

**THE IMPACT OF STATUTORY REFORM ON PEOPLE WITH DEMENTIA:  
LESSONS FROM THE *GUARDIANSHIP AND ADMINISTRATION ACT 2019*  
(VIC)**

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## I INTRODUCTION

This essay examines the impact of a statutory ‘supported decision-making regime’ on dementia sufferers. Specifically, it evaluates the *Guardianship and Administration Act 2019* (Vic) (‘GAA (Vic)’) and examines whether similar legislation would be beneficial to South Australia. It will be argued that Victoria’s supported decision-making approach to guardianship cannot appropriately assist those with dementia in South Australia. This piece will focus on the impacts of a supported decision-making model and a human-rights-centred definition of capacity. First, this paper outlines the international pressure to implement ‘supported decision-making’ models within Australian guardianship legislation. Second, this essay outlines the nuances of dementia and, subsequently, explores how this cognitive illness is captured under South Australia’s and Victoria’s respective guardianship schemes. Finally, this essay examines relevant cases from the Victorian Civil and Administrative Tribunal (‘VCAT’) and, consequently, makes brief recommendations. Overall, the utility of a supported decision-making guardianship regime is questionable when considering dementia.

## II BEYOND SUBSTITUTION: THE SHIFT TO SUPPORTED DECISION- MAKING

This section outlines the demand for supported decision-making models through the lens of the *Convention on the Rights of Persons with Disabilities 2006* ('CRPD'). It also highlights South Australia's and Victoria's respective decision-making regimes.

### A *The CRPD*

The *CRPD*<sup>1</sup> represents a legal shift towards 'supported decision-making' guardianship models. Supported decision-making involves 'placing a disabled person's own will and preferences at the centre of decision-making'.<sup>2</sup> This 'shift' was primarily sparked by Article 12 of the *CRPD* ('Article 12'),<sup>3</sup> which presumes that everyone has an 'equal right to *legal capacity*' regardless of any compromise to their *decision-making* capacity due to 'illness, congenital factors or other cognitive disabilities'.<sup>4</sup> 'Legal capacity' refers to a person's ability to 'hold and exercise rights through valid legal acts'.<sup>5</sup> This is linked with decision-making capacity, which refers to an individual possessing a level of 'intellectual and decision-making ability'.<sup>6</sup> Linkage between these concepts is evident, as those with impaired decision-making abilities are often stripped of power to make valid legal decisions.

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<sup>1</sup> United Nations General Assembly, *Convention on the Rights of Persons with Disabilities 2006*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

<sup>2</sup> Meredith Blake et al, 'Supported Decision-Making for People Living With Dementia: An Examination of Four Australian Guardianship Laws' (2021) 28 *Journal of Law and Medicine* 389, 390.

<sup>3</sup> *CRPD* (n 1) art 12.

<sup>4</sup> Blake et al, (n 2) at 391 citing Penelope Weller, 'Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice' (2014) 23 *Griffith Law Review* 498, 500; Penelope Weller, 'The Convention on the Rights of Persons with Disabilities and the Social Model of Health: New Perspectives' (2011) *Spring Journal of Mental Health Law* 74.

<sup>5</sup> Kevin De Sabbata, 'Dementia, Treatment Decisions, and the UN Convention on the Rights of Persons with Disabilities. A New Framework for Old Problems' (2020) 11(571722) *Frontiers in Psychiatry* 1, 1-2.

<sup>6</sup> *Ibid* at 2.

By positioning legal capacity as a fundamental human right, Article 12 suggests everyone should be given support to uphold their decision-making and legal capacities. Relatedly, Article 12(3) reads:

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>7</sup>

Article 12(4) supplements this, stating mechanisms are needed to:

...ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.<sup>8</sup>

These sections bolster the notion that supported decision-making is required to protect legal capacity.

Tangentially, Article 12 implicitly rejects ‘substitute decision-making.’ Substitute decision-making is the traditional approach underpinning guardianship practices. It provides that another person can make decisions on behalf of someone lacking decision-making capacity.<sup>9</sup> Substitute decision-making elucidates a dualistic model of capacity, under which a person either ‘has capacity’ or ‘has no capacity.’<sup>10</sup> This model is paramount in Australia.

## *B The Current Australian Context*

### *1 Jurisdictions other than Victoria*

All Australian states and territories have guardianship legislation.<sup>11</sup> Such legislation purports to assist with healthcare-and-lifestyle related decisions where an adult’s decision-making

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<sup>7</sup> CRPD (n 1) art 12(3).

<sup>8</sup> CRPD (n 1) art 12(4).

<sup>9</sup> Blake et al, (n 2) at 391.

<sup>10</sup> Blake et al, (n 2) at 420 quoting Tina Minkowitz, ‘The United Nations CRPD on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions’ (2007) 34 *Syracuse Journal of International Law and Commerce* 405, 408.

