REPAIRING SECTION 5: IS THE VICTORIAN MODEL OF 'SUPPORTED DECISION MAKING' DESIRABLE FOR SOUTH AUSTRALIA?

Law and Justice Internship

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Supported Decision Making ('SDM') for persons with disability has been an ever-present issue both domestically and internationally, and will only become more important. This essay aims to outline a proper path towards amendment of the *Guardianship and Administration Act 1993* (SA), particularly in light of the now operational *Guardianship and Administration Act 2019* (Vic). The surrounding context of SDM will first be stated, before comparing some relevant Victorian provisions with Section 5 of the South Australian Act. Finally, it will be answered whether SA's core guardianship principles need drastic change, and to what degree Victoria's own solutions should be incorporated. By determining the strengths and weaknesses of both the South Australian and Victorian approaches, the future of South Australian decision-making can be better determined.

What is Supported Decision Making?

The international debate has long since progressed past justifying the 'need' for SDM. At its core, SDM is distinct from traditional guardianship, in that a decision is made 'by' the person with disability, rather than on their behalf. This support involves aiding a person's own life choices through 'respecting' their 'rights, will and preferences', without coercion or undue influence.[1] Where a person's will and preference cannot be determined, the United Nations Convention on the Rights of Persons with Disabilities (*'UNCRPD'*) promotes the 'best interpretation of will and preferences.'[2] This support must be performed with consent, and the provision of support should not 'hinge on mental capacity assessments.'[3]

National views have not aligned with international obligations. Australia has supported 'substituted decision-making' as a last resort through an interpretive declaration of the UNCRPD, despite ongoing critiques of this behaviour from the CRPD Committee.[4] This form of decision making allows the continued appointment of traditional guardians, and according to the CRPD Committee, to make decisions in the 'best interests' of a person.[5] 'Best interests' tests are particularly maligned, allowing guardians to deny the autonomy of the person with disability, usurping their actual wishes in favour of what a guardian 'believes' a person's best interests to be.[6] An interpretative declaration does not

[1] *United Nations Convention on the Rights of Persons with Disabilities,* Opened for Signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 12 (*'UNCRPD'*).
[2] Convention on the Rights of Persons with Disabilities Committee, *General Comment No.1,* 11th Sess, UN Doc CRPD/C/GC/1 (19 May 2014), [21] (*'CRPD Committee'*).
[3] Ibid 5, 7.
[4] Ron McCallum, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability,* (Research Report: The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance, October 2020) 52,53.
[5] CRPD Committee (n 2) [27].
[6] Ibid, [21]

modify the actual scope of a treaty, and so Australia may remain in breach through its continued adoption.[7]

There is room for debate that a substituted decision by a guardian which reflects 'will and preferences' rather than 'best interests' could be permissible. Additionally, there is substantial argument that substituted decision making cannot ever be entirely eradicated, and at times may be needed as a last resort. Irrespective of any future international consensus surrounding the 'need' for guardianship, so long as Australia explicitly intends to maintain 'substituted decision making' models, any related provisions should at least avoid 'best interests' formulations as far as possible.

Assessing potential amendments for South Australia has been made particularly difficult by the lack of actual evidence on what formulations of SDM are successful.[8] Additionally, Alston rightfully notes that minor changes in legal wording will have far less impact than providing substantive financial and resource support to bodies such as the Public Advocate.[9] Whilst this essay will purely address options for change within the legislation, it is expected that any amendment, no matter how small, will need to be accompanied by extensive cultural shifts surrounding the agency of persons with disability, in addition to the provision of education and training for all persons involved with SDM.

