

## SEISMIC SHIFTS – RECONFIGURING ‘CAPACITY’ IN LAW AND THE CHALLENGES OF ARTICLE 12 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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Internationally, the idea of ‘capacity’ has been shaken up and tossed around, and it is a process that is continuing. Medical and legal ideas have been unpicked and interrogated through the lens of human rights. The Hippocratic oath and law’s pragmatic transactional focus have locked horns in an intellectual battle in which the prize is a model of dignity and equality for those whose ability to make decisions is questioned.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) of 2007 signalled a turning a point in terms of international commitment markers.<sup>1</sup> Its definition of disability was a wide one, including ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’ It reflects a social approach to disability, requiring a policy focus on the person and their ability, with the support they require to interact with society and their environment; placing the policy emphasis not on ‘impairment’ but on ‘support’. Article 12, ‘Equal recognition before the law’, represents the pole star in this area for legal policy makers and those engaged in intellectual discourse around the concepts of agency and capacity. Article 12, moreover, underpins the ability of persons with disability to achieve many of the other rights in the Convention. In countries with an ageing population like Australia and the United Kingdom,<sup>2</sup> and the increase in the presentation of cognitive impairment and other disabilities that may accompany it,<sup>3</sup> Article 12 will be of increasing significance in the fields of elder law and policy.

By ratifying the CRPD, state signatories accepted the obligations to recognise that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life, and to take appropriate measures to provide persons with disability access to the support they may require in exercising their legal capacity. While implementation is clearly a multifaceted challenge, particularly in countries where a federal system splits responsibilities between the federal government and the governments of its states or provinces, a document like the CRPD both reflects and propels shifts in thinking.

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

<sup>2</sup> Australia: see, eg, Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia’s Older People?* Cat No 2071.0 (2012). UK: see, eg, <https://21stcenturychallenges.org/britains-greying-population/>. Global data: World Economic Forum, *Global Agenda Council on Ageing Society, Global Population Ageing: Peril or Promise?* (2011), 5.

<sup>3</sup> The number of older persons with disability as a proportion of the total number of persons with disability is likely to increase with population ageing: see, eg, in relation to Australia, Australian Institute of Health and Welfare, *Australia’s Welfare 2011* (2011), 11.

And the CRPD did reflect shifts in thinking; a paradigm shift from a model that was expressed in terms of 'best interests' to one that seeks to give expression to the 'will and preferences' of a person and which moves from an approach of substituted decision-making to supported decision-making. This model finds its practical voice in contexts such as 'deputyship' or 'guardianship', as it was historically known, and other situations involving assistance in or the making of decisions for others.

In July 2013, the Australian Law Reform Commission (ALRC) was given Terms of Reference to consider the recognition of people with disability before the law and their exercise of legal capacity on an equal basis. It resulted in the report, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014). In leading this important inquiry I came to it as an academic lawyer and as a legal historian.<sup>4</sup>

My background was in succession and property law and I was very familiar with law's approach to capacity questions; ones that arise usually in retrospect when a transaction – such as a contract or a will – is challenged or sought to be undone on the basis of a lack of legal capacity. Law manages such matters in a functional way. Capacity is considered as fluctuating and calibrated to the transaction in hand. This is certainly how testamentary capacity is tested, in which the leading case involved someone who had been committed to a 'lunatic asylum'.<sup>5</sup> The decision about his capacity to make a will was a legal one, not a medical one.<sup>6</sup> Mr Banks was institutionalised because of his mental health issues. He was diagnosed as having paranoid schizophrenia because of delusions, believing that devils or evil spirits were chasing him and that Featherstone Alexander was pursuing him, notwithstanding that he was dead. Banks was considered to be 'insane'. However, he managed his financial affairs, his testamentary plans were sensible ones, and his delusions were considered irrelevant to his scheme of testamentary disposition. His 'mental disease' was not considered as affecting his testamentary capacity. His will stood.

