needed because a person's own decisions or the influence of others puts their safety and wellbeing at imminent risk*

We support the *Australian Law Reform Commission Report Equality Capacity and Disability in Commonwealth Laws* that substitute decision making is option of last resort and location of suitable supports is examined as a first option. The order should be limited in scope and subject to review.

There are many examples that come to the attention of our service through our telephone advice line indicating the necessity for a person to have a substitute decision making appointment due to the lack of the capacity of the person to participate in decision making concerning themselves, and abandonment or conflict in the family.

*A caller had an aunt aged 83 living at home. The aunt had an ACAT assessment in 2015 and was diagnosed with dementia. Her dementia had deteriorated. The aunt had a son in country NSW who no longer visited the aunt. The community nurse had raised concerns about her being vulnerable to exploitation, and not having access to her own funds in the future. The caller was referred to the Guardianship Division of the NSW Civil and Administrative Tribunal for advice about alternative decision making.*

If a substitute decision making model is adopted there is a preference for a national model to avoid the implementation of the law on a piecemeal basis between states. The following example illustrates the problems associated with state based legislation.

*A man called from Queensland. His mother was in an acute hospital in NSW. The mother had diminished capacity but medical staff would not provide the man with any medical information. There was no power of attorney or guardian in place. The mother's other two sons also lived in other states. The man arranged to move his mother to an aged care home close to him and his family in Queensland. He paid \$6,000 to fly mother from outer Sydney to Townsville. SRS discussed the matter with NCAT and QCAT but neither could assist at the time because the mother and the son were in different states.*

- (3) Should the legislation specify what factors the Court or Tribunal should consider before appointing a substitute decision- maker and, if so, what those factors should be?**

*Substitute Decision Making – Guardianship Orders*

The current factors assessed by the Guardianship Division of NCAT for a guardianship order are to determine (a) if the person has a disability as defined under section 3 of the Guardianship Act 1987 (b) the person is in need of a guardian (c) who should be appointed the guardian in the person’s best interest.

Section 3 relates to a determination, on medical evidence, that a person lacks the mental capacity to make decisions about accommodation and lifestyle, and understand the consequences of those choices. Alternatively, the person could have mental capacity but lack the physical capacity to remain at home, even with services in place, without being at risk of harm.

The test if the person is in “need” of a guardian involves an examination of the informal supports in place and whether they are sufficient in assisting the older person to protect their welfare and wishes. If so, an order is not made.

The Tribunal will only make an order in relation to those functions that are needed. The functions include accommodation, health care, personal services, medical and dental, advocacy, access, coercive functions. It is rare that a plenary order is made.

Pursuant to section 17 of the Guardianship Act 1987 it provides:

- (1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:*
- (a) The personality of the proposed guardian is generally compatible with the person under guardianship,*
  - (b) There is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and*
  - (c) The proposed guardian is both willing and able to exercise the functions incurred or imposed by the proposed guardianship order.*



We are of the view that these are suitable considerations for a Guardianship Order as they are consistent with the view that a guardian be appointed as a last resort.

#### Substitute Decision Making – Financial Managers

We recommend that similar considerations to those in section 17 of the Guardianship Act 1987 also be required to be considered by the Tribunal in the appointment of a private manager under a financial management order.

#### **Question 5.4 Other Issues**

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

Training would need to be provided to support persons who were there to help the older person make their own decision. As capacity can diminish and fluctuate over time there may come a time where the older person is less capable of making certain decisions. This would need to be identified by the support person as they would not be able to substitute their own decision and the role of substitute decision maker commence either by previous power of attorney or guardianship appointment or by order.

#### **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?**

The older person should have capacity to understand the appointment of a supporter and be free of undue influence or coercion. The appointment should have similar formal and witness requirements to other forms of planning ahead appointments to ensure the person understands the appointment.

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

We support Recommendation 35 of the Victoria Law Reform Report.

