

## **Australian Guardianship Tribunals: An adequate response to CRPD disability rights recognition and protection of the vulnerable over the lifecourse?**

Terry Carney LLB PhD,  
Emeritus Professor of Law, The University of Sydney,  
Visiting Research Professor, University of Technology,  
Sydney, Australia

### **Abstract**

Australia's path-breaking experiment in the 1980s of a tribunal model of substitute decision-making may well have been a major advance over traditional adult guardianship courts or other reforms on offer at the time, as suggested by socio-legal studies. However, resource constraints, demographic pressures, the passage of time, and the development of new models designed to advance the principle of supported decision-making enshrined by the UN *Convention on the Rights of Persons with Disabilities* ('CRPD') raise new questions about its contemporary suitability and its possible replacement or reform. This paper reviews three decades of experience with the Australian model in various states of the federation and new models advanced in recent law reform commission reports by both the Victorian and Australian commissions. It assesses how well these models reflect CRPD values and principles of access to justice, while providing safeguards protecting the vulnerable against abuse. These debates are placed within emerging international trends, including legislative and non-legislative supported decision-making models, other adult guardianship reform proposals, and other cognate tribunals (such as mental health).

**Keywords:** guardianship; tribunals; law reform; supported decision-making; ethics.

### **[A] Introduction.**

Writing about the ethical frame of the *Convention on the Rights of Persons with Disabilities* (CRPD), Kelly Johnson (2013: 227) queries whether it unduly elevates individual over more communal values. The suggestion is that its core values of dignity, individual autonomy, non-discrimination, participation, and community inclusion fail sufficiently to account for particular vulnerable groups of people with disabilities — those less able to position themselves as active agents in realisation within their own lives of such value precepts of a western conception of the 'good life'. She questions the extent to which the CRPD framework might 'include the importance of care and relationships which are central for some people in living good lives'. While the equality principle of Article 12 of the CRPD contains within it the obligation to adequately resource enjoyment of the right to supported decision-making (i.e. a 'socio-economic' or positive right, Carney, 2015c), the concern about giving

undue weight to particular conceptions of *individual* civil rights remains. Other respected scholars such as Marie-Jo Thiel also point to the ‘very limited notion of the individual’ captured by a ‘growing dominance of Anglo-Saxon values like the minimalist principles of Bioethics (autonomy, justice, beneficence, non-maleficence constituting principlism)’, instead commending more inclusive ethical frames such as the ‘ethic of care’ (Thiel, 2014: 15-16). While this important debate lies outside the scope of the present paper (further Carney, 2015a), the CRPD emphasis on replacing the proxy decision-making powers of adult guardianship with ‘supported decision-making’ (Carney, 2015b) raises other ethical challenges, such as the challenge of balancing principles of respect for individual autonomy against risk of misuse of new supported decision-making powers of self-directed living and of realising distributional equity and access to justice. The main question considered in the present paper is whether the tolerably sound ethical balances struck by Australia’s well regarded tribunal model of adjudication of appointment of adult guardians — and its equivalent (but more vexed) tribunal model for review of involuntary mental health care — can be replicated or improved upon in the move to design new arrangements for supported decision-making. Responsibilities in Australia are constitutionally and largely, but not exclusively, matters for the States and Territories rather than the national (‘federal’ or Commonwealth) governments.

As explained elsewhere, there are a number of progressive features of the Australian guardianship model of tribunal adjudication (Carney, 2015b). Accessing these tribunals is citizen friendly and cost free. Hearings are relaxed, flexible, and proactive (inquisitorial in form), and are free of technicalities or need for legal representation (though representation is permitted). Tribunal members are drawn from a range of areas of expertise and backgrounds. Case-management and conciliation processes help to screen out unnecessary applications (Thurstans, 2016), while investigative arms or other processes facilitate gathering relevant information to assist tribunals to decide cases which do go forward to hearing. Principles of intervention as a last resort and in the least restrictive manner are legislated and honoured in practice, along with obligations to ascertain and respect the wishes of the person subject to an order. And orders once made must be periodically reviewed (see generally, Carney & Tait, 1991; 1997, 1998). However, even reformed guardianship intrinsically and unavoidably entails derogating from the autonomy and choice of the person subject to an order (Carney, 2015b). This is so whether the order covers property and finances, guardianship of the person, or health decision-making. In each case it involves appointing a *proxy* decision-maker (Carney, 2015b). Standard insistence that guardians or other proxies consult the person about the exercise of such powers does not alter the fact that the power has been transferred away from the person and given to the guardian.