Legal capacity sets the threshold for individuals to take certain actions that have legal consequences. For example, a range of transactions may involve an age threshold as a benchmark of when a person is regarded as being able to act independently and with binding effect – to have legal *agency* to make 'legally effective choices'.<sup>7</sup> Legal capacity goes to the validity – in law – of choices and being

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<sup>4</sup> I was assisted wonderfully by Graeme Innes, then Disability Discrimination Commissioner, who was given an additional 'hat' as a part time Commissioner of the ALRC.

<sup>5</sup> *Banks v Goodfellow* (1870) LR 5 QB 549.

<sup>6</sup> The presumption of capacity arises if the will is rational on its face and is duly executed. See, eg, Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) ch 2. This was expressed in the legal maxim '*omnia praesumuntur rite et somemniter esse acta*': all acts are presumed to have been done rightly and regularly.

<sup>7</sup> Terry Carney and David Tait, *The Adult Guardianship Experiment—Tribunals and Popular Justice* (Federation Press, 1997) 3. With respect to the idea of legal agency, see: Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 24; Bernadette McSherry, 'Legal Capacity Under the Convention on the Rights of Persons with Disabilities' (2012) 22 *Legal Issues* 23 and (2012) 20 *Journal of Legal Medicine* 22. The right to recognition as a legal agent is also reflected in art 12(5) CRPD, which outlines the duty of States Parties to 'take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit and shall ensure that

accountable for the choices made. ‘Those who make the choice’, Emeritus Professor Carney states, ‘should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent.’<sup>8</sup>

As the law generally approaches these questions retrospectively, it starts with a *presumption* of capacity; a challenge on the basis of a lack of capacity (in the sense of agency) is brought to rebut the presumption of legal capacity, as in the example of John Banks’ will. The common law – including doctrines of equity – also includes protective doctrines for vulnerable people, such as the doctrines concerning undue influence and unconscionable transactions.<sup>9</sup> Where a lack of the required level of understanding is proved in the particular circumstances, the transaction may be set aside. Such doctrines focus on a transaction and the circumstances surrounding it. They are decision-specific and involve assessments of understanding relevant to the transaction being challenged – a functional approach. As a lawyer, this appeared respectful and based on the premise of autonomy. The common law presumption of capacity has, after all, been described as ‘the law’s endorsement of autonomy’.<sup>10</sup>

But in leading the ALRC inquiry on capacity, my eyes were opened. We had to *start* somewhere else.<sup>11</sup> If you start from a presumption, you separate people; between those *with* capacity and those *without*. For in every presumption lies the possibility of rebuttal. It is a binary model, and for those with lived experience of disability it is deeply troubling. What the idea of equality means to people with disability is *not* a definition of capacity based on a presumption. The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) emphasised that the idea of equality reflected in Article 12 is essentially about the exercise of human rights: ‘[e]quality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights’.<sup>12</sup>

Legal capacity is clearly a different concept from ‘mental capacity’ and should not be confused with it.<sup>13</sup> The UNCRPD commented that the Convention ‘does not permit perceived or actual deficits in mental capacity to be used as justification for denying legal capacity’.<sup>14</sup> This reflects two concerns: first, that legal capacity should not simply be *equated* with mental capacity; secondly, that people with cognitive

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persons with disabilities are not arbitrarily deprived of their property’: United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [11].

<sup>8</sup> Ibid.

<sup>9</sup> See, eg, Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 14.

<sup>10</sup> Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 93.

<sup>11</sup> The starting point we concluded upon was expressed as the first of the ‘National Decision-Making Principles’: ‘All Adults have an equal right to make decisions that affect their lives and to have those decisions respected’. That is, we started with the *right*, not the rebuttable presumption.

<sup>12</sup> United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [1].

<sup>13</sup> See, eg, the distinction between medical and legal perspectives in Terry Carney, ‘Guardianship, “Social” Citizenship and Theorising Substitute Decision-Making Law’ in Israel Doron and Ann M Soden (eds), *Beyond Elder Law* (Springer, 2012) 1.