It states

*VCAT should be able to appoint a personal or financial supporter to assist a person if:*

- (a) The person's ability to make or implement decisions about the matters referred to in the order is impaired in some way*
- (b) The person would be assisted to make decisions about the matters referred to in the order if provided with appropriate guidance and support from one or more supporters*
- (c) The person is unable to make the appointment themselves*
- (d) There is a need for an appointment to be made*
- (e) The proposed supporter is suitable to act in the role and consents to the appointment*
- (f) The person freely and voluntarily consents to:*
  - (a) The appointment of individuals who are proposed to be appointed as a supporter*
  - (b) All other aspects of the order*
- (g) The appointment of the supporter/s will promote the personal and social wellbeing of the person.*

## **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?**

If a supporter is to be appointed by the Tribunal, we support the requirements for supporters set out by the Victorian Law Reform Report Recommendation 36. It states:

*In determining whether a person is suitable to act in the role of supporter, VCAT must take into account:*

- (a) The wishes of the person;*
- (b) The desirability of preserving existing family relationships, and other relationships of importance to the person,*
- (c) The nature of the relationship between the person and proposed supporter, and in particular whether the relationship is characterized by **trust**,*
- (d) The ability and availability of the proposed supporter to assist the person to make decisions about matters referred to in the order*
- (e) Whether the proposed supporter will act honestly, diligently and in good faith and in performance of their role,*
- (f) Whether the proposed supporter has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts.*

**Question 6.3 Characteristics that should exclude potential appointees.**

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

We support the view that the following persons should not be supporters:

- Persons convicted of certain criminal offences;
- Bankrupts;
- Persons who work at a facility where the person lives;
- A person who has acted as a supporter and the Court determines they should not continue
- Person acting as a supporter as persons spouse and the relationship has ended;
- The Public advocate.

The primary importance is that there is a relationship of trust. It may be possible to trial a volunteer program under the supervision of the Public Advocate for those person who have no close family and friends.

**Question 6.4 What limits, if any, should there be on the number of supporters or co-decision makers that can be appointed?**

This would depend on the older person's individual circumstances but the more decision makers involved the more confusing in may become for the older person. Perhaps one or two would be prudent in the circumstances.

**Question 6.5 Public Agencies as supporters and co-decision makers.**

**(1) What are the advantages and disadvantages of allowing public agencies to be appointed as supporters and co-decision makers?**

Public Agencies such as the Public Advocate are professionals and not engaged in close personal relationships with the older person to be supported. This would be a disadvantage in having a Public Agency as a support person.

**In what circumstances should public agencies be able to act as supporters and co-decision makers?**

The Agency could provide guidance and assistance to the support person.

The Agency could also operate an advocacy program to provide support persons to those people who do not have trusted family members and friends.

We support view a support person should not receive direct financial remuneration for performing their role.

**Question 6.6 Paid workers and organizations 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?**

Allowing advocacy groups to act as supporters has the advantage of there being an increased availability of persons willing to provide support to an older person.

These persons would only be indirectly remunerated for providing a support service to the older person rather than directly remunerated.

This disadvantage of these persons over a family member or carer is that they may not have as intimate a knowledge of the older person's needs and history of the older person.

**(2) In what circumstances should paid care workers be appointed as supporters or co-decision makers?**

These appointments should be a last resort, where there are no other persons which the older person trusts to be a support person.

**(3) What are the advantages or disadvantages of allowing professional organizations to be appointed as either supporters or co-decision makers?**

We support the Victorian Law Reform Commission's view that professional advocates that are paid for performing this role are not suitable as supported decision makers. Supporter arrangements are designed for close personal relationships rather than professional appointments.

**(4) In what circumstances should professional organizations be appointed as supporters or co-decision makers?**

We refer to our comments above.

## **Question 6.7 Volunteers as Supporters and Co-Decision makers**

### **(1) What could be the advantage and disadvantage of appointing community volunteers as supporters?**

Allowing community groups to act as supporters has the advantage of there being an increased availability of persons willing to provide support to an older person.

This disadvantage of these persons over a family member or carer is that they may not have as intimate a knowledge of the older person's needs and history of the older person. There would need to be reviews in place by organizations such as the Public Guardian for such supported persons to protect them from potential abuse.

In some circumstances a community advocate as a support person may be more appropriate as an independent advocate for the older person where there is no-one available in the family. This is illustrated in the following example.

*A woman and her daughter arrived at an aged care home intending to take a 100 year old resident home. The care manager stepped in to support the woman who had capacity, and who was stating she did not wish to leave. The manager threatened to call the police. An advocate was on site and also spoke to the older woman who felt manipulated and confused by other parties, saying her family never visit, and the aged care home staff only "bring her down stairs to show her off because she is 100 years old".*

### **(2) What could be the advantage and disadvantage of appointing community volunteers as co-decision makers?**

We do not support co-decision making at this time for reasons set out earlier in this submission.