<sup>11</sup> *Guardianship Act 1987* (NSW) (‘GA (NSW)’); *Guardianship and Administration Act 1990* (WA) (‘GAA (WA)’); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship and Administration Act 1993* (SA) (‘GAA (SA)’); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration*

capacity is impaired.<sup>12</sup> Australia's ratification of the *CRPD* encouraged attention towards the issue of 'decision-making capacity' of individuals with cognitive impairment, like dementia sufferers. However, Australia has been slow to adhere to the *CRPD* and eliminate substitute decision-making across its guardianship regimes.

In most Australian jurisdictions, a substitute decision-making approach is utilised. In New South Wales and Western Australia, deciding what is in a person's 'best interests' is the standard applied during guardianship decisions.<sup>13</sup> This test remains, despite being rejected by the Australian Law Reform Commission.<sup>14</sup> Conversely, South Australian guardianship legislation requires substitute decision-makers and tribunals to consider what the person with a disability would have wanted.<sup>15</sup> This employs a 'substituted judgment approach.'<sup>16</sup> When compared to the 'best interests' standard, this approach somewhat aligns with the *CRPD* by 'respect[ing] autonomy'.<sup>17</sup> Nonetheless, it still falls short of being a supported decision-making model.

## 2 Victoria

Contrastingly, Victoria has integrated a supported decision-making model into the *GAA* (Vic). Specifically, the VCAT can make 'supportive guardianship orders' under s 87 of the *GAA* (Vic). Broadly, a supportive decision-maker collects information,<sup>18</sup> communicates with others,<sup>19</sup> assists with communication,<sup>20</sup> and takes other 'reasonable action' to assist a

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*Act 2000* (Qld); *Guardianship of Adults Act 2016* (NT); *Guardianship and Administration Act 2019* (Vic) ('*GAA* (Vic)').

<sup>12</sup> Meredith Blake, 'People Living with Dementia: What Difference Does Statutory Change Make? A Case Study from Australia' (2025) 13(1) *The European Society of Medicine* 1, 2.

<sup>13</sup> *GA* (NSW) (n 11) s 21A(2)(b); *GAA* (WA) (n 11) s 51(1)-(2); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report, August 2014) 50 [2.62].

<sup>14</sup> *Ibid* at 76 [3.54].

<sup>15</sup> *GAA* (SA) (n 11) s 5(a)-(b); Australian Law Reform Commission (n 13) at 50 [2.62].

<sup>16</sup> Australian Law Reform Commission (n 13) at 50 [2.62].

<sup>17</sup> Blake et al, (n 2) at 400.

<sup>18</sup> *GAA* (Vic) (n 11) s 90(1)(a).

<sup>19</sup> *Ibid* s 90(1)(b).

<sup>20</sup> *Ibid* s 90(1)(c).

supported person.<sup>21</sup> Theoretically, this gives precedence to a supported person's will and preferences.<sup>22</sup> The decision is not solely being made on one's behalf; instead, they are *supported* to make choices.

This contrasts with the traditional role of a guardian, which is still available in both South Australia and Victoria.<sup>23</sup> Preservation of 'guardians' reflects Victoria's decision not to entirely implement the principles of the *CRPD*. Whilst a 'supporter' encourages the decision-making process, a guardian makes decisions *for* the person with a disability.<sup>24</sup> Despite needing to consider a person's wishes,<sup>25</sup> will and preferences,<sup>26</sup> guardians' can effectively 'veto' any desire the person with a disability might express.<sup>27</sup>

Uniquely, Victoria employs a hybrid system. Whilst Victoria has evidently not rejected substitute decision-making, its introduction of supportive guardianship orders demonstrates *some* movement towards supported decision-making. Thus, the Victorian approach adds a granularity to the VCAT's options that is not available to the South Australian Civil and Administrative Tribunal ('SACAT').

### III REDEFINING CAPACITY: A HUMAN RIGHTS APPROACH TO DEMENTIA

This section aims to define dementia. It also highlights the differences in evaluating capacity in South Australia and Victoria, as spearheaded by each jurisdictions' definition of 'capacity.'

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<sup>21</sup> *Ibid* s 90(1)(d).

<sup>22</sup> Victoria, *Parliamentary Debates*, Legislative Council, 28 May 2019, 1419 (Jane Garrett, Legal and Social Issues Standing Committee).

<sup>23</sup> *GAA* (SA) (n 11) s 31; *GAA* (Vic) (n 11) s 32.

<sup>24</sup> *GAA* (Vic) (n 11) ss 38(1)(a); *GAA* (SA) (n 11) s 31.

<sup>25</sup> *GAA* (SA) (n 11) s 5(a)-(b).

<sup>26</sup> *GAA* (Vic) (n 11) s 9(1)(a)-(c).

<sup>27</sup> *Ibid* s 38(3).