Any potential amendments are also hindered by the need to ensure national consistency. At the time of writing, there is no substantive consistency between any State in the realm of SDM, although current ongoing development of a national decision-making framework may change this.[10]

The Legal Framework for SA and VIC:

The South Australian Act makes no explicit reference to SDM. Instead, a set of four 'principles' under section 5 provide the core framework for all decisions. Three of these relate to both tribunals and guardians, whereas section 5(c) acts to recognise the existence of 'informal' SDM. Guardianship

[7] Bruce Alston, 'Towards Supported Decision-Making : Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform' (2017) 35(2) *Law in Context* 21, 26-27.
[8] Ibid 40.
[9] Ibid 40-41.
[10] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws,* (Final Report, August 2014), [10.35].

orders will not be made where a person's current relationships are already sufficient, and similar concepts can be found in the Victorian Act.[11]

Rather than a singular section, the Victorian Act possesses both general principles for all persons, alongside specific considerations for substituted decision makers.[12]

The Victorian Act also provides for a formalised 'supportive' order, beyond that of merely recognising informal relationships.[13] No matter how supportive a substituted decision can become, it will always inherently involve the formal denial of autonomy, and whilst beyond the scope of this essay, proposals of formal alternatives thus merit their own extensive assessment.

A draft amendment bill in 2021 aimed to overhaul section 5, adopting some of the Victorian approaches.[14] Unfortunately, this bill did not progress beyond the planning stage. With the Victorian Act now having been in operation for some time, a closer look of the three decision-making considerations of section 5 is again warranted.

[11] *Guardianship and Administration Act 1993* (SA) s 5©; *Guardianship and Administration Act 2019* (Vic) s 31(b)
[12] *Guardianship and Administration Act 2019* (Vic) ss 8-9 (*'G&A Act* (Vic)'.
[13] Ibid s 87.
[14] *Guardianship and Administration (Miscellaneous) Amendment Bill 2021* (SA) (Draft).

Section 5(d): Overriding Wishes

Section 5(d) of the SA Act is especially concerning. In this consideration, all decisions must be 'least restrictive of the person's rights and autonomy, as is consistent with his or her proper care and protection.'[15] What constitutes 'proper care and protection' is not made explicit under the Act.

This provision can be contrasted with section 8(1)(c) of the Victorian Act, which ensures that powers used should be 'least restrictive' of the person's 'ability to decide', 'as is possible in the circumstances.' Whilst both use the terms 'least restrictive', the SA Act implicitly permits infringement upon rights, whereas the Victorian provision emphasises maximising rights. The SA provision might easily be used to ignore any principle of SDM, as any broad act which warranted 'proper care' could be used to ignore the 'will and preferences' of the person with disability. Whilst protection from harm is important for all members of society, persons should be free to make poor or even risky decisions. Alston argues that the 'proper care and protection' provision is the 'best interests' test 'sneaking in the backdoor,' undermining any supportive aim the SA Act might have.[16]

Admittedly, there are some situations so extreme that it would be wrong for a person not to intervene, even where a substituted decision maker wanted to maintain SDM principles of individual autonomy. Rather than allowing wishes to be ignored by traditional guardians due to 'proper care', the Victorian Act only permits the will and preferences of the represented person to be ignored 'if necessary to prevent serious harm.'[17] This is likely a far higher standard than 'protection.' Additionally, a serious harm override might be supported in other international instruments, such as the ICCPR.[18]

Whilst 'serious harm' is not explicitly defined, recent tribunal behaviour may demonstrate the scope of this override. 'Serious harm' can extend to at minimum physical and financial harms, and more importantly, the risk of harm should likely be 'high' or 'substantial.'[19] Furthermore, the risk must be in close proximity to the present day. The case of *EHV* involved an administrator seeking to sell the flat of the represented person against their wishes. EHV was living in a 'precarious' situation. However, the administrator was not yet able to sell the flat, as although a change in living expenses

[15] *Guardianship and Administration Act 1993* (SA) s 5(d) ('*G&A Act* (SA)').
[16] Alston (n 7) 35.
[17] G&A Act (Vic) (n 12) s 9(1)(e).
[18] George Szmukler, '"Capacity", "Best Interests", "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18(1) *World Psychiatry*, 34.

