Is South Australia ready to shift from substitute decision-making to a model of supported decision-making? If so, from a legal perspective, what factors and challenges need to be considered in this shift?

Making decisions for one's own life is often taken for granted, whether that be the decision to live in a certain suburb over another or choosing one's own hairdresser. For people with disabilities, making decisions is not always simple and the South Australian frameworks, requirements and legislation surrounding decision-making for persons with disabilities is complex. With substituted decision-making, decisions are made for a person with disabilities, and this includes decisions for accommodation, medical treatments or lifestyle. This approach has been subject to criticism from the Australian and global sphere as it can be seen as too restrictive and in need of reform. With the amendments to their *Guardianship and Administration Act 2019* (Vic),[1] Victoria implemented supported decision-making (SDM) as a parallel approach to substituted decision-making. SDM is the process whereby a guardian will guide and help the person with disabilities to make their own decision. South Australia currently looks to this Victorian Act to consider if and how it could be used as an example for South Australian legislation.

Whether to appoint a guardian to make decisions for a person with disabilities rests on the concept of mental capacity. The meaning and implications of capacity are debated and often modified to fit changing views. Further, assessment of capacity plays a key role in the possible implementation of SDM in South Australia. This is due to Victoria using capacity as a requirement for whether a guardian is needed at all and secondly, whether they will make decisions for the person with disabilities (substituted decision making) or support them to make their own decisions (SDM).

[1] *Guardianship and Administration Act 2019* (Vic).

This essay will firstly explore the critical relationship between capacity and SDM in the context of South Australian legislation. An analysis of how capacity is currently assessed in South Australia is required and the ways in which it could be improved. From this analysis, the need for capacity to be reframed into a more modern concept is demonstrated in the essay. A global perspective will be explored with the argument that South Australia would be conforming with international treaty obligations if SDM was implemented into legislation. Finally, a snapshot of what SDM could look like in South Australia will be presented including both the benefits and realities. This will be achieved with a close comparison with the Victorian model and what South Australia could take from their approach.

Relationship between capacity and SDM

Under the *Guardianship and Administration Act 1993* (SA),[2] a guardianship order will be made by the South Australian Civil and Administrative Tribunal (SACAT) if satisfied that the person subject to the application has a mental incapacity. An exception to this, however, is where there are informal arrangements in place for the individual, such as having a family member of friend as their guardian.[3] 'Mental incapacity' is defined as the inability of a person to look after their own health, safety or welfare or to manage their own affairs.[4] As the *GA Act* defines, a mental incapacity will be brought on as a result of either any damage to or any illness, disorder, delayed development, impairment of the brain or mind, or any physical illness that renders the person unable to communicate their intentions or wishes in any manner.[5]

This provision of *GA Act* establishes the requirement for a guardian to be appointed to make decisions for a person with disabilities. There are two main issues with this provision being the definition's width and significance. Firstly, 'mental incapacity's' definition in the *GA Act*

[2] *Guardian and Administrative Act 1993* (SA) s 29(1)(a) ('*GA Act*').
[3] Ibid. s 5(c).
[4] Ibid. s 3.
[5] Ibid.

is too broad and somewhat vague. There are so few requirements or criterium to meet in this definition. The impact of this is that many people with varying levels of a disability are captured in this definition when a guardian to make their decisions is not necessary. South Australia, unlike Victoria, does not recognise in law that there can be different levels at different times to make decisions. This is where SDM could greatly improve South Australia's current legislation. This is the case because at the heart of SDM is the proposition that instead of delegating a person's decision-making power to another, the individual can be provided with necessary supports to make and communicate decisions according to their wishes.[6] The abilities of the SDM model to capture the fluctuations of capacity, however, are discussed later in the essay. Using mental capacity as a basis to limit someone's decisional authority is potentially dangerous.[7] This is due to it relying on broad criteria that are often ambiguous in meaning and requires clinical and judicial judgment making it a difficult task with errors potentially being made.[8]

Secondly, *GA Act* places too much weight on this definition of 'mental incapacity'. The only other requirement for SACAT to assess when granting a guardianship order is whether that order should be made in respect to the person.[9] This is a somewhat redundant provision because SACAT will clearly decide a guardianship order should be made if the person subject to the order is found to have a mental incapacity. The requirement to find mental incapacity in the person causes the second requirement to lose purpose. The *GA Act*, therefore, is in need of reform to recognise the realities of capacity for people with disabilities and establish a more extensive set of criteria to assess against.

[6] Piers Gooding 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2013) 20(3) *Psychiatry, Psychology and Law*, 431, 434.
[7] Jillian Craigie 'Legally capacity, mental capacity and supported decision-making: Report from a panel event' (2018) 62 *International Journal of Law and Psychiatry*, 164.
[8] Ibid.
[9] *GA Act* s 29 (1)(b).