## *A What is Dementia?*

Dementia is a terminal condition associated with chronic and gradual neurodegenerative decline.<sup>28</sup> It is the second leading cause of death in Australia.<sup>29</sup> Due to Australia's ageing population,<sup>30</sup> there is predicted to be a 'threefold increase' in those with dementia before 2050.<sup>31</sup> Thus, understanding how to appropriately help dementia sufferers is a prominent issue, even beyond the realm of guardianship.

Despite dementia's increasing prevalence, many misconceptions about the illness remain. Importantly, dementia is not a normal part of ageing.<sup>32</sup> Additionally, the cognitive changes a dementia sufferer may experience differs depending on the type of dementia one has been diagnosed with. For instance, some have impaired memory whereas others have limited higher-order cognitive functioning.<sup>33</sup> Further, dementia sufferers' abilities can fluctuate<sup>34</sup> daily<sup>35</sup> or contextually.<sup>36</sup> Therefore, the fluidity of the illness must be at the forefront of any law reform regarding those with dementia.

## *B 'Decision-Making Capacity' in the Current Landscape*

### *1 Issues with 'Mental Incapacity'*

Being diagnosed with dementia is life-changing for a plethora of reasons. However, this essay focuses on dementia's impact on decision-making capacity.

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<sup>28</sup> Blake et al, (n 2) at 390.

<sup>29</sup> Australian Bureau of Statistics, *Causes of Death, Australia, 2018* (Catalogue No 3303.0, 25 September 2019).

<sup>30</sup> Ross Bicknell, 'Medical issues: The dangers of dementia: Getting the balance right' (2015) 23(2) *Journal of Law and Medicine* 303, 304.

<sup>31</sup> Ibid citing Australian Institute of Health and Welfare, *Dementia in Australia*, Cat No AGE 70 (2012).

<sup>32</sup> Blake et al, (n 2) at 390.

<sup>33</sup> Ibid.

<sup>34</sup> De Sabbata (n 5) at 2.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid at 5 citing Kari Lislerud Smebye, Marit Kirkevold and Knut Engedal, 'How do persons with dementia participate in decision making related to health and daily care? A multi-case study' (2012) 12(1) *BMC Health Services Research* 1, 2; Marina Giampieri, 'Communication and informed consent in elderly people' (2012) 78(2) *Edizioni Minerva Medica* 236, 239-42; Elena Mariani, 'Shared decision-making in dementia care planning: barriers and facilitators in two European countries' (2016) 21(1) *Ageing & Mental Health* 31, 31-9.

Particularly in the final stages of dementia, a person might be unable to communicate their wishes.<sup>37</sup> Nonetheless:

...people with dementia might be unable to grasp a certain implication of the decision, but appear perfectly aware of other aspects of it, so that they are still able to give meaningful indications which need to be taken into account...<sup>38</sup>

It is the ‘flexibility’ of dementia that presents issues in the current legal paradigm of decision-making capacity and, thus, guardianship. Notably, a dementia sufferer’s decision-making capacity is impacted by their environment.<sup>39</sup>

Legally, all adults are presumed to have capacity.<sup>40</sup> To rebut this presumption, legislation often attempts to define and distinguish ‘having capacity’ from ‘incapacity.’ Coined the ‘binary approach’ by the Disability Royal Commission,<sup>41</sup> trying to categorise a dementia sufferer as strictly ‘having capacity’ or being ‘mentally incapable’ is near impossible.

Cumulatively, these arguments suggest that a test rooted in ‘mental incapacity’ leads decision-makers to more frequently assume that dementia sufferers are incapable of making their own choices.<sup>42</sup>

## *2 Demonstration of these Issues in the South Australian Landscape*

In South Australia, this ‘binary approach’ to decision-making capacity is spearheaded by s 3 of the *Guardianship and Administration Act 1993* (SA) (*GAA* (SA)). Section 3 of the *GAA*

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<sup>37</sup> De Sabbata (n 5) at 5 citing Julie Hugo and Mary Ganguli, ‘Dementia and cognitive impairment: epidemiology, diagnosis, and treatment’ (2014) 30(2) *Clinics in Geriatric Medicine* 421.

<sup>38</sup> Ibid citing Manuel Trachsel, Helena Hermann and Nikola Biller-Andorno, ‘Cognitive fluctuations as a challenge for the assessment of decision-making capacity in patients with dementia’ (2015) 30(4) *American Journal of Alzheimer’s Disease & Other Dementias* 360.

<sup>39</sup> De Sabbata (n 5) at 2.

<sup>40</sup> *Coffey v Coffey (No 2)* [2015] NSWSC 338, [15]-[19] (Slattery J); *Scott v Scott* (2012) 7 ASTLR 299, [233] (Lindsay J); *Murphy v Doman* (2003) 58 NSWLR 51, [34]-[36] (Handley JA).