The CRPD, therefore, advocates replacement of traditional guardianship by support for decision-making, shifting from proxy decision-making on behalf of people to finding ways of enabling individual will and preferences (or a person’s rights) to find expression (further, Carney & Beaupert, 2013; Kerzner, 2011; Morrissey, 2012; UN Committee on the Rights of Persons with Disabilities, 2014: para 28). While some Canadian provinces had already introduced laws along these lines and schemes exist in countries such as Sweden (Gooding, 2014: 110-111; Gordon, 2000; LCO, 2014: 126-130 [Canada], 130-31 [Sweden]), few operative international models exist. In Australia both the Victorian and the Australian Law Reform Commissions recently made proposals for the introduction

of supported decision-making (ALRC, 2014; VLRC, 2012), as has the Law Commission of Ontario (LCO, 2013, 2014). However, Australia has been slow to move (Carney, 2015b) other than some very tentative legislative steps in the state of Victoria (further, Carney, 2015c) and some small pilot projects initiated in various parts of the federation (Carney, 2014; LCO, 2014: 123-24).

This paper reviews experience with the Australian adult guardianship model, evaluates reform proposals made by the Victorian and by the Australian Law Reform Commissions (the 'VLRC' and the 'ALRC'), and seeks to place these debates within emerging international trends, including legislative and non-legislative supported decision-making models, other adult guardianship reform proposals, and other cognate tribunals (such a mental health). It is argued that in the construction of new 'gate-keeper' and accountability mechanisms for such alternatives to traditional guardianship, the values of accessibility, proactive enquiry, responsiveness, and flexibility — epitomised by Australian guardianship tribunals and mirrored in part in the work of complementary institutions such as an Office of Public Advocate — are still the values to be pursued, but in innovative new ways. This is particularly so for the new 'work-horse' appointments of supporters, enduring attorneys (whether over the person, finances or health), or nominees (whether representative payees, correspondence nominees, disability planning, or e-health data nominees). Despite some progress, it is concluded that a legion of outstanding ethical challenges remain to be resolved.

### **[B] Tribunals as Safeguards: Robust, accessible, and 'fit for purpose'?**

Australia's tribunal model of adjudication of need for adult guardianship orders, along with its separate mental health tribunals, differs from the specialist courts found in many other parts of the world. Australia pioneered a least restrictive, 'presumptively-limited' guardianship reform model in the 1980s, entrusting adjudication of the need for orders to multi-disciplinary tribunals, rather than follow overseas preferences for courts or specialised courts (Carney, 1982, 2001; Carney & Tait, 1997). That true multi-member tribunal model has largely been preserved as the preferred model in Australia. Although the guardianship list within Victoria's super-tribunal (the Victorian Civil and Administrative Tribunal, 'VCAT') shifted over to mainly single member hearings, the biggest jurisdiction, the guardianship division of the NSW Civil and Administrative Tribunal ('NSWCAT'), has retained mostly multi-member panels. This is an approach that the VLRC report encouraged VCAT to emulate, at least for more complex matters (VLRC, 2012: paras. 21.50, 21.53, 21.78-82, 21.147-151).

This tribunal model of adjudication of applications for adult guardianship, complemented by an Office of the Public Advocate ('OPA') with proactive watchdog and advocacy functions for all vulnerable citizens whether or not subject to an order, was essentially invented by the Cocks Committee in Victoria in the early 1980s (Victoria, 1982). It was devised both as a court substitute (replacing the rarely utilised inherent *parens patriae* 'committee of the person or estate' jurisdiction of superior courts, still retained in Canadian provinces such as British Columbia: Carney, 1982; Seymour, 1994) and as a replacement for 'automated' or fast-track appointment of proxy decision-makers. Automated appointment of a manager of finances previously occurred in Australia when a person acquired the status of an involuntary resident due to mental health or intellectual disability, while fast-track administrative appointments of a proxy usually involved an administrative process of

application, based on completion of certificates by two medical practitioners attesting to the person's incapacity.

The tribunal component was rapidly copied in much the same form across the rest of the Australian federation (VLRC, 2012), while the complementary watchdog and advocacy bodies took on somewhat more varied forms (in New South Wales and some other jurisdictions responsible only for those under an order). Modelled in part on Alberta's *Dependent Persons Act 1968* (Victoria, 1982) and devised as what may be termed a specialised application of the flexible powers of the institution of the ombudsman (Abraham, 2012), Victoria's OPA for example has been shown to have chalked up some impressive achievements in terms of proactive and both individual and systemic protection of the rights of vulnerable people with cognitive impairments (Feigan, 2011).

