MOVING TOWARDS SUPPORTED DECISION-MAKING IN SOUTH AUSTRALIA

What approach to SDM should be adopted in South Australia's guardianship legislation and how should the concept of 'serious harm' be understood within this framework?

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Introduction:

Australia was one of the first nations to ratify the Convention on the Rights of Persons with Disabilities (*CRPD*)[1]. The Convention directs State Parties to recognise legal capacity as a universal construct. [2] The *CRPD* promotes the adoption of supported decision-making (SDM) in place of substitute-decision making practices such as guardianship. [3]

In Australian law ratifying an international convention does not mean that its provisions will be automatically incorporated into domestic law. [4] Such a step can only take place where substances of a treaty are enacted into law.[5]

Therefore, the question posed is whether a SDM framework can be adopted in the *Guardianship and Administration Act* 1993 (SA) ('*GAA'*). This essay will explore this question by considering various approaches to SDM.

Firstly, the paradigm of SDM will be discussed from the international law perspective, and specifically, the *CRPD*. This is to understand Australia's obligations as a party to this treaty. It will be considered if this approach is feasible and appropriate.

Then, recommendations by the Commonwealth Disability Royal Commission ('DRC') will be considered. The DRC proposes the implementation of SDM into guardianship laws and offer a different approach to that of the *CRPD*.

[1] 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). ('*CRPD'*).
[2] Ibid, art 12.
[3] The Committee on the Rights of Persons with Disabilities, General Commet No 1; Article 12: equal recognition before the law, 11th sess, UN Doc CRPD/C/GC/1/, 19 May 2014, [27]. ('GC')
[4] *Minister for Immigration and Ethnic Affairs v Teo* (1995) 128 ALR 353, 361.
[5] Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: an assessment of Australia's level of compliance* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Research Report, October 2020).

Lastly, the issue will be explored from the national front. Victoria's GAA Act, which is highly considered as the closest in compliance with the CRPD will be analysed to determine if it can provide further guidance to SA lawmakers.

For SA to move towards SDM, the matter will need to be explored from various fronts, to ensure the most appropriate approach is adopted.

Article 12 CRPD:

The *CRPD* which entered into force in May 2008 was the first human right treaty adopted in the twenty first century. [6] It embodies a paradigm shift away from the 'medical model' of disability to one that is entrenched in human rights. [7] It is designed to protect the inherent dignity, and human rights of persons with disabilities.[8] Such a treaty is necessary as many people with a disability around the world are not able to completely enjoy their fundamental rights on the same basis as others. Article 12 of the *CRPD* arguably demonstrates the strongest display of the paradigm shift.[9] The Article recognises that all people with a disability are equal before the law and should be granted this right on the same basis as others.[10] It confers obligations on State Parties to ensure they take appropriate measures to provide people with access to support in order to exercise their legal capacity and to create appropriate and effective safeguards. [11]

[6] Rosemary Kayess and Phillip French 'Out of Darkness into Light: Introducing The Convention On The Rights Of Persons With Disabilities' (2008) 8(1) *Human Rights Law Review*, 1.

[7] Fleur Beaupert, Linda Steele and Piers Gooding 'Introduction to Disability, Rights and Law Reform in Australia: Pushing Beyond Legal Futures' (2017) 35(2) *Law in Context* 21, 1-14.
[8] 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). ('*CRPD'*) art 1.
[9] Ibid, art [12].
[10] Ibid, art 12(3)-(4).
[11] Ibid.

In Australia, like in many other countries, persons with cognitive impairments are often subjected to substitute decision-making regimes.[12] This is despite the country's ratification of the CRPD. The power to act as a substitute decision maker is often provided through legislation where decisions are based on the objective best interests of the person concerned. [13]

SDM comprises a range of processes involving the provision of supports and accommodations to a person in their exercise of legal capacity. [14] With their consent, the person can be assisted to make and communicate their wishes and preferences about a decision affecting them. [15]

Many state parties, including Australia, entered interpretative decelerations relating to Article 12. Australia clarified their interpretation that substitute-decision making regimes do not breach the relevant provisions of the CRPD.[16]

The CRPD Committee's 2014 General Comment greatly criticised substitute decision making practices. [17] Their interpretation is that it is clear how under Article 12 "perceived or actual deficits in mental capacity must not be used as a justification for denying legal capacity' and require state parties to repeal laws that pertain to substitute decision-making and instead develop SDM alternatives.[18] The intention of the Committee in its General Comment is worthy of support. [19] The aim is to prevent harmful removal of one's legal capacity and avoid

[12] Joanne Watson et al, 'The impact of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on Victorian guardianship practice' (2022) *Disability and Rehabilitation* 44(12), 2806-14.
[13] *Guardianship and Administration Act* 1993 (SA) s 29. ('*GAA'*)
[14] Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2013) 20(3) *Psychiatry, Psychology and Law* 20(3) 431, 434.
[15] Ibid.
[16] *Australia, Ratification (with Declarations),* registered with the Secretariat of the United Nations 17 July 2008, 2527 UNTS 289 (date of effect 16 August 2008).