<sup>41</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Diversity, Dignity Equity and Best Practice: A Framework for Supported Decision-Making* (Research Report, January 2023).

<sup>42</sup> De Sabbata (n 5) at 6.

(SA) defines ‘mental incapacity’ as ‘the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs’ due to:

- (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or
- (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever.<sup>43</sup>

The SACAT uses this definition to evaluate whether a person has a mental incapacity and, consequently, whether a guardianship order should be made in relation to that individual.<sup>44</sup>

This polarised definition is largely ignorant of those who can make decisions in some contexts,<sup>45</sup> such as people with dementia. Further, there is no requirement for SACAT to consider a person’s environment. Instead, the SACAT’s decision is solely based upon the ‘observable consequences of a relevant condition;’<sup>46</sup> here, dementia. It does not account for the fluidity of dementia. Article 12 rejects this deficit-focused definition, instead seeking a definition centred in human rights.

By approaching evaluations of mental incapacity through a binary lens, the floodgates are arguably opened for premature issuing of guardianship orders. In 2021, ‘the South Australian Public Advocate reported a 110% increase in guardianship matters’ over the prior ten years, with dementia-related cases making up 20% of such work from 2017-18.<sup>47</sup> In 2023-24, this percentage increased to 22.1%.<sup>48</sup> These figures do not encapsulate the number of private guardianship orders also issued. Hypothetically, where a presumption of capacity is instead

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<sup>43</sup> *GAA (SA)* (n 11) s 3.

<sup>44</sup> *Ibid* s 29(1).

<sup>45</sup> *De Sabbata* (n 5) at 5.

<sup>46</sup> *Blake et al.*, (n 2) at 397.

<sup>47</sup> *Blake et al.*, (n 2) at 391 citing Office of the Public Advocate (SA), *Annual Report 2016-2017* (Report, September 2017) 9-12 and John Chesterman, ‘The Future of Adult Guardianship in Federal Australia’ (2013) 66 *Australian Social Work* 26, 28.

<sup>48</sup> Office of the Public Advocate (SA), *Annual Report 2023-2024* (Report, September 2024) 21.

utilised, the SACAT may acknowledge the fluidity of decision-making capacity.

Consequently, this growing number of dementia-related guardianship orders could decrease.

### 3 *The Victorian Approach To ‘Capacity’*

The VCAT’s evaluations concerning decision-making capacity are led by s 5 of the *GAA* (Vic). Individuals are presumed to have decision-making capacity,<sup>49</sup> which is classified as the ability to understand, retain, use or weigh-up information.<sup>50</sup> A person must also be able to communicate their decision in a manner appropriate for them.<sup>51</sup> Further, s 5(4)(a) of the *GAA* (Vic) uniquely highlights that, when evaluating decision-making capacity, one must consider that ‘a person may have decision-making capacity in relation to some matters and not others’.<sup>52</sup> Therefore, mental incapacity is not a ‘pre-requisite’ when issuing a guardianship order in Victoria.<sup>53</sup> Specifically, s 5(4)(a) of the *GAA* (Vic) moves away from a binary approach by acknowledging how a person’s capacity might fluctuate. This is a positive amendment for dementia sufferers, as this multi-factorial ‘test’ for decision-making capacity provides the VCAT with greater opportunity to find that a person has capacity. This is evidenced by the Victorian Public Advocate having reported a decrease in clients with dementia in the 2022-23 period.<sup>54</sup>

Furthermore, s 6 of the *GAA* (Vic) considers the importance of the environment a person with dementia is in. It states:

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<sup>49</sup> *GAA* (Vic) (n 11) s 5(2).

<sup>50</sup> *Ibid* s 5(1)(a)-(c).

<sup>51</sup> *Ibid* s 5(1)(d) and (3).

<sup>52</sup> *Ibid* s 5(4)(a).

<sup>53</sup> *Blake* (n 12) at 3.

<sup>54</sup> Office of the Public Advocate (Vic), *2023 Annual Report* (Report, November 2023) 1, 35.

...a person who is assessing whether a person has decision-making capacity...must take reasonable steps to conduct the assessment at a time at which, and in an environment in which, the person's decision-making capacity can be assessed most accurately.<sup>55</sup>

Sometimes, merely placing a dementia patient in a quieter environment helps them to communicate their wishes.<sup>56</sup> By requiring assessment to be in an appropriate context, s 6 of the *GAA* (Vic) facilitates capacity-related results that reflect the lived experience of a dementia sufferer.

The consequences of these amendments will now be unpacked.