<sup>14</sup> United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [12].

impairment should not be assumed to have limited legal capacity, in the sense of being able to exercise legal agency. What is clearly not appropriate in the context of the CRPD is a disqualification or limitation on the exercise of legal capacity *because of* a particular status, such as disability, or, like John Banks, because of a particular mental health condition. The approach should therefore be on the support needed to exercise legal agency, rather than an assumption or conclusion that legal agency is lacking because of an impairment of some kind, whether physical or mental.

In adopting an approach that shifted away from ‘substitute decision-making’ to ‘supported decision-making’, the ALRC report embraced the paradigm shift embodied in the CRPD. There is an important distinction between them but it is also the point about which most confusion has arisen. There is an evident tension in the way that the labels of ‘supported decision-making’ and ‘substitute decision-making’ are used; the discourse around Article 12, including the submissions made to the UNCRPD in response to its draft General Comment on Article 12 in 2013,<sup>15</sup> has exacerbated this tension.<sup>16</sup>

Any discussion about substitute decision-making needs to distinguish two separate issues: the first is the *appointment* of a person to act on behalf of another and the scope of the person’s powers; the second is the *standard* by which that appointee is to act. They are entirely separate points but are often confused. The appointee may be chosen by the person themselves, for example through instruments such as enduring powers of attorney, or by a court or tribunal, in the appointment of a guardian, deputy or financial administrator. The standard is the test by which any decision-making by the appointee is to occur. The danger in analytical terms is to condemn the appointment of a person to act on behalf of another simply by virtue of the appointment, presupposing that the appointee will not act in a way that places the individual at the centre of the decision-making process.

Decision-making support has a long history, conventionally summarised in the evolution and development of guardianship regimes.<sup>17</sup> Traditional guardianship laws have been described as exceedingly paternalistic,<sup>18</sup> protecting the estate of the person under protection, and not promoting their autonomy, especially where plenary forms were used involving a complete vesting of authority in another person. The

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<sup>15</sup> United Nations Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law*, 2013. The submissions in response are at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>. The final General Comments No 1 and No 2 were adopted by the UNCRPD on 11 April 2014.

<sup>16</sup> General Comments are provided by way of guidance and are different from legally binding obligations as reflected in the CRPD itself. The Rules of Procedure of the UNCRPD provide that it may prepare General Comments ‘with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations’: UNCRPD, *Rules of Procedure* (5 June 2014) r 47.

<sup>17</sup> For the history of guardianship, see, eg: William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, 292–294; Terry Carney, ‘Civil and Social Guardianship for Intellectually Handicapped People’ (1981) 8 *Monash UL Rev.* 199; John Seymour, ‘Parens Patriae and Wardship Powers: Their Nature and Origins’ [1994] *Oxford Journal of Legal Studies* 159; Sarah Burningham, ‘Developments in Canadian Adult Guardianship and Co-Decision-Making Law’ (2009) 18 *Dalhousie J. Legal Stud.* 119; Shih-Ning Then, ‘Evolution and Innovation in Guardianship Laws: Assisted Decision-Making’ (2013) 35 *Sydney Law Review* 133.

<sup>18</sup> Eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [6.95]–[6.96].

disability rights movement of the 1960s led to increasing pressure to move away from such models, championing a social rather than a medical model of disability.<sup>19</sup>

Such efforts sought to limit the *scope* of appointment of substitute decision-makers, such as guardians, to achieve the ‘least restrictive option’. But they also focused on the standard by which the appointee was to act: ‘best interests’ standards were ones that preceded, and were to be contrasted with a ‘substituted judgment’ approach. The ‘best interests’ principle was seen to reflect the idea of ‘beneficence’; a dominant theme in medical ethics in which the ‘primary imperatives were for doing good for the patient, the avoidance of harm and the protection of life’.<sup>20</sup> A ‘best interests’ standard ‘requires a determination to be made by applying an objective test as to what would be in the person’s best interests’. A ‘substituted judgment’ standard, in contrast, is ‘what the person would have wanted’,<sup>21</sup> based, for example, on past preferences. Substitute decision-making can therefore apply in two broadly different ways: one involves an objective ‘best interests’ standard and the other involves a focus on what the person wants or would have wanted (‘substituted judgment’).<sup>22</sup>

Even in a reformed context of being committed to advancing individuals’ rights, however, ‘best interests’ standards were still retained in language and in form. ‘Best interests’ and the person’s wishes are both used – a combination of subjective and objective.