[17] GC (n 3), [27].
[18] Ibid, [7].
[19] Tina Minkowitz 'Abolishing mental health laws to comply with the Convention on the Rights of Persons with Disabilities' (2008) *Rethinking Rights-Based Mental Health Laws*, Bloomsbury Publishing, 151-77.

authoritarian forms of substitute decision-making that do not take adequate account to the views of a person; to support a person's autonomy and avoid discrimination. [20]

Dawson argues that a more realistic view should be taken of the implications of the CRPD for mental health and guardianship laws. [21]. He stresses that a balancing concept is often used to clarify between respecting individual autonomy and protecting the interests of those most vulnerable. [22]This concept is not highlighted in the Convention nor in the Committee's General Comment. The Committee asserts that decisions should solely be based on a person's will and preferences or the best interpretation of this. [23]In this sense, the Committee supports the idea that the concept of impairment should be removed from legal standards entirely. [24]

The Committee illustrates how an assessment of decision-making capacity should not be relied upon in the application of the law. Rather, support should be provided to ensure all persons with disabilities are able to exercise capacity. Although the Committee's standing and approach of SDM is commendable, it falls short of recognising those with severe cognitive impairment, where even through support, may not have capacity to make a decision.

Therefore, the construct of SDM will be considered further, firstly through the lens of the DRC.

[20] John Dawson, 'A realistic approach to assessing mental health laws' compliance with the UNCRPD' (2015) 40 *International journal of law and psychiatry* 70-9.
[21] Ibid.
[22] Ibid.
[23] GC (n 3), 21.
[24] Dawson (n 20).

The Binary and Principled Approaches to SDM:

In the Research paper *Diversity, Dignity and Equality* funded by the DRC, the binary and principled approaches to supported decision-making are discussed. [25]

The binary approach distinctly distinguishes between supported and substitute decision-making. In this approach, SDM involves a person being supported to actively participate in making a decision and retaining control of it; or there is substitute decision-making where even through support, a person is not able to actively participate in a decision and a substitute decision is made based on their perceived 'bests interests'.[26] This binary approach excludes persons with severe cognitive disabilities from accessing supported decision-making. This understanding of the two as the binary opposites is to an extent grounded in the CRPD.

There are challenges to the application of this approach where people have severe cognitive impairments, who may not be able to understand or comprehend decisions and their implications even with support. [27] This brings into question, the notion of capacity and how it is conceptualised within the binary approach. A supporter's purpose is to extend a person's autonomy and capacity to the greatest extent possible.[28] Where a person does lacks sufficient capacity even through support, then a substitute decision-maker may be required. [29] Scholars have found that although this binary approach of substitute decision-making versus SDM is a common way of viewing the SDM framework, it does have issues in accommodating all persons with cognitive disabilities. [30] Australian scholars Callaghan and Ryan provide a

[25] Christine Bigby et al, Diversity*, dignity, equity, and best practice: a framework for supported decision-making* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Research Report January 2023).
[26] Ibid, 2.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] McCallum (n 3), 50.

nuanced perspective to the binary approach and article 12. [31]Although they accept the article's aims, they contend that a form of substitute decision-making will often be necessary in circumstances of "hard cases- where there is a risk to self or others after supportive processes have failed to produce an outcome". [32] They agree that a person should be supported as far as possible to make their own decisions and substitute decisions should only be resorted to where their decision may infringe other rights and lead them to suffer harm. [33]

The principled approach understands SDM as a "continuum of decision support".[34] It consists of people being supported to make their own decision as well as decisions being made based on a supporter's interpretation of a person's will and preference. This interpretation approach is referred to in the paper as will and preference substitute decision-making.[35] This principled approach is supported in this essay.