#### IV FROM POLICY TO PRACTICE: OBSERVABLE OUTCOMES OF THE *GAA* (VIC)

So far, this paper has discussed Victoria's 'hybrid' supported decision-making model and its presumption of capacity. Now, it is necessary to explore the VCAT's decisions to determine whether the *GAA* (Vic) has changed guardianship outcomes for dementia sufferers. Notably, this paper cannot discuss all issues with the *GAA* (Vic), such as the impact of family conflict.<sup>57</sup>

##### *A The 'Typical' Approach*

VCAT's decisions usually begin by referencing the primary object of the *GAA* (Vic);<sup>58</sup> namely, to have regard to the *CRPD*.<sup>59</sup> This does not occur in South Australia. The VCAT then considers whether a supportive guardianship order is appropriate. In early 2025,

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<sup>55</sup> *GAA* (Vic) (n 11) s 6.

<sup>56</sup> De Sabbata (n 5) at 6.

<sup>57</sup> See, eg, Blake (n 12) at 5 discussing *MGB (Guardianship)* [2021] VCAT 206 (Member Carruthers); *ESU (Guardianship)* [2024] VCAT 340 (Member Camerson); *XEX (Guardianship)* [2024] VCAT 26 (Senior Member Preuss); *BHP* [2024] VCAT 26 (Senior Member Steele).

<sup>58</sup> *GAA* (Vic) (n 11) s 7(1)(a).

<sup>59</sup> See generally *Re TBV* [2020] VCAT 595 (Senior Member Hoysted) and *Re VIJ* [2020] VCAT 760 (Senior Member Burdon-Smith). See also Blake et al, (n 2) at 397.

Professor Meredith Blake identified forty-three VCAT decisions which concerned ‘dementia’ and ‘supported decision-making.’<sup>60</sup> However, VCAT did not issue any supportive guardianship orders in these cases.<sup>61</sup> This complete absence of supportive guardianship orders sparks the under-addressed question: what is the utility of the Victorian supported decision-making model?

### *B Supportive Guardianship vs ‘Unofficial Guardianship’*

Foremost, the questionability of supportive guardianship is apparent in instances of ‘unofficial guardianship.’ This paper defines ‘unofficial guardianship’ as situations in which a loved one is acting as an informal decision-maker for a dementia sufferer.<sup>62</sup> Despite being able to make supportive guardianship orders, the VCAT’s decisions indicate a preference for the less restrictive option of ‘unofficial guardianship.’ Alternatively, the VCAT have also opted to use the less restrictive provisions in the *Medical Treatment Planning and Decisions Act 2016* (Vic).<sup>63</sup>

The case of *NBY*<sup>64</sup> illustrates this preference within the context of dementia. NBY had dementia and was living in an aged care facility. The Victorian Public Advocate had recommended that their current position as guardian for NBY be revoked.<sup>65</sup> This revocation was the seminal issue in the case.

Deputy President Genevieve Nihill AM considered s 31 of the *GAA* (Vic), which states that VCAT must consider a person’s will,<sup>66</sup> preferences<sup>67</sup> and informal supports.<sup>68</sup> These

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<sup>60</sup> Blake (n 12) at 4.

<sup>61</sup> *Ibid.*

<sup>62</sup> Blake et al, (n 2) at 405.

<sup>63</sup> See, eg, *UAC (Guardianship)* [2023] VCAT 101, 10 [50] (Member Moon); *EIS (Guardianship)* [2024] VCAT 100, 6 [30] (Member Bombas).

<sup>64</sup> *(Guardianship)* [2023] VCAT 39 (Deputy President G Nihill AM) (‘*NBY*’).

<sup>65</sup> *Ibid* [18].

<sup>66</sup> *GAA* (Vic) (n 11) s 31(a).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* s 31(b)(i).

considerations are not dissimilar from the requirements under s 9 of the *GAA* (SA) to consider a person's wishes<sup>69</sup> and informal arrangements.<sup>70</sup> In considering s 31 of the *GAA* (Vic), the Tribunal Member found '...no personal decisions that need[ed] to be made that [could not] be made in a less formal way'.<sup>71</sup> In forming this conclusion, the Tribunal Member noted NBY's non-existent prospect of travelling and the support provided by the staff in her facility.<sup>72</sup> Further, NBY could 'make decisions...about...day-to-day personal matters'.<sup>73</sup> However, the primary point of interest is that, when considering 'less formal way[s]',<sup>74</sup> of supporting NBY, there was no discussion of a supportive guardianship order. The informal support offered by the facility was deemed adequate.<sup>75</sup>

Furthermore, in *Re CWG*<sup>76</sup> the absence of unofficial support led the VCAT to 'conclude that there was no other option than a [traditional] guardianship order.'<sup>77</sup> CWG had 'no...contacts available to assist him in making informal decisions'.<sup>78</sup> This demonstrates that a supportive decision-making model is largely useless where a person does not have loved ones or other informal 'supporters' available to them. For dementia sufferers with no remaining family or friends, this regime has no utility; instead, they remain subject to traditional guardianship orders.