In recent times, however, factors such as tightening budgets, rising proportions of dementia and acquired brain injury disabilities within the guardianship cohort, an increasingly 'risk averse' service system (imperilling enjoyment of the dignity of risk) and greater appreciation of human rights considerations — have combined to lead to some re-thinking of the 1980s model (Chesterman, 2010b), along with calls for its greater harmonisation across the federation (Chesterman, 2013).

### 1. Why a tribunal rather than a court?

The main reasons for originally selecting a tribunal rather than a court centred around creating a no-cost, accessible, inquisitorial, and expert adjudicative body. But subsequent experience suggests that such a fresh start also had the bonus of enabling the tribunal to more *faithfully* express the principles underpinning the reformed model of least restrictive intervention, through periodically reviewed and time-limited, preferably partial, orders. Favourable experience with mental health review tribunal models copied from the UK provided another template (Carney, Tait, Perry, Vernon, & Beaupert, 2011: Ch 4), as too did the long tradition of investing in tribunal review of administrative action (Creyke, 2012; Maher, 1994), including in high volume areas such as social security (Gaze, Quibell, & Fehlberg, 2014).

In Australia and some other common law jurisdictions such as the UK, such investment in tribunals has been favoured for administrative law purposes ahead of investment in *primary* decision-making processes (such as the US concentration on its 'hearings' rules for primary decision-making) or investment in the *judicial* review stage (illustrated by the specialised administrative courts in Germany and France). This is Australia's preferred way of ensuring accuracy, efficiency and fairness of decision-making — serving in this arena as an 'alternative' to courts for making or reviewing decisions. Investment in such forms of external tribunal review differs from much of Europe, where mandatory or elective *internal* administrative review ('objections') acts to screen resolvable cases away from needing review by administrative courts (Dragos & Neamtu, 2014), with quasi-judicial administrative tribunals akin to those found in Australia or the UK being quite rare (Dragos & Marrani, 2014: 556-557). Strictly, therefore, tribunals in Australia are in a sense also part of the executive rather than the judicial branch of government (as in its pure form is the case in France: Asimow, 2015: 25), adding to their sense of being 'alternatives' to courts.

Conceptually, Michael Asimow (2015: 5) suggests that the 'sharply' different and 'difficult to

compare' varied forms and roles taken by tribunals can be distinguished by the answer to four binary choices: (i) by whether the agency has 'combined' functions or a 'pure review' function; (ii) by whether its procedures are 'adversarial' or 'inquisitorial'; (iii) by whether review is open to 'new' information or is 'frozen' to the matters originally decided; and (iv) by whether the review body is a 'generic' or a 'specialised' one (Asimow, 2015: 3). While Asimow's schema confines the last two variables to judicial review, for present purposes they have been broadened to review generally, since our focus here is not on where to concentrate resources across the life course of decision-making and review, but rather on the *characteristics* of the adjudication itself. Seen in that light, it is clear that the Australian guardianship tribunal and also its mental health tribunal model is one entailing *combined* functions ('making' the orders on application); through exercising an *inquisitorial* process (responsible for actively satisfying itself on the need for orders, often through an investigative arm of the tribunal); by operating by way of an *open* process (not restricted to the material contained in or at the time of the application); and constituted as a *specialised* ('expert') body.

While these procedural or operational features of tribunals are critical to the outcomes achieved, such as the capacity to review issues on their merits (to 'step into the shoes' of earlier decision-makers), they are no guarantee of satisfaction or of particular substantive outcomes. This is best illustrated by the work of mental health tribunals ('MHTs'). Studies suggest MHTs fare little better than courts in meeting the expectations of involuntary patients of going beyond 'rubber stamping' of clinical opinion about admission and discharge, with extremely low rates of discharge and short hearings (see for example the studies reviewed in Carney, Tait, Perry, Vernon, & Beaupert, 2011: Ch 3). However, the problem here is arguably not the character of the tribunal. Rather, it is the MHTs' inappropriately narrow focus on merely reviewing issues in the *legal* domain (exercise of powers of restraint) to the neglect of the issues of greatest concern to applicants and their carers/support network: namely issues in the *health* domain (appropriateness of treatment and therapy regimes) and the *social* domain (work, housing, relationship). Research suggests that these latter two domains are of greatest importance to mental health consumers and those around them, and that the 'relational space' already populated by tribunal hearings is more than capable of expansion to creatively engage such dimensions through pre-hearing, mediation, and flexible hearing processes (Carney, 2010, 2012b; Vernon, 2010).