[19] *ZWU (Guardianship)* [2021] VCAT 371 [51, 58] (Steele).

could lead to serious financial harm in the future, there was no reason to sell the flat until such a change had occurred.[20]

Whereas the SA provision plainly discriminates, easily allowing a guardian to ignore SDM in favour of what they think is best for an individual, the Victorian provisions are non-discriminatory. In practice, it permits intervention in instances where any person would wish to prevent a family or friend from harm, rather than limiting choices on the basis of someone's impairment.[21] Admittedly, there will be a time in the future where this high bar leads to dangerous consequences, that a guardian unwittingly allows to proceed due to following the Act. The limbs may further add confusion to such guardians, failing to demonstrate when one might need to step in in the case of incremental or cumulative harms. Nonetheless, these risks can be minimised, at least legally, by considering and emphasising the need to respect rights in any substituted decision. Rights should be protected, rather than usurped.

Section 5(a):

The difference in paramount considerations between the two acts is the largest barrier for SDM in South Australia, and without drastic change, may be one too large to overcome. Section 5(a) of the SA Act states the 'paramount consideration' that a guardian must decide based on what the wishes of the person would have been, were they 'not mentally incapacitated.'[22] Although this section is prefaced with the condition that only 'reasonably ascertainable evidence' can be used to make this opinion, the Act inherently requires that a decisionmaker ignore the actual wishes of a person in favour of a legal fiction.[23] For persons born with disability, no such person would have ever existed, nor are the wishes of a person in the present inherently worse than those of the past. The Victorian Act implicitly makes will and preferences the paramount consideration, by requiring all decisions in the act to reflect them 'as far as practicable.'[24] The person with disability is considered only as their true present self, and 'incapacity' is not used against them.

The incorporation of 'incapacity' into section 5(a), as well as the additional criteria of incapacity in granting any guardianship order, is arguably the most egregiously concerning aspect of the SA Act. The CRPD has made clear that mental and legal capacity should not be conflated, and that legal capacity should never be deprived on the basis of disability.[25] Not only does Section 5(a) allow for

[20] *EHV* (Guardianship) [2021] VCAT 425 [61-65] (Steele).
[21] Ron McCallum (n 4) 51.
[22] G&A Act (SA) (n 15) s 5(a).
[23] Ibid s 5(b).
[24] G&A Act (Vic) (n 12) s 8(1)(b).
[25] CRPD Committee (n 2) [15, 29(i)].

decisions to be made that discriminate against those who lack mental capacity, but the Act itself determines the provision of a guardianship order, and thus the deprivation of rights to autonomy, on the basis of 'incapacity.'[26]

The Victorian Act maintains a capacity requirement for any order, but adds a presumption of capacity, alongside outlining that capacity is decision-specific, rather than encompassing a person's entire life.[27] This approach may be ignoring the core of the issue. By including definitions of capacity in any sense, it opens tribunals up to unhealthy reasoning, as well as harmful systemic impacts upon guardians, supporters and the public in their perceptions of persons with disability. Some studies have shown that supporters are more likely to respect the will and preferences of an individual when they see the person's capacity in a positive light, yet any criteria of lacking capacity will likely make the opposite occur.[28] The question for making an order should instead be whether it will provide the support necessary for a person to make decisions, not that they need an order due to lacking capacity.[29] This need to emphasise a starting point of determining the support necessary for individual autonomy has itself been supported by the ALRC, although they have also emphasised maintaining non-binary definitions of capacity to some extent.[30]

The fears surrounding tribunal perceptions of capacity have sadly borne out in practice. Stewart argues that recent Victorian guardianship decisions surrounding persons with dementia have unfortunately conflated the availability of formal supporter orders with whether or not a person has capacity, failing to consider whether any such order might allow a person to make the decisions necessary, with these assessments often entirely relying on medical evidence alone.[31] Admittedly, the number of cases assessed in that study was small, and it may take some time for VCAT to become accustomed to the new law.

There is some merit to the argument that as with substituted decision making, tests of capacity cannot be entirely done away with.[32] In examining the 'supports necessary', the decision-making ability of a person would inevitably be considered even without the explicit mentioning of 'capacity.'