In Australia, more than half of permanent aged care residents have dementia.<sup>79</sup> Thus, whilst it is acknowledged that not all people with dementia are in residential aged care, it is not drastic to conclude that the facts of NBY's case are translatable to others. This speaks to the limited

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<sup>69</sup> *GAA* (SA) (n 11) s 5(a)-(b).

<sup>70</sup> *Ibid* s 5(c).

<sup>71</sup> *NBY* (n 64) at 10 [43].

<sup>72</sup> *Ibid* at 5 [22].

<sup>73</sup> *Ibid* at 9 [39].

<sup>74</sup> *Ibid* at 10 [43].

<sup>75</sup> *Ibid*.

<sup>76</sup> [2020] VCAT 975 (Deputy President Nihill) ('*Re CWG*').

<sup>77</sup> *Blake et al*, (n 2) at 415.

<sup>78</sup> *Re CWG* (n 76) [44].

<sup>79</sup> Emmanuel Gnanamanickam et al, 'Direct health and residential care costs of people living with dementia in Australian residential aged care' (2018) 33(7) *Geriatric Psychiatry* 859, 859.

utility of supportive guardianship orders and, thus, a supported decision-making model in the context of assisting those with dementia. Should the Victorian model be adopted, this preference for ‘unofficial guardianship’ would likely repeat in South Australia.

Further, these contrasting cases reveal a ‘grey area’ in the applicability of supportive guardianship orders. In *NBY*, no supportive guardianship order was issued due to the presence of informal support. Conversely, in *CWG*, a supportive guardianship order was not issued due to a lack of informal support. Therefore, it is unlikely the decrease in dementia-related, Victorian guardianship orders<sup>80</sup> is attributable to a preference for supportive guardianship. Instead, a hesitancy to transition from unofficial measures might be a better explanation. This ultimately demonstrates the limited utility of Victoria’s model.

### *C Autonomy vs Risk of Harm*

Additionally, there is a pitfall in the *GAA* (Vic) regarding balancing autonomy and potential harm. As made evident, prioritising a person’s will and preferences is at the core of Article 12. Supported decision-making is positioned as the means through which to secure this ‘prioritisation.’ However, the *GAA* (Vic) fails to highlight how the VCAT should proceed where a person without decision-making capacity intends to risk their health or safety.

Drawing from a cross-section of cases,<sup>81</sup> a tribunal decision which illustrates this lack of balance is *R XO*.<sup>82</sup> In this case, the daughters of a dementia sufferer were concerned their mother was being coerced by her husband to move from Victoria to Queensland. Allegedly, there had been prior instances of domestic violence. Nonetheless, the Tribunal Member held:

The difference between [*GAA* (Vic)] and the [*Guardianship and Administration Act 1986* (Vic)] is that *R XO*’s will and preferences have greater consequences in the context of implied coercive

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<sup>80</sup> Office of the Public Advocate (Vic) (n 54) at 35.

<sup>81</sup> Blake (n 12) at 4.

<sup>82</sup> (*Guardianship*) [2023] VCAT 872 (Senior Member Smith) (*‘R XO’*).

control. Such consequences can only be addressed when there is *overt evidence of actual harm and risk*...this case did not reach that threshold.<sup>83</sup>

Crucially, RXO never stated that she did not wish to move to Queensland.<sup>84</sup> Therefore, despite her husband's 'domineering' nature,<sup>85</sup> RXO's preference to remain with him was decisive. This demonstrates VCAT's prioritisation of will and preferences, even where there is a risk of harm.

Whilst it is important to maintain a dementia sufferer's autonomy, risks should not be ignored. It is beyond the scope of this paper to engage in comprehensive normative analysis. However, should South Australia adopt the Victorian model, it is pertinent this issue be addressed. For inspiration, the UK's *Mental Capacity Act 2005 (Code of Practice)* states that such Act 'aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack capacity to make decisions to protect themselves'.<sup>86</sup> Including a similar statement in s 5 of the *GAA (SA)* might encourage equilibrium when considering a dementia sufferer's will and preferences and their risky behaviour. Further, clarity should be given to the threshold of 'overt evidence.'<sup>87</sup>

#### D *Over-reliance on Medical Evidence*

Another interesting observation is the VCAT's strong reliance on medical evidence when assessing decision-making capacity. As highlighted by Professor Meredith Blake,<sup>88</sup> *RCF (Guardianship)*<sup>89</sup> illustrates this concept well.

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<sup>83</sup> Ibid at 12 [36] (emphasis added); see also Blake (n 12) at 6.

<sup>84</sup> Ibid at 10 [27].

<sup>85</sup> Ibid at 10 [28].

<sup>86</sup> *Mental Capacity Act 2005 (Code of Practice)* (UK), para. 1.4.

<sup>87</sup> *RXO* (n 82) at 12 [36].

<sup>88</sup> Blake (n 12) at 4.