For example, the Mental Capacity Act 2005 (UK) s 4(6) requires a person making a determination of ‘best interests’ to consider, ‘so far as is reasonably ascertainable’:

- (a) the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.<sup>23</sup>

In addition, s 4(7) requires the decision-maker to take into account, ‘if it is practicable and appropriate to consult them’, the views of:

- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
- (b) anyone engaged in caring for the person or interested in his welfare,
- (c) any donee of a lasting power of attorney granted by the person, and
- (d) any deputy appointed for the person by the court,
- (e) as to what would be in the person’s best interests and, in particular as to the matters mentioned in subsection (6).

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<sup>19</sup> *Ibid* [2.8]

<sup>20</sup> Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 11. Donnelly refers to the Hippocratic Oath.

<sup>21</sup> Explanatory Notes, *Mental Capacity Act 2005* (UK) [28].

<sup>22</sup> The latter approach was the one advocated by the ALRC. The ‘best interests’ approach was also rejected by the Scottish Law Commission in its Report 151, *Incapable Adults*, 1995 [2.50]. See Adrian D Ward in ‘Abolition of Guardianship? “Best interests” versus “best interpretation”’ (2015) *Scots Law Times*.

<sup>23</sup> A similar model is included, for example, in the Mental Health Act 2014 (WA), pt 2 div 3, ‘Best interests of a person’.

Of such a hybrid standard, Dr Mary Donnelly writes that it ‘attempts to mitigate the consequences of a loss of capacity while staying within a best interests framework’.<sup>24</sup> The overall question is an objective one, but it is informed by past and present wishes and the opinion of others as to what would be in the person’s best interests. In its application it appears that the UK section is being applied more towards the subjective than the objective, using the decision in *Aintree University Hospital NHS Foundation Trust v James* as the illustration and the comments of Lady Hale that the purpose of the best interests test in the 2005 Act is ‘to consider matters from the patient’s point of view’.<sup>25</sup>

By the second decade of the 21st century, the approach being advocated was described as ‘supported decision-making’, placing the person who is being supported at the front of the decision-making process. The decision is *theirs*. Supported decision-making emphasises the ability of a person to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. It focuses on what the person *wants*.

As our exploration of the literature revealed, however, in the context of developing – and championing – ‘supported decision-making’, ‘substitute’ has often been equated with ‘guardianship’, and both are assumed to represent a standard that is not consistent with the rights of persons with disability. The fact that someone is appointed as a substitute becomes problematic of itself, rather than focusing upon *how* the substitute is to act. Interwoven in the discussion about ‘substitute’ and ‘supported’ decision-making is therefore a lack of conceptual clarity about the role that a person’s wishes and preferences play when another acts for them as a ‘substitute’ decision-maker; and the role that a ‘supporter’ plays in assisting a person to make decisions.

Conceptual confusion is also exacerbated when models use ‘best interests’ language, but are expressed in terms of giving priority to the person’s wishes and preferences, such as in the Mental Capacity Act 2005 (UK). Given the tensions around the usage and understanding about ‘substitute’ decision-making – and the blurring between ‘substituted judgment’ and ‘substitute decision-making’ – we concluded that it was preferable to move away from this language altogether. The terms we recommended were ‘supporter’ and ‘representative’ and they were articulated in a model focused on Commonwealth decision-making. Indeed, given how loaded and conflicted the language and discourse is in some respects, we advocated what I described as a ‘new lexicon’.<sup>26</sup>

The next challenge for signatories to the CRPD is to translate the UNCRPD’s conclusions in relation to Article 12 into their review of their guardianship and

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<sup>24</sup> Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 203. This approach, she writes, is ‘not without difficulties’.