Turning to cost and accessibility measures, both guardianship and mental health tribunals fare well against access to justice and productivity criteria, indeed perhaps too well to be completely confident about the quality of justice in avoiding 'production line' processing. Thus, the Australian Productivity Commission enquiry found that MHT costs averaged out in 2011-12 at AUD320 per case in Tasmania and AUD530 in Victoria (Productivity Commission, 2014: 354), a low figure compared to AUD2,300 in the then Social Security Appeals Tribunal ('SSAT'; from July 2015 a division of the super-tribunal, the Administrative Appeals Tribunal or 'AAT') — no doubt partly due to average hearing times of an astoundingly short 20 minutes in MHTs (Carney, Tait, Perry, Vernon, & Beaupert, 2011: Ch. 10) compared to at least an hour in the then SSAT. Turning to guardianship, average costs per case in 2012-13 placed third lowest out of 11 case types dealt with by Australia's most comprehensive super-tribunal, Victoria's VCAT (at around AUD500), while in Queensland,

cases going to hearings (as distinct from less resource intensive reviews of existing orders) ran at around AUD800 per case (Productivity Commission, 2014: 355 [bar graph comparisons]). In terms of timeliness, guardianship cases took an average 5 weeks to complete in Victoria and 13 weeks for Queensland (ibid: 360), while MHTs and guardianship generally ranked behind only residential tenancies tribunals or workers compensation tribunals in a comparison of the median times for case processing (ibid: 361-362).

## 2. Fiscal, demographic, and other challenges to primacy of Tribunal gate-keepers

Fiscal and demographic pressures are among major challenges to retaining fidelity to the original design principles of the Australian guardianship tribunal model.

Budget reductions due to general belt-tightening efficiencies are an obvious threat to tribunal retention of multi-member hearing panels, but so too is any failure to allow budgets to grow in line with shifts in the (ageing) demographic profile of the population. This latter exacerbates the fiscal challenge, as illustrated by the projected disproportionate growth in demand for guardianship due to the relative increase in the proportion of the ageing 'baby boomer' cohort (as evidenced by general pressures identified in recent law reform enquiries in Victoria and Ontario: LCO, 2014: 58-59; VLRC, 2012: 32-38 [predicting a 25% increase in VCATs guardianship list caseloads between 2010 and 2020, and another 27% in the decade to 2030]). However, from a pure distributional equity and justice perspective, it might be argued that it is wrong to 'move the goal posts' by diluting present justice entitlements compared to those available to past generations, merely because demographic shifts have led to an increase in demand. For if it is inequitable and wrong to restrict a public service like critical health care for such reasons, why should guardianship be treated differently?

With an estimated penetration of just 2 per cent of the population of people with severe or profound cognitive impairments on the basis of Victorian modelling (VLRC, 2012: 37), it is, however, clear that guardianship tribunals already are rarely involved at all, and when they are invoked, their role is a quite special or selective one. 'Gatekeeping' in the making of orders by such a public sector agency, then, caters only to the *acute* needs of that fragment of the population of cognitively impaired individuals for whom neither informal arrangements nor private plans have been put in place (whether by durable powers of attorney or guardianship). Unsurprisingly, perhaps, lower social capital of potential applicants (such as lack of any informal support networks) on the part of those living in lower socio-economic areas may account for their over-representation and higher utilisation of guardianship (Cripps, 2015).

The obvious distributional equity question from this is where does this leave the other 98 per cent of people with significant cognitive impairments in terms of realisation of their CRPD rights? For its part, the CRPD monitoring committee, in its General Comment #1, would answer that the *whole* population in question should be dealt with under some form of supported decision-making (UN Committee on the Rights of Persons with Disabilities, 2014), as now discussed.

## 3. Alternatives to guardianship

Supported decision-making options are not straightforward (Carney & Beaupert, 2013; Then, 2013).

There is a lack of evidence about whether any of the varied array of supported decision-making models around the world actually achieve their declared goals of realising the autonomy of people who need such assistance, for which disability types or sub-sets within disability categories, and to what degree — irrespective of whether the scheme be a legislated one (Kohn & Blumenthal, 2014; Kohn, Blumenthal, & Campbell, 2013) or an informal one (Power, Lord, & deFranco, 2013).