### **(3) In what circumstances do you think community volunteers should be appointed as supporters or co-decision makers?**

These appointments should be a last resort, where there are no other persons which the older person trusts to be a support person.

### **Question 6.8 Powers and functions of supporters**

#### **(1) What powers and functions should the law specify for formal supporters?**

We support powers that would support the older person to make the decision but not substitute the decision for them. We refer to Recommendation 43 of the Victorian Law Reform Commission. It recommends the following powers of supporters

*43 A supported decision making appointment or order should authorize a supporter to exercise some or all of the following powers in relation to a decision:*

- (a) The power to access, collect, or obtain or assist the supported person in accessing, collecting or obtaining from any person any relevant information to assist the supported person understand the information;*
- (b) The power to discuss the relevant information with the supported person in a way the person can understand and that will assist the person making a decision;*
- (c) The power to communicate or assist the supported person in communicating decisions to other people, and advocate for the implementation of the person's decision where necessary,*
- (d) The appointment or order specifies which of these powers the supporter is to exercise.*

#### **(2) What powers or functions should the law specifically exclude for formal supporters?**

In relation to powers that should be specifically excluded it should be clear that the supported person is not to make a substitute decision. In order to prevent abuse of the position it may be considered prudent to impose restrictions on the level of significant financial transactions an older person can enter into with the assistance of a supported person. For example, in relation to these decisions the older person must be able to decide for themselves and communicate for themselves whether they want to enter those transactions, and demonstrate an understanding of those transactions. Otherwise a substitute decision maker may be necessary for more complicated and significant financial transactions.

We refer in this regard to the powers excluded in Recommendation 45 of the Victorian Law Reform Commission Report:

*45. To avoid doubt, the law should specify that:*

*(a) A supporter is not authorized to make decisions on behalf of the supported person, and may not exercise their authority without the knowledge and consent of the person.*

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

*(c) The power to communicate decisions under a support agreement should not authorize the supporter to enter into significant financial transactions, including:*

*(i) investing for the supported person*

*(ii) continuing the investments of the supported person, including taking up rights to issue of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding,*

*(iii) signing any documents that have legal effect.*

### **Question 6.9 Powers and functions of co-decision makers**

#### **(1) What powers and functions should the law specify for formal co-decision makers?**

We do not support co-decision making at this time for reasons set out earlier in this submission.

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

We do not support co-decision making at this time for reasons set out earlier in this submission.

### **Question 6.10 Duties and Responsibilities of Supporters and Co-Decision makers**

#### **(1) What duties and responsibilities should the law specify for formal supporters?**

We support the responsibilities of supporters set out in the Victorian Law Reform Commission Report Recommendation 47.

Supporters should be required to:

*(a) Assist the supported person to make the decisions specified in the appointment or order*

*(b) Act honestly diligently and in good faith*

*(c) Act within the limits of the appointment, comply with any conditions, limitations or requirements set out in the appointment or order,*

- (d) *Identify and respond to situations where the supporters interest conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, seek external advice where necessary,*
- (e) *Respect the confidentiality and privacy of the supporter person by:*
  - (h) *Only collecting personal information about the supported person in their capacity as supporter to the extent that it is relevant to and necessary for carrying out the supporters role*
  - (i) *Only disclosing such information:*
    - *With the supported persons consent*
    - *For a purpose that is relevant to and necessary for carrying out the supporters role or*
    - *For the purpose of any legal proceedings arising out of the Act or any report of such proceedings*
    - *With any other lawful excuse.*

**(2) What duties and responsibilities should the law specify for formal co-decision makers?**

We do not support co-decision making at this time for reasons set out earlier in this submission

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

We endorse Recommendation 48 of the Victorian Law Reform Commission Report that the law require that supporters should not:

- (a) *Not use their authority to assist the supported person to conduct illegal activity*
- (b) *Not coerce, intimidate or in any way unduly influence the supported person into a particular course of action.*

Applications could be made by persons concerned with the welfare of the supported person to the NSW Civil and Administrative Tribunal to review the appointments if it were suspected that such orders and appointments were being abused. Supported decision making orders could be reviewed automatically every 12 months then every 3 years by motion of the Tribunal.