<sup>25</sup> [2013] UKSC 67. A more recent legislative example is the *Assisted Decision-Making (Capacity) Act 2015* (Ireland), which does not use ‘best interests’ language at all.

<sup>26</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014) [1.8]. It is interesting to note that the language of ‘decision-making representatives’ has been adopted in the *Assisted Decision-Making (Capacity) Act 2015* (Ireland).

deputyship laws. While the General Comment about Article 12 was prompted by what the UNCRPD described as ‘a general misunderstanding of the exact scope of the obligations of States Parties under Article 12’,<sup>27</sup> the hardening of the position between the draft and final versions of the General Comment is quite confronting.<sup>28</sup> The UNCRPD suggested that substitute decision-making regimes should be abolished and replaced by supported decision-making regimes and the development of supported decision-making alternatives. Most importantly, the Committee commented that ‘[t]he development of supported decision-making systems in parallel with the retention of substitute decision-making regimes *is not sufficient to comply with Article 12*’.<sup>29</sup> What is required is ‘*both* the abolition of substitute decision-making regimes and the development of supported decision-making alternatives’.<sup>30</sup> This may not sit entirely comfortably where States Parties are committed to reforming their guardianship laws towards supported decision-making models, but still see the need for the appointment of a substitute decision-maker in certain cases as a matter of last resort.

And how is Article 12(4) to be reconciled with this approach? It provides that:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

The requirements of safeguards that ‘respect the rights, will and preferences’ of the person, and that they be ‘proportional’, ‘tailored to the person’s circumstances’, ‘apply for the shortest time possible’ and are subject to ‘regular review’ seem implicitly to acknowledge measures that may be regarded as ‘substitute’ models. We concluded that, while substitute decision-making models that reflect the constraints identified in Article 12(4) may technically *not* be contrary to the CRPD, ‘[t]here is still considerable debate over the significance of the [CRPD] for guardianship’.<sup>31</sup> The burning question is whether ‘guardianship’/‘deputyship’ is compatible with the CRPD? Or is it rather a question of *what kind of guardianship* (or whatever other label is used) is incompatible with it? Namely, is it only guardianship where decisions are made without reference to the wishes and preferences of the person under protection?

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<sup>27</sup> United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [3].

<sup>28</sup> This was also pointed out by Adrian D Ward ‘Abolition of Guardianship? “Best interests” versus “best interpretation”’ (2015) *Scots Law Times*

<sup>29</sup> *Ibid* [24]. Emphasis added.

<sup>30</sup> *Ibid*. Emphasis added.

<sup>31</sup> John Chesterman ‘The Future of Adult Guardianship in Federal Australia’ (2013) 66 *Australian Social Work* 26, 31. See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014) [2.8].

Australia expressed concern that the draft General Comment was characterising the entirety of Article 12 'in absolute terms',<sup>32</sup> although Article 12 itself is not expressed in this fashion:

Australia considers that while it is important that the legal capacity of persons with disabilities is respected to the fullest extent possible, there are circumstances in which substituted decision-making may be the only available option. Australia considers that guidance from the Committee on the most human rights compatible approach in situations where a person does not have, either temporarily or permanently, the capacity to make or communicate a decision, would be useful to States Parties.<sup>33</sup>

Australia argued that, in a number of respects, the draft General Comment sought to extend the scope of Article 12 beyond that of existing expressions of both equality before the law and 'legal capacity' in international human rights law. It stated that the most significant example of this is 'the characterisation of Article 12 as requiring supported decision-making and not permitting substituted decision-making in any circumstances':

The statement that there are no circumstances permissible in which a person may be deprived of the right to recognition as a person before the law, or to have this right limited, relates to article 16 of the ICCPR, rather than article 12 of the Convention. The ICCPR provides for this in article 4(2), which states that no derogation from that right is permissible even in times of public emergency. The Convention does not contain a similar provision. However, Australia accepts that this is applicable in relation to article 12(1).<sup>34</sup>

Australia reiterated that it did not consider Article 12 required the abolition of all substitute decision-making regimes and mechanisms.<sup>35</sup> Other States Parties expressed similar concerns with the language of the draft General Comment.<sup>36</sup> A joint submission from the Equality and Human Rights Commission, the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission observed, for example:

This absolutist approach appears to base the minimum acceptable standard on the maximum desired conduct, rather than taking a more pragmatic approach which reflects the state of *opinio juris*, the complexity of the issues and the emerging nature of supportive decision making regimes.