<sup>89</sup> [2023] VCAT 893 (Senior Member Steele).

This case concerned EMY, who strongly opposed a doctor’s assessment of his mother’s decision-making capacity. The Tribunal Member placed greater weight upon the doctor’s evidence due to her expertise and independence.<sup>90</sup> This was juxtaposed with EMY’s ‘clouded...objection to the assessment’.<sup>91</sup> Of course, this element of subjectivity cannot be ignored.

However, when considering s 6 of the *GAA* (Vic), the Tribunal Member held that RCF had been assessed in an appropriate environment. In forming this conclusion, the Tribunal Member did not ‘give *any* weight to the views expressed by EMY...as to his mother’s decision-making capacity’ as ‘he [was] not an expert or even medically trained’.<sup>92</sup>

Arguably, EMY likely possessed a strong understanding of his mother’s capabilities. This is evidenced by RCF stating that she would have given her enduring power of attorney to her son.<sup>93</sup> Additionally, RCF lived with EMY, where she was ‘cared for’ and supported.<sup>94</sup> Nonetheless, EMY’s testament about his mother’s cognition was, oddly, not considered remotely ‘equal’ to the medical evidence.

This pulls into question whether s 6 of the *GAA* (Vic) goes far enough. Whilst decision-making capacity is to be assessed in an environment that promotes accuracy, the VCAT places limited weight on the opinions of those who view the dementia sufferer in their everyday, comfortable environment. This is hard to reconcile. Further, the Victorian Office of the Public Advocate has reported that over-reliance on medical evidence has perpetuated a ‘broad-brush’ approach to decision-making capacity.<sup>95</sup> This has led to extreme powers being

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<sup>90</sup> Ibid at 13 [52].

<sup>91</sup> Ibid.

<sup>92</sup> Ibid at 16 [75] (emphasis added).

<sup>93</sup> Ibid at 10 [34].

<sup>94</sup> Ibid at 22 [106].

<sup>95</sup> Office of the Public Advocate (Vic), *Reflections on guardianship: the law and practice in Victoria* (Final Report, February 2023) 1 at 7 [2.1.3].

conferred on guardians and has discouraged proportionate orders from being made.<sup>96</sup> Whilst guardianship orders concerning dementia sufferers are decreasing in Victoria,<sup>97</sup> a failure to include legislative ‘instructions’ pertaining to use of medical evidence has prevented the VCAT from tailoring guardianship orders.<sup>98</sup> Therefore, this issue of proportionality remains a live issue in both South Australia and Victoria.

Thus, should South Australia adopt a supported decision-making model, its guardianship legislation will need to specify a ‘threshold’ from which to balance medical evidence with the views of those close to the dementia sufferer. For instance, the legislation could require the SACAT to balance diagnostic assessments with evidence of functional capacity, such as a person’s management of their daily life in the environment they actually live in. In doing so, ‘decision-making capacity’ can be partially based on a person’s lived experience and not solely on medical findings.

## V CONCLUSION

The scope of this essay has not allowed for discussion of every weakness and strength of the *GAA* (Vic). However, this paper makes evident that South Australia has a lot to learn from Victoria.

Foremost, the Victorian legislation better aligns with the demands of the *CRPD*. The Victorian presumption of decision-making capacity is human rights focused and might be partially contributing to the declining number of guardianship orders concerning dementia sufferers. Additionally, s 6 of the *GAA* (Vic) takes a positive step towards considering how one’s environment can impact their decision-making capacity.

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<sup>96</sup> Ibid.

<sup>97</sup> Office of the Public Advocate (Vic) (n 54).

<sup>98</sup> Office of the Public Advocate (Vic) (n 95).

Unfortunately, the utility of a ‘supportive guardianship order’ is questionable for those with dementia. In the face of ‘unofficial guardianship,’ the VCAT remains reluctant to order supportive guardianship arrangements. An all-or-nothing approach remains. Additionally, the *GAA* (Vic) fails to properly balance a person’s wishes with any risk of harm. An over-reliance on medical evidence detracts from the positive definition of decision-making capacity, providing a ‘broad-brush’ approach to capacity that is ignorant of those who care for dementia sufferers.

Thus, whilst Victoria has paved the way for supported decision-making, South Australia should hesitate before blindly following them down this path. Instead, South Australia should contemplate the fluidity of dementia and translate this into legislative reform better reflective of lived experiences.