The VLRC in its 2012 Final Report cautiously proposed to complement traditional guardianship and administration orders by adding two new supported decision-making measures, each able to be made either by appointment by the person or after applying to the tribunal (the guardianship list of VCAT) for an order: namely supported decision-making and co-decision-making (VLRC, 2012: paras 8.13-8.31; 8.78-87). The then conservative Government rejected the latter and botched the introduction of supported decision-making by retaining the name of proxy powers in the new arrangements: its legislated measure for personal appointment of a ‘supportive *attorney*’ and its lapsed Bill for VCAT appointment of a ‘supportive *guardian*’; defects not remedied by the incoming Labor Government (Carney, 2015b, 2015c).

However, as I have discussed previously, provision of a wider array of orders able to be made by tribunals (or courts) after the need for assistance has become evident but no private planning appointments have been executed, may simply compound difficulties evident with existing proxy decision-making appointments. It is suggested that these concerns include ‘net-widening’ (powers intended to replace more intrusive options instead being utilised for people previously not subject to orders of any kind) and public misapprehension that orders conferring not a shred of proxy powers are treated as being a full set of proxy authorities for holders of such appointment (Carney, 2012a, 2013a).

The next section, therefore, turns attention to how accountability safeguards and other CRPD principles might be secured in this emerging new environment of supported decision-making.

### **[C] Finding Safeguards for Guardianship Alternatives: Robust, accessible, and ‘fit for purpose’?**

While Australia moved early to encourage the use of private planning instruments in place of guardianship (on the basis of expanding choice and agency of individuals and families), neither these arrangements nor the more recent exploration of supported decision-making options has done much either to relieve the cost and workload pressures on traditional guardianship, or to guarantee greater popular accessibility. Because guardianship alternatives lie partially or entirely in civil society informal processes and cater for the more mainstream or routine day-to-day needs of people with cognitive impairments, the concept of accessibility looms larger than it does even when considering the configuration of tribunals or courts as gatekeepers of traditional guardianship.

In common with the more established private planning powers open to citizens to arrange their affairs in advance (through executing enduring powers of attorney or guardianship), or the avenue for family or others to apply for guardianship or financial administration orders from a public body (guardianship tribunals), these new supported decision-making powers raise issues of accessibility, respect for individual autonomy values, protection of the vulnerable, and compliance

with UN injunctions against resorting to ‘capacity tests’ as gatekeepers for who obtains or is denied access to support (for discussion of the Victorian capacity test and possible reforms, see: Chesterman, 2010a). The same is true of work-horse provisions such as representative payee (or other ‘nominee’) provisions and statutory ‘lists’ of authorised proxy decision-makers for health (Carney, 2015b, 2015c), as now discussed.

### 1. Access to Justice: Accessibility?

While access to justice for people with disabilities as conceived in Article 13 of the CRPD rightly engages symbolic, procedural, substantive, and participatory components (Flynn, 2015: 19), the focus here is on rights of access to supported decision-making for the ordinary user. As Rubinson (2005: 91) perceptively observed, for the mass of ordinary citizens ‘any principled moral or ethical analysis demonstrates that the stakes are much higher in [their] disputes... than in disputes involving affluent individuals’, yet the investment of justice resources overwhelmingly favours the affluent.

Supported decision-making alternatives, likewise, are low-investment justice products pitched at the ordinary or mass user (Carney, 2015b, 2015c). But access to justice means different things to different groups. As Trevor Farrow (2014) argues, access to justice means different things to insiders like lawyers or academics than it does to the people who actually *use* or *experience* it. And while both constituencies will likely appreciate lowering or elimination of cost barriers to access, greater friendliness of engagement with the system, fairness, and flexibility of processes, or speedier outcomes — none of that will resonate with the public if the substantive outcomes diverge from common perceptions of what ‘justice’ entails. As Farrow’s pilot study reveals, from the public standpoint the focus is more on whether the system delivers ‘fairness, equality, morality and the ability to be an active participant in society’ (Farrow, 2014: 968-69).

While laws designating default proxy decision-makers (or in theory also a ‘supporter’) for all citizens in the event that one is needed might be seen as a cheaper or more effective solution to low-take up of private planning instruments, these can be problematic from the perspective of Farrow’s public sense of justice. Certainly, enactment of such templates to be imposed on average citizens have long been a part of the law; one classic example is the ‘statutory will’ which Parliament enacts for those one in ten or so citizens who die without making a will (Burns, 2013). Another example is the commonly enacted medical hierarchy of ‘statutory default’ decision-makers of close relative or friends who are automatically authorised in advance to consent to basic medical or dental care of a person otherwise unable to give their own consent outside an emergency (Carney, 2015c; VLRC, 2012: Ch 13; White, Willmott, & Then, 2014: 244-248). However, there are always delicate ethical balances to strike in determining when the gravity of the matter at stake outweighs the convenience of allowing it to be governed by the standard provision, and in designing checks and balances (Carney, 2015c).