Current assessment of mental capacity in South Australia

Areas of reform for the *GA Act* can be highlighted through an example of how South Australia currently assesses mental capacity in a person with disabilities. In a particular SACAT hearing, the Public Advocate applied for the internal review of the decision to revoke the application of the Public Advocate as the guardian of a person (they will be referred to as X) and instead appoint X's friend as their guardian.[10]

There is too much of a reliance on medical opinion when making a determination of mental incapacity in a person and this SACAT hearing provides an example of this notion. In determining whether X had a mental incapacity, it was first acknowledged that deciding a person needs a guardian to be appointed is often a straight-forward question.[11] This demonstrates the Tribunal's, and South Australia's opinion, that appointing guardians and therefore, deeming a person to not possess mental capacity, is an easy and obvious decision. The Tribunal simply look to whether the medical evidence in this case disclosed a consensus of expert opinion that the person has a mental incapacity and this assessment being based on the person managing their own affairs.[12] Medical opinion of a person with disabilities will only reveal information of their capacity to some extent as it is an assessment at a certain point in time. Mental capacity can change for some people over time, meaning there may be periods of their life where they can make decisions. Alternatively, other people with disabilities can effectively make decisions for some areas of their life, for example where they want to live, but cannot for other areas, such as complex health decisions. An order by SACAT of mental incapacity overrides these fluctuations or capabilities of a person with a simplistic approach that merely looks to a medical report and at times misses the reality of the situation. Due to the gravity of these determinations by SACAT, as a decision of mental incapacity takes the ability to make decisions about one's own life, a greater appreciation of the complexities to capacity should be considered and further evidence be sought from other disciplines other than medical.

[10] SACAT hearing 2022/SIR000254 (December 2022) [1].
[11] Ibid. [22].
[12] Ibid. [22].

A further restraint on the current assessment requirement for mental capacity in South Australia, is that the *GA Act* defines 'incapacity' as an absolute term.[13] The Tribunal expressed that X is an intelligent and educated person and at times able to conduct sophisticated conversations and engage in some reasoning.[14] Due to the far-reaching definition of mental incapacity in South Australia, however, there is no attempt to thoroughly assess X's capacity. The Tribunal, although at times acknowledging X's capacity and that 'impairment can fluctuate'[15], cannot act outside the scope provided by legislation that there either is capacity or incapacity in a person. This restrictive approach is not accommodating to people with disabilities, such as X, who at times or on certain topics are able to make a decision about their life with the appropriate supports in place. This problematic nexus between mental capacity and law still takes the historical role of restraining people with disabilities rather than providing support.[16]

It was held that X did have a mental incapacity and his friend was appointed as his guardian.[17] Had reforms to assessment of capacity in South Australia existed, X may have instead had his friend to support him to make decisions at times in his life when he was not able to do so, as opposed to an overriding decision to remove X's ability completely. A proposed reform to the current approach is to reframe the concept of mental capacity into 'decision-making ability' and in doing this, implement some SDM approaches used by Victoria.

[13] Ibid. [28].
[14] Ibid. [25].
[15] Ibid. [28].
[16] Gooding *supra* note 5, 439.
[17] SACAT hearing *supra* note 9, [30].

The need for capacity to be reframed into decision-making ability

Specifically, South Australia should begin to abandon the concept of capacity and reframe this into the 'decision-making ability' of a person with disabilities. Adopting this reframed concept of decision-making ability would support bringing about the more progressive approach of SDM into South Australia's legislation, allowing people to be in control of their own decisions. This would be achieved because decision-making ability is a broad term that establishes a higher threshold to be met to deem a person must be appointed a guardian. In contrast to the uncompromising notion of incapacity means this person either has capacity or not and there is no realistic acknowledgement of their abilities being somewhere in between on the spectrum. Further, decision-making ability would properly allow for the fluctuations in someone's mental disability to be acknowledged because it assesses their ability to make each individual decision. Through this, the focus shifts to the social and contextual factors that impact upon the ability to make decisions rather than mental capacity being defined within a person's disability.[18]

SDM, as used in Victorian legislation,[19] means a supportive guardian provides all the information and guidance possible to support the person with disabilities to make their own decision. With this approach efforts are directed at identifying a person's decision-making impairments but only as a means to implement the necessary support they require to exercise their ability to make the decision themselves.[20] In contrast to the 'all or nothing' approach used in South Australia, the continuum approach to capacity moves towards an assessment on a decision-by-decision basis and that is not heavily linked to the person's disability status.[21] When it is deemed necessary that a person with disabilities cannot make a particular decision at that point in time, the decision is made by a guardian. An adaption to assessing decision-making ability, however, will when appropriate allow people with disabilities to make decisions more often and ensure traditional guardianship is an avenue of last resort.