## VI BIBLIOGRAPHY

### *A Articles/Books/Reports*

Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report, August 2014)

Bicknell, Ross, 'Medical issues: The dangers of dementia: Getting the balance right' (2015) 23(2) *Journal of Law and Medicine* 303

Blake, Meredith, 'People Living with Dementia: What Difference Does Statutory Change Make? A Case Study from Australia' (2025) 13(1) *The European Society of Medicine* 1

Blake, Meredith, Cameron Stewart, Pia Castelli-Arnold, Craig Sinclair, 'Supported Decision-Making for People Living With Dementia: An Examination of Four Australian Guardianship Laws' (2021) 28 *Journal of Law and Medicine* 389

Chesterman, John, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26

De Sabbata, Kevin, 'Dementia, Treatment Decisions, and the UN Convention on the Rights of Persons with Disabilities. A New Framework for Old Problems' (2020) 11(571722) *Frontiers in Psychiatry* 1

Giampieri, Marina, 'Communication and informed consent in elderly people' (2012) 78(2) *Edizioni Minerva Medica* 236

Gnanamanickam, Emmanuel, Suzanne Dyer, Rachel Milte, Stephanie Harrison, Enwu Liu, Tiffany Easton, Clare Bradley, Rebecca Bilton, Wendy Shulver, Julie Ratcliffe, Craig Whitehead and Maria Crotty, 'Direct health and residential care costs of people living with dementia in Australian residential aged care' (2018) 33(7) *Geriatric Psychiatry* 859

Hugo, Julie and Mary Ganguli, 'Dementia and cognitive impairment: epidemiology, diagnosis, and treatment' (2014) 30(2) *Clinics in Geriatric Medicine* 421

Mariani, Elena, 'Shared decision-making in dementia care planning: barriers and facilitators in two European countries' (2016) 21(1) *Aging & Mental Health* 31

Minkowitz, Tina, 'The United Nations CRPD on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions' (2007) 34 *Syracuse Journal of International Law and Commerce* 405

Office of the Public Advocate (SA), *Annual Report 2016-2017* (Report, September 2017)

Office of the Public Advocate (SA), *Annual Report 2023-2024* (Report, September 2024)

Office of the Public Advocate (Vic), *Reflections on guardianship: the law and practice in Victoria* (Final Report, February 2023)

Office of the Public Advocate (Vic), *2023 Annual Report* (Report, November 2023)

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Diversity, Dignity Equity and Best Practice: A Framework for Supported Decision-Making* (Research Report, January 2023)

Smebye, Kari Lislerud , Marit Kirkevold and Knut Engedal, 'How do persons with dementia participate in decision making related to health and daily care? A multi-case study' (2012) 12(1) *BMC Health Services Research* 1

Trachsel, Manuel, Helena Hermann and Nikola Biller-Andorno, 'Cognitive fluctuations as a challenge for the assessment of decision-making capacity in patients with dementia' (2015) 30(4) *American Journal of Alzheimer's Disease & Other Dementias* 360

Weller, Penelope, 'Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice' (2014) 23 *Griffith Law Review* 498

Weller, Penelope, 'The Convention on the Rights of Persons with Disabilities and the Social Model of Health: New Perspectives' (2011) *Spring Journal of Mental Health Law* 74

#### B Cases

*BHP* [2024] VCAT 26

*Coffey v Coffey (No 2)* [2015] NSWSC 338

*EIS (Guardianship)* [2024] VCAT 100

*ESU (Guardianship)* [2024] VCAT 340

*MGB (Guardianship)* [2021] VCAT 206

*Murphy v Doman* (2003) 58 NSWLR 51

*NBY (Guardianship)* [2023] VCAT 39

*RCF (Guardianship)* [2023] VCAT 893

*Re CWG* [2020] VCAT 975

*Re TBV* [2020] VCAT 595

*Re VIJ* [2020] VCAT 760

*RXO (Guardianship)* [2023] VCAT 872

*Scott v Scott* (2012) 7 ASTLR 299

*UAC (Guardianship)* [2023] VCAT 101

*XEX (Guardianship)* [2024] VCAT 26

*ZII v ZIJ* [2018] NSWCATAP 225

#### C Legislation

*Guardianship and Administration Act 1986* (Vic)

*Guardianship Act 1987* (NSW)

*Guardianship and Administration Act 1990 (WA)*

*Guardianship and Management of Property Act 1991 (ACT)*

*Guardianship and Administration Act 1993 (SA)*

*Guardianship and Administration Act 1995 (Tas)*

*Guardianship and Administration Act 2000 (Qld)*

*Guardianship of Adults Act 2016 (NT)*

*Guardianship and Administration Act 2019 (Vic)*

#### *D Treaties*

United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UNTS 999 (entered into force 3 May 2008)

United Nations General Assembly, *Convention on the Rights of Persons with Disabilities 2006*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008)

#### *E Others*

Australian Bureau of Statistics, *Causes of Death, Australia, 2018* (Catalogue No 3303.0, 25 September 2019)

Australian Institute of Health and Welfare, *Dementia in Australia*, Cat No AGE 70 (2012)

*Mental Capacity Act 2005 (Code of Practice)* (UK)

Victoria, *Parliamentary Debates*, Legislative Council, 28 May 2019