The draft does not, for example, appear to give consideration to the changes that have been made in a significant number of countries to develop a human rights-based approach to legal capacity that provide a range of measures, beginning with the presumption of capacity, and are tailored to individual capabilities and needs.

While stating an absolutist position, the draft offers little in terms of guidance as to how it should be observed, including in difficult cases.<sup>37</sup>

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<sup>32</sup> Australian Government, Submission to the UN Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law*, 2014, [13].

<sup>33</sup> *Ibid* [16].

<sup>34</sup> *Ibid* [21].

<sup>35</sup> *Ibid* [24].

<sup>36</sup> See submissions to the UNCRPD on the draft General Comment from, eg, Denmark, New Zealand and Norway: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>.

<sup>37</sup> Joint Submission from the Equality and Human Rights Commission, the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission, UN Committee on the Rights of Persons with Disabilities, *Draft General Comment on*

There are distinct threads in such submissions. First, that an approach of supporting decision-making is paramount; secondly, that any appointment of a person to act on behalf of another should be limited, a last resort and subject to safeguards compatible with human rights; and thirdly, that the CRPD does not prohibit the appointment of a person to act on behalf of another.

What is *not* clearly disentangled, however, is separating the fact of an appointment in certain circumstances and how the person is to act. Both are subsumed in the argument that, in some limited circumstances, 'substitute decision making' may be appropriate, without closely interrogating what substitute decision-making means. The argument is therefore expressed in terms of 'supported' *versus* 'substitute' decision-making.

The ALRC considers that the focus of analysis needs to be on how support is translated into a principles-based model that may guide law reform. How should support be articulated as the principal idea, consistent with the Convention and the concerns of the UNCRPD? What is the standard by which supporters and anyone appointed to act on behalf of another are to act? What is the standard to apply when the will and preferences of a person are not evident and cannot be determined? What is a human rights compatible approach?

The most difficult policy challenges concern those who require the most support. Where a person's will and preferences are difficult, or impossible to determine, they may need someone else to make decisions on their behalf. These hard cases should not, however, be treated as a barrier to building law and legal frameworks that move towards supported decision-making in practice, as well as in form.

For the ALRC, the inquiry was a deeply reflective and respectful process and we embraced the task of proposing a new model in Commonwealth laws as the opportunity to make a singular contribution in this crucial field. We recognised, however, that changes in law, of themselves, do not effect change, but changes in law are important and can play a normative role. As remarked in one important joint submission:

Changing laws and implementing new policies regarding legal capacity is only the first step in realising the right to equal recognition before the law for people with disability.<sup>38</sup>

An important first step, indeed. And while supported decision-making is, after all, much more than just about law,<sup>39</sup> the intellectual engagement around Article 12

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Article 12, 28 February 2014:  
<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>, 4.

<sup>38</sup> People with Disability Australia, Australian Centre for Disability Law, Australian Human Rights Centre, *Submission 136*. Others who supported this approach included: ACT Disability, Aged and Carer Advocacy Service, *Submission 108*. The submissions are published at <http://www.alrc.gov.au/inquiries/disability/submissions>.

<sup>39</sup> Bernadette McSherry 'Support for the Exercise of Legal Capacity: The Role of the Law' (2015) 22 *Journal of Legal Medicine* 739; Terry Carney, 'Participation and Service Access Rights for People with Cognitive Impairments: An Australian Perspective' (2015) 4 *Laws* 37; Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431.

helps propel thinking and practice and the commitment nationally and internationally towards the equal right of all adults to make decisions that affect their lives and to have those decisions respected.<sup>40</sup>

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<sup>40</sup> The first of the National Decision-Making Principles in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014).