The dilemmas sketched so far are, of course, not new either in law or in governance. As already discussed, it was in order to close the gap between daily reality of the unmet needs of people with cognitive impairments and the theoretical protection offered by the rarely used Supreme

court 'committee of person/estate' powers that Australia's guardianship tribunal model was devised, supplemented by its often neglected complementary ombudsman-like institution — OPA. So the question now becomes how to pursue those old ethical goals of autonomy, protection, and accessibility within the new supported decision-making environment.

## 2. Towards a Model 'Fit for purpose' for Contemporary Support Options?

Impressive as the gatekeeper achievements of the guardianship tribunal and the monitoring and safeguard roles of the OPA model may be, it may be questioned whether such institutions, even when well led and generously funded, are capable of addressing the low level but nevertheless real risks of abuse or misuse of the routine 'laws for the masses' such as powers of attorney or support, or representative payee/nominee appointments (further, Carney, 2015a, 2015b). Because, as already shown, for the 98 per cent of people with serious cognitive impairment and not availing themselves of guardianship for one reason or another, it is these day-to-day instruments, or purely informal arrangements, which cater for their needs for support.

This inability to expect guardianship tribunals or even OPAs to provide all of the answer to safeguards against abuse of such instruments is not so much for lack of options for remedying abuse once detected. This is because in Australia the tribunals can readily discharge durable power appointments and replace them with more appropriate orders, although federal schemes such as those for social security or e-health (DoH, 2015) are less straightforward due to the lack of equivalent Commonwealth bodies (ALRC, 2014: 119ff, 147ff; Carney, 2015b). Rather, the difficulty is that the sheer volume of transactions and the 'private' character of those transactions renders any abuse of the provisions largely *invisible* from ready detection, even given the excellent work of OPA or other agencies in bringing concerns to light. This is a veil even less likely to be pierced if the oversight body is pressed for resources; or, in the case of Australia's federal appointments, where equivalent national agencies are totally lacking and thus detection of misuse of powers is entirely reliant on the goodwill of state and territory agencies to devote their scarce resources to meeting a responsibility of another level of government (OPA, 2014: 26).

Such challenges arguably point to the limited capacity to provide adequate accountability protections solely (or even mainly) by way of a combination of accessible adult decision-making tribunals (whether adjudicating guardianship or supported decision-making, or both), allied with an active agency such as OPA. Something *outside* these two institutions seems to be called for. With representative payee and similar payment or correspondence nominee provisions, that accountability might be enhanced through measures such as: beefing up the checks undertaken prior to agreeing to requests for such appointments; strengthening fiduciary duties and routine reporting on discharge of responsibilities, or following Canadian innovations such as also appointing another individual as 'monitor' of the way the holder of the relevant power goes about discharging their task (Carney, 2015b). Ideally, these arrangements would mirror the capacity of the tribunals (and of OPA) to deliver on the values of accessibility, proactive enquiry, responsiveness, and flexibility.

### 3. A solution in the ALRC's safeguards model?

The 2014 ALRC Report advances a new national model designed to confine proxy decision-making appointments to an absolute minimum (re-naming them as 'representatives') with strong preference for relying instead on a new power for a person to appoint (and to terminate) a 'supporter'. A supporter is someone who would have no power to make decisions, but would be able to access information needed by a person or assist in providing information to others (ALRC, 2014; Carney, 2015b). The national model is also envisaged by the ALRC as a template for reform at state and territory level.

The Commission made a valiant attempt to tackle the issue of adequate safeguards around appointments of its proposed supporters or representatives, enunciating safeguards as one of four fundamental principles later elaborated in more detail in its proposed Safeguards Guidelines (ALRC, 2014: 13, 64, 86-89) as follows:

#### **Recommendation 3–4 Safeguards Guidelines**

##### *(1) General*

Safeguards should ensure that interventions for persons who require decision-making support are:

- (a) the least restrictive of the person's human rights;
- (b) subject to appeal; and
- (c) subject to regular, independent and impartial monitoring and review.

##### *(2) Support in decision-making*

- (a) Support in decision-making must be free of conflict of interest and undue influence.
- (b) Any appointment of a representative decision-maker should be:
  - (i) a last resort and not an alternative to appropriate support;
  - (ii) limited in scope, proportionate, and apply for the shortest time possible; and
  - (iii) subject to review.