The DRC highlights how there are circumstances where the principled approach to SDM may not extend to all decisions.[36] Where there are issues of risks, decisions can be guided by a person's personal and social wellbeing.[37] They state that such a step should only occur where a person's stated or interpreted will and preference entails risk of serious and imminent harm, where they unable to understand the risk even with support. [38]

[31] Sascha Callaghan and Christopher James Ryan, 'An Evolving Revolution: Evaluating Australia's Compliance with the Convention on the Rights of Persons with Disabilities in Mental Health Law' (2016) 39(2), *University of NSW Law Journal.*
[32] Ibid, 610.
[33] Ibid.
[34] Bigby (n 26), 20.
[35] Ibid.
[36] Ibid, 21.
[37] Ibid.
[38] Ibid.

The Disability Royal Commission Final Report 2023:

This further reflects the Final Report subsequently released by the DRC in September of 2023.[39] The Report included 222 Recommendations towards inclusivity in Australian laws. Recommendation 6.10 states that a person's will, and preferences must be respected unless doing so would cause serious harm to them.[40] In these circumstances, the representative must act to promote and uphold the person's personal and social wellbeing with least possible restriction on their autonomy and dignity. [41] The DRC's recommendation upholds the SDM paradigm developed in the CRPD as the preferred decision-making framework. However, it acknowledges its difficulties in practice. It recognizes that a best interest's approach will inevitability still linger where there is a serious risk of harm to self. This is reflective of the principled approach to SDM. [42]

There is no definition of what constitutes serious harm provided by the DRC in their Final Report. This creates a challenge for implementing the framework into State legislation as it does not provide clarity of the circumstances where a person's will, and preferences can be overridden by a representative. Without a definition, representatives may default to a best interest's approach.

The Victorian GAA will be considered for further clarity.

[39] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report- Executive Summary, Our Vision for an inclusive Australia and Recommendations* (Final Report, September 2023).
[40] Ibid, 191.
[41] Ibid
[42] Ibid, 188.

Developments in Victoria's Jurisdiction:

Legislation was passed in 2019 to reform the Victorian GAA to incorporate principles of SDM. Many have commentated that the Victorian Act is the closest amongst Australia's jurisdictions to comply with the *CRPD*.[43]

Section 9 of the Vic GAA outlines how a supporter must have regard to the represented person's will and preference; the best interpretation of their wishes based on all information available; their will and preference should only be overridden to prevent serious harm. [44]

Like the DRC, the Vic GAA does not define serious harm.

The Victorian Civil and Administrative Tribunal (VCAT) have explored this issue in a few of their cases that will be considered below.

Case Law- Conceptualising Serious Harm

EHV:

The case of EHV involved a 64-year-old man with alcohol related brain injuries.[45] His guardian, the Public Advocate had decided it was necessary he reside in a secure residential facility, but EHV's wish was to return to his flat and live independently, Additionally, EHV was in a precarious financial situation- his only source of income was from his pension, almost all of this was taken to pay his accommodation.[46] He also had debts to pay off and outgoings for the flat that he owned jointly with his sister's estate. State Trustees Limited (STL) was EHV's administrator. STL renewed an application they had made under the previous administration seeking approval from VCAT to sell EHV's flat in order to pay off

[43] Watson (n 12), 2810.
[44] *Guardianship and Administration Act* 2019 (VIC) s 9(1)(a)-(e). ('VIC GAA').
[45] EHV (Guardianship) [2021] VCAT 425, 2.
[46] Ibid, 3.

his debts.[47] VCAT had to consider whether EHV's financial circumstances were serious enough to allow STL to override his wish to retain his flat. [48]STL had a duty under section 55 GAA to use reasonable care when dealing with EHV's finances and VCAT acknowledged that they were right to consider selling the flat to meet his debts.[49] But no creditor had attempted to force a sale on the flat or recover money owed.

The Tribunal decided that his strong preference to live in his flat should prevail- application to sell EHV's flat was refused.[50] Tribunal stated that if there is an increase in his expenses leading to his budget going into deficit, meaning his debts cannot be paid it may be necessary for the flat to be sold to avoid serious harm to him. A forced sale (brought about by creditor) would be serious harm to him because he would lose much of the proceeds of the sale to pay what he owes as well as legal costs.[51]

This case suggests that for a decision to constitute serious harm, risks must be imminent and material. It is not sufficient that a person has debts to pay, the harm must be significant, and long-lasting. No creditors had attempted to force a sale or recover money owed and this was a key factor to the Tribunal's decision.

ZWU and XIY:

The cases of ZWU and XIY provided further clarity on understanding serious harm. ZWU's case concerned a risk of liability and VCAT had to consider whether allowing the represented person's brother to live on his property would cause serious harm to ZWU.[52] The case highlights how a circumstance may constitute serious harm if there is a significant risk of

[47] Ibid, 4.
[48] Ibid, 57.
[49] Ibid.
[50] Ibid, 61.
[51] Ibid, 65.
[52] ZWU (Guardianship) [2021] VCAT 371, 34.

civil or criminal liability.[53] If there was an imminent risk of an adverse event that could result liability, then this may potentially constitute serious harm.