[18] Michelle Browning, Christine Bigby & Jacinta Douglas, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' (2014) 1(1) *Research and Practice in Intellectual and Developmental Disabilities*, 38.
[19] *Guardianship and Administration Act 2019* (Vic) s 87(1).
[20] Gooding *supra* note 5, 438.
[21] Browning, Bigby & Douglas *supra* note 17, 40.

The following hearings at the Victorian Civil and Administrative Tribunal (VCAT) and the Victorian Mental Health Tribunal (VMHT) provide examples of how Victoria differs in assessing whether a person can make decisions for themselves and because of this encourages a SDM approach.

I. GJN [2019] VMHT 33 (12 November 2019)

The case from VMHT reviewed whether the person with disabilities (GJN) had capacity to give informed consent for the use of Electroconvulsive therapy (ECT). The Tribunal states that a person has capacity to give informed consent and make their own decision about ECT if they understand the relevant information and are able to do the following: remember the information that is relevant to their decision, use or weigh this information and communicate their decision by any means. The first element to understanding the information was satisfied as GJN told the Tribunal that ECT involved 'shock treatment to the brain' and understood that it involved anaesthetic, as she stated that she 'did not like the needle'. GJN stated that she had schizophrenia and remembered that she had received ECT as treatment in the past. Whether GJN could weigh the information relevant to her decision was more difficult to determine, however, the Tribunal deemed it satisfied. It was shown that GJN understood why the treating team were recommending it, and she recollected her symptoms and how ECT had assisted her previously.[22]

Significantly, VMHT conduct a process of assessment that had far greater depth than the hearing held by SACAT. Fragmenting the assessment of capacity into elements and establishing more requirements allows for a more accurate representation of the person's capacity to be made and enables them to retain control of their decisions. Further, the Tribunal made clear that the threshold of capacity in the Act is relatively low. This, therefore, reflected the importance of the principles of self-determination, to be free of non-consensual medical treatment and personal inviolability and the dignity of the person.

[22] *GJN* [2019] VMHT 33 (12 November 2019).

II. IFZ (Guardianship) [2020] VCAT 582 (22 May 2020)

VCAT reviewed the issue as to whether the person of subject (IFZ) had a disability that affected their decision-making capacity in respect to any financial matter.[23] Similar to the VMHT hearing, the same elements of criteria were applied to IFZ in order to determine if they could understand relevant information and make their decision.[24] VCAT went further than the previous case, however, in exploring IFZ's particular circumstances and used relevant evidence to determine her current decision-making ability.[25] IFZ's estate subject to the financial decision was substantial which required complex decisions that were under undue influence from interested family members.[26]Although it was held IFZ had a disability and because of this did not haver decision-making capacity, the approach as a result of Victorian legislation again gave depth to the Tribunal's decision. The legislation enabled a wholistic assessment of the person and took in multiple considerations that created a spectrum of decision-making capacity. This is further supported when acknowledging the nature of exercising the capacity to give informed consent was issue-specific, fluctuating and context dependent.[27] As a resulting, the Tribunal was able to gain an accurate representation of IFZ's mental capacity and therefore make a sound decision.

Convention on the Rights of Persons with Disabilities

Further to these adaptions and principles being beneficial to people with disabilities if implemented in South Australia, they would also uphold international human right obligations from the United Nations (UN). Standards, requirements and principles surrounding the rights and treatment of people with disabilities have been established by the

[23] *IFZ* (Guardianship) [2020] VCAT 582 (22 May 2020).
[24] Ibid. [92].
[25] Ibid. [113].
[26] Ibid. [114].
[27] Ibid. [112].

UN in the *Convention on the Rights of Persons with Disabilities*.[28] Of particular interest is Article 12(3) which states:

> *'State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising legal capacity.'*[29]

In Australia, 'legal capacity' is understood as the law recognising the right of personhood to every natural person and in that control of one's own life. As a result, Article 12 clarifies for the first time under international law, that a person's disability cannot provide a justification for the denial of the person's right to legal personhood or equal recognition under the law.[30] This article becomes an obvious call to the whole of Australia, as a party to the *CRPD*, to legislate reform and create systems that will filtrate SDM into their country. A SDM model would be an effective and 'appropriate measure' in providing access for people with disabilities to be supported in exercising decision-making ability. This is evident because a SDM processes sees the person with disabilities having conversations with the supportive guardian about their wishes and information being presented in understandable ways to help them make a decision.