As general principles there is little to take issue with and much to applaud in these guidelines. But is there devil in the detail perhaps?

In a way the answer to this question is both yes and no: this is because there is presently rather too little by way of more concrete delineation of the safeguards. Certainly, the ALRC does provide some further elaboration of what is intended, doing so separately for supporters (ALRC, 2014: 109-111) and representatives (ALRC, 2014: 117-119), while calling for existing safeguards around the new individualised funding packages being rolled out in National Disability Insurance Scheme ('NDIS') trial sites (further, Purcal, Fisher, & Laragy, 2014) to be subject to ongoing review and development as the scheme rolls out (ALRC, para 5.125). Thus, for supporters the Commission suggested in paragraph 4.90 that the key safeguards include:

# ARTICLE

- the recommended duties of supporters;
- the ability of the person who requires decision-making support to revoke the appointment at any time;
- provision for the appointment of more than one supporter;
- and guidance and training for people who require decision-making support, their supporters and Commonwealth departments and agencies interacting with them.

These protections around supporters are weak. Statements of duties are all very well, but experience to date with social security correspondence nominees demonstrates that in practice adequate educative training about their responsibilities does not sufficiently materialise nor prove to be effective (Carney, 2015b). Revocation is an empty remedy for removing an unsatisfactory supporter if there is no ready alternative and the supporter is a family member on whom the person is emotionally or practically reliant. Nor will it remedy the damage done where a supporter has neglected their responsibilities to the person, such as in failing to accurately report income to ensure that a social security overpayment debt did not arise. Appointment of more than one supporter could offer some protection, but this is offered by the ALRC as an option rather than a *requirement*, and in a standard case of say a social security client with cognitive impairment, the additional appointee is likely to be the second of two parents. And training for public servants and others is likely to be of limited practical benefit, as now elaborated.

A simple and anything but uncommon income support example illustrates why this is likely to be ineffective: *Assume that a person with a cognitive impairment has obtained on-going part-time but casual employment to supplement their disability or other relevant pension, with earnings which vary from week to week depending on the hours worked. Those variable earnings determine the rate of pension payable under the pension income test in Australia, but reporting obligations to the administering agency ('Centrelink') can either be left with the person (where the law requires reporting within 14 days of a change of circumstances such as in earnings) or can be set down as a pattern of fortnightly or lengthier reporting dates. Assume further that Centrelink unilaterally decides (as not infrequently happens) to write to the person and their 'supporter' (the ALRC's new term for a 'nominee') advising that fortnightly reporting of income is 'no longer be required' but reminding them about the 14 day reporting obligation 'should circumstances (including earnings) change'. Further assume that Centrelink failed to mention that an internal mistake has led to 'nil' earnings being entered into the computer in place of the (substantial) amount of earnings routinely being reported in the fortnights prior to receipt of the letter ceasing fortnightly reporting.*

Under Australian law about social security debts, any failure of the supporter/nominee to comprehend that this *actually* means that those variable earnings must still be reported each fortnight, and any failure to react to and seek to rectify the substantial increase in pension due to the 'nil' earnings figure, will result in a fully recoverable overpayment debt of virtually all the pension paid (the difference between full rate and a very small part rate entitlement based on the earnings). And that debt, which may easily reach AUD20,000 or more within a year or two, will be fully recoverable against the person with the cognitive impairment who was reliant on the actions of their nominee/supporter (this is because the debt is neither solely Centrelink error nor is it likely to satisfy the other debt waiver test of 'special circumstances', see Carney, 2013b: para 22.3.4480). Needless to say, nominees already fail to comprehend such nuances, and this risk to the rights of the person with the disability is surely exacerbated by appointment of a supporter given how weak are the ALRC's proposed 'safeguards'.

So perhaps the protections around appointment of a representative, while identical to the current option of a payment nominee for such cases, would provide a more adequate safeguard against the case example overpayment? Certainly, safeguards around the powers of both supporters and representatives, which currently are proposed to vary with the context (ALRC, 2014: para 4.126), might be further boosted to address such serious risks. However, even the proposed safeguards for representatives (proxy decision-makers) arguably fall short, with the Commission proposing consideration of the following elements:

- mechanisms for review and appeal of the appointment of representatives, including on the application of any interested party;
- the potential for representatives to be periodically required to make declarations regarding compliance with their duties;
- reporting obligations on representatives with respect to decisions, for example by provision of a report, inventory, or accounts;
- the powers of any Commonwealth body conferred with jurisdiction to appoint a representative should include the power to respond to instances of abuse, neglect, or exploitation;
- the role of Commonwealth departments and agencies in monitoring, auditing, and investigating the conduct of representatives; and
- the broader applicability of safeguards envisaged under a NDIS quality assurance and safeguards framework (ALRC, 2014: para 4.127).