In the case of XIY, represented person was using his savings and had depleted them to a point that they would run out by the end of 2023.[54] After this point, he would be required to live within his means. The Tribunal rightly noted that living within your means is something many in the community experience and that although it is unfortunate that XIY will probably feel distress an inconvenience in this transition it is not a level of harm that could be considered serious.[55]The Tribunal described serious harm as an event that has "profound consequences on the ability of the represented person to lead their lives".[56]
The above cases also highlight how within this SDM framework in Victoria, the qualifier for overriding a decision is not whether a person lacks decision-making capacity, but rather whether their decisions cause serious harm to them. By understanding what constitutes serious harm, SDM could be adopted in SA legislation.

VDX:

The case of VDX involved an 88-year woman residing at Goulbourn Valley Health (GVH). [57]GVH had initially applied for a guardianship order and proposed one of her children as supportive guardian.[58] GVH then applied for a further application for guardianship and for the supportive guardianship appointment to be reassessed.[59] Under section 8 of the GAA Act, VDX's will, and preferences should be put at the forefront "as far as practicable".[60] VDX's will and preference was to be able to make her own decisions about where she lives

[53] Ibid, 57.
[54] XIY (Guardianship) [2023] VCAT 809, 62.
[55] Ibid.
[56] Ibid, 61.
[57] VDX (Guardianship) [2020] VCAT 1186, 2.
[58] Ibid, 3.
[59] Ibid, 6.
[60] VIC GAA (n 44) s 8.

and what services she requires. Medical evidence indicated that VDX no longer had decision-making capacity about her living circumstances, even if support was in place.[61] VCAT also considered whether a supportive guardian would be appropriate as it is less restrictive than traditional guardianship and aligns with principles in section 8 of the Act, but found this option was no longer available because evidence showed VDX would not have decision making capacity even with support.[62]

Ultimately, the Tribunal could not give effect to her will and preference as she would be at risk of serious harm if allowed to return home to live by herself without "significant assistance services".[63] Allowing VDX to live by herself, where she is alienated from support services would be significant enough to constitute serious harm.

Two-Streamed Approach:

This case illustrates the two-streamed approach to guardianship in Victoria. Victoria's GAA is in line with Australia's interpretative declaration on Article 12 as it maintains the pathway of traditional guardianship whilst introducing a new stream of supportive guardianship. Traditional guardianship provisions are maintained to allow for a traditional guardian to be appointed where a person does not have capacity to make a decision even with support.[64] Under section 87, a supportive guardian only has power to assist a person carry out their decisions but does not have authority to override a decision.[65] A traditional guardian (the Public Advocate) does have the power to override the represented person's will and preferences where there is risk of harm.[66]

[61] VDX (n 57), 21.
[62] Ibid, 25.
[63] Ibid, 37.
[64] Vic GAA (n 44) , s 5.
[65] Ibid, s 87.
[66] Ibid, s 15.

This distinction is not outlined in the DRC's findings, rather it takes a linear view. The two streamed approach in Victoria, removes liability that would otherwise fall onto a supportive guardian. Additionally, the wording in section 9 of the GAA differs to that in Recommendation 6.10 by the DRC. Section 9 states that a representative should give effect to a person's will and preferences whilst the DRC is stricter and uses the term 'must'. This is a critical distinction and GAA recognises the challenges of applying SDM in practice. For SA, consideration must be given to the two streamed approach and the degree to which guardians should or must give effect to the represented person's decision.

Conclusion:

South Australia is looking to shift its guardianship legislation from substitute decision-making to SDM. Recommendations by the CRPD and DRC are driving this initiative. The CRPD urges parties to abolish substitute-decision making regimes that are binary to SDM. The DRC, however, takes a principled approach and acknowledges the reality that best interests' practices will inevitably still linger to prevent serious harm. The principled approach highlighted by the DRC is the most effective. The Victorian GAA and VCAT clarify the concept of serious harm as a decision that would result in profound consequences for the ability of the represented person to lead their lives. This can be severe financial circumstances, such as a forced sale in the case of EHV, risks of liability in the case of ZWU, or significant deterioration of health and alienation from support services such as in the case of VDX. The two streamed approach from Victoria is recommended in South Australia as it aims to reduce liability whilst upholding standards from CRPD and DRC.

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