SDM is a process that enables some people to exercise their capacity, and thus greater autonomy and self-determination.[31] By South Australia, therefore, upholding international obligations, especially Article 12(3), people with disabilities will be able to enjoy these concepts because they are making decisions about their own life. Autonomy and self-determination would more likely be achieved through SDM because these terms are reimagined from an independent to interdependent phenomenon.[32] A more advanced approach with a realistic view of autonomy is acknowledged where individuals can rely on to greater or lesser extents depending on where on the fluctuation their capacity sits. Further, interdependent autonomy would consist of multiple parties providing supports to the

[28] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD'*).
[29] *CRPD* art 12(3).
[30] Craigie *supra* note 6, 161.
[31] Browning, Bigby & Douglas *supra* note 17, 36.
[32] Gooding *supra* note 5, 435.

individual including family, friends, doctors, accountants, or social workers. Seeing this shift in how autonomy and self-determination can be interdependent, would greatly support the implementation of SDM in South Australia along with upholding obligations outlined in the *CRPD*. Integrating the ideas within Article 12, it can be said that just as people with physical disabilities need a ramp to ensure that they are reasonably accommodated to access a building, SDM is seen as the vehicle to reasonably accommodate people with cognitive disabilities to exercise their capacity.[33]

Implementation of SDM in South Australia

There is little doubt that the implementation of SDM into South Australian legislation would yield many benefits for individuals with disabilities. The reality of practice, however, can often look quite different to the initial concept. South Australia may use the Victorian model to better understand both the advantages and the potential gaps of implementing a SDM system. In particular, the gaps are of great importance to South Australia as they highlight how to legislate SDM in different and more effective ways.

I. The need for more resources

Like so much else, to legislate and then implement SDM in South Australia requires money, time and people well-trained in the disability sector. The state can evaluate Victoria's approach to sufficiently providing all these resources, however, it does present a great difficulty. This significant need can be used as a legitimate argument against the implementation of SDM as the solutions are not simple. It is expensive in terms of both money and time to take a SDM approach with an individual over a substituted decision-making approach. This is due to there being far more discussions with the individual as the supporter is not quickly making decisions, but instead taking time to explain and present their options in accessible ways. Further, it would be costly in respect to funds and time to train and employ more staff in the disability sector to work with a transition to SDM and the

[33] Browning, Bigby & Douglas *supra* note 17, 36.

continuation of this system in South Australia. Even with new legal tools being adopted that allow for SDM, they will only be productive and beneficial if the resources exist to realise the choices and decisions made by the person with disabilities.[34]

II. Balancing the benefits of SDM and risk to individual

The Victoria model of SDM does not sufficiently address whether a balance is struck between the advantages of autonomy and self-determination that are brought about through SDM and individuals making decisions that put themselves at risk. If a person with disability has only a supportive guardian and not a guardian making decisions for them, there is the potential that the individual will make a risky or unsafe decision to their health, finances or wellbeing. Alternatively, individuals would be deprived of the chance to learn the skill of risk-evaluation and assessment of options if SDM was never enforced, denying them the inherent dignity of exercising choice.[35] South Australia is required to shift its protective impulse toward preventing the actions of an individual purportedly at risk, and turn to ensuring the provision of adequate information and assistance in supporting their decisions. For successful implementation of SDM, therefore, adequate safeguards are required to ensure these plans and decisions are guided by valid and 'best-interpretations' of the supportive guardian.[36] These would include proper education on what safe SDM looks like and prepared action-plans if a situation does tip the balance in the direction of risk-associated decisions.

Although there are reports from Victoria outlining the state's SDM model and global, theoretical literature explaining the advantages of SDM, there is very little on how SDM practically works. South Australia would benefit from especially Victoria discussing the practicalities of SDM in real-life.

[34] Ibid. 40.
[35] Gooding *supra* note 5, 436.
[36] Craigie *supra* note 6, 163.

Upon reflection, it can seem that South Australia could simply fall back on the already established processes of substituted decision-making and submit to the challenges facing SDM. Especially when it is shown that the necessary question of whether the support provided has been effective in enabling decision-making or whether it is just informal substituted decision-making is ignored.[37] This is perhaps unwise, however, as implementing SDM into its legislation would align South Australia with modern and international thinking towards the autonomy and self-determination of people with disabilities. The challenges of resourcing and upholding SDM are significantly outweighed by the benefits that this reformed system can provide for individuals. Making amendments to legislation and reframing concepts such as 'capacity' will enable South Australia to take the much needed and overdue step forward to upholding the equality of people with disabilities.

[37] [37] Browning, Bigby & Douglas *supra* note 17, 41.

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