This list, by contrast with that for supporters, does provide not only the promise of a gatekeeper of some substance but also routine monitoring, reporting, investigation of abuse, and some prospect of Departments owing clients a 'duty of care'. But the list is not markedly more extensive or stronger than the *existing* statutory obligations and policy guidelines about appointment and monitoring of social security payment nominees (for current protocols: DSS, 2016).

These safeguards in practice would in most instances fail to protect against the debt risk just described, deficiencies numerous enquiries have highlighted (ALRC, 2012: paras 9.40ff; Commonwealth Ombudsman, 2009: Ch 7; Legal and Constitutional Affairs Committee, 2007: para

3.120; NSWL&JFoundation, 2004: Ch 9). Moreover, as the Victorian Office of Public Advocate has observed, currently there are not even any equivalent federal bodies or agencies with the kinds of investigative and safeguards roles found at state and territory level (OPA, 2014: 27).

### [D] Conclusion.

If the guardianship tribunal model is well regarded when adjudicating on the 2 per cent of people with a substantial cognitive impairment currently the subject to applications for substitute decision-making orders, and perhaps in future also for any tribunal ordered supported decision-making akin to the lapsed 2014 measure introduced by the then Victorian Government (Carney, 2015c), where does this leave the 98 per cent of people with substantial or severe cognitive impairments or the overall system as privatised settings grow in importance? If mental health tribunals have a patchier record due to being deprived of the opportunity to engage the treatment planning and civil society support relationships of greatest concern to consumers, what capacity do such tribunals have to exercise wider, and more flexible mediation-style roles? Both guardianship and mental health are obligated by the CRPD to shrink if not eliminate substitute decision-making in favour of supported decision-making and support for decisions, including through the use of advance directives and representation agreements, located mainly in the private spaces of civil society. But where are the protections for the vulnerable and the general accountability called for by the monitoring Committee for the CRDP to be found?

One obvious starting point for assessing the adequacy of safeguards proposed under such supported decision-making reforms is the UN CRPD Committee's *General Comment #1* on Article 12 (UN Committee on the Rights of Persons with Disabilities, 2014). Benchmarks laid down there include respecting individual autonomy (para 29(g)), concerns about those vulnerable due to isolation (para 29(d)), and safeguards to ensure fidelity to respecting the will and preferences of people making appointments of supporters or to challenge contrary actions (para 29(h), (d)). At a purely *formal* level, there is surely little to fault the language of the supported decision-making reforms advanced by bodies such as the ALRC when judged against such standards.

But what are the *substantive* outcomes to be pursued by these replacements for (or at worst precursors to) guardianship? The gold standard of course is presumably a set of arrangements where civil society, family, and friendship networks naturally form to facilitate enjoyment of maximum choice — through respect for 'autonomy, will and preferences' (UN Committee on the Rights of Persons with Disabilities, 2014: para 26) or as the ALRC recommendations phrase it, respect for 'will, preferences and rights' of people (2014: Recs 3-1, 3-3; pp 75-85) — without degenerating into hidden abuse, exploitation, or self-interested paternalism on the part of the supporter. Yet as suggested in this paper, these downside risks are significant, human nature being a flawed commodity (elaborated elsewhere: Carney, 2015a). That risk is magnified by the privacy of the setting for informal or even automatic appointments in immunising the setting from outside scrutiny or accountability (Carney, 2015b). And any evidence of a *social gradient* in usage — whether in utilization of guardianship orders (Cripps, 2015) or in reliance on supported decision-making, must raise questions about possible breaches of either or both of ethical principles of distributional equity and the CRPD equality principle. This surely is in play unless disproportionate reliance actually

reflects *greater need* for intervention or support (due say to social isolation), and then only if such isolation proves incapable of redress through government outlays on, and/or civil society voluntary schemes of supported decision-making targeted towards such individuals (Burgen & Chesterman, 2014).

In short, as this paper has shown, despite some important advances, the outstanding ethical challenges of designing acceptable measures of supported decision-making are legion.

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Address for correspondence:

e-mail: [terry.carney@sydney.edu.au](mailto:terry.carney@sydney.edu.au)

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