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[26] G&A Act (SA) (n 15) s 29(a).
[27] G&A Act (Vic) (n 12) s 5.
[28] Joanne Watson et; al, 'The Impact of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on Victorian Guardianship Practice (2022) 44(12) *Disability and Rehabilitation* 2806, 2811.
[29] Alston (n 7), 37.
[30] Rosalind Croucher, 'Modelling Supported Decision Making in Commonwealth Laws – The ALRC's 2014 Report and Making it Work' (Conference Paper, AGAC 2016 National Conference, 18 October 2016).

[31] Cameron Stewart, 'Health Law Reporter: Supported Decision-Making for People Living with Dementia: An Examination of Four Australian Guardianship Laws' (2021) 28(2) *Journal of Law and Medicine* 389, 415.
[32] Croucher (n 30).

Furthermore, the mere recognition of a difference in decision-making ability is not inherently discriminatory.[33] The issue of capacity approaches may be one of cultural perceptions, rather than the particular importance attributed to it in an Act. This can be seen in the fact that SACAT has in some instances utilised the preferred starting approach of determining the 'supports necessary' for individual decision-making, even without express legislative requirement.[34]

Any amendment to promote SDM must minimise the emphasis upon capacity to the greatest possible extent, to reduce any potential detrimental impact upon both substituted decision-making and the wider perception of persons with disability themselves. At the very least, 'incapacity' must be removed from the section 5 principles, if not section 5(a) entirely. Furthermore, the ability of SACAT to already incorporate the 'ideal' form of reasoning will not be sufficient in all cases. A clear act will only aid SACAT, not detract from it.

[33] Szmukler (n 18), 36 ; Laura Pritchard-Jones, 'Exploring the Potential and the Pitfalls of the United Nations Convention on the Rights of Persons with Disabilities and General Comment No.1 for People with Dementia' (2019) 66 *International Journal of Law and Psychiatry,* 6.
[34] *Re KCG* [2018] SACAT 17 [67-69, 87] (Hughes).

Section 5(b): Will and Preferences

Implementing SDM is impossible without ensuring the will and preferences of the person are respected, and the Victorian approach improves upon SA, if perhaps only superficially. Section 5(b) of the SA Act allows for consideration of 'present wishes. 'No elaboration or guidance is provided in determining these wishes.[35] In contrast, the Victorian Act consistently regards the 'will and preferences' throughout the Act.[36] Furthermore, traditional guardians are given a hierarchy process to determine how will and preferences might be interpreted for difficult situations, although no substantive guide exists for aiding persons under supportive guardianship orders, nor a set of definitions, recommended practices and approaches generally.[37] For these 'hard cases', the guardian must give effect to what they believe the person's will and preferences 'are likely to be', through consulting with relatives and close friends of the individual. Where this is not possible, the guardian must make the decision that promotes 'personal and social wellbeing.'[38] In effect, this is largely similar to what was proposed by the CRPD Committee, which promotes a 'best interpretation of will and preferences' in otherwise difficult situations.[39]

Given the importance of will and preferences, it is unfortunate that the SA Act does not assist in any respect for 'hard cases.' Unfortunately, the Victorian Act is hardly an improvement. Some scholars have promoted interpreting 'will' as long-term values, whereas 'preferences' act as a person's presently expressed wish.[40] Lacking any clear definition, the Victorian Act leaves the issue of prioritising one or the other up to the decision-maker. A persons preferences can and will often be in conflict with their long-held wishes, and it will be incredibly difficult for any guardian to correctly maintain principles of SDM under such circumstances. Pritchard-Jones rightly notes that a bare implementation of 'will and preferences' understates the complex role of support, assuming that a supporter merely exists to express another's clear cut and pre-determined stances on every conceivable topic. A person may not necessarily have any opinion at all on an issue until discussion is conducted with their guardian, creating an unavoidable level of influence on the part of the

[35] G&A Act (SA) (n 15) s 5(b).
[36] G&A Act (Vic) (n 12) s 8(1)(b).
[37] Ibid s 9.
[38] Ibid s 4.
[39] CRPD Committee (n 2) [21].
[40] Ilan Wiesel et al, 'The Temporalities of Supported Decision-Making by People with Cognitive Disability (2022) 23(7) *Social & Cultural Geography*, 934, 943.

'supporter.'[41] An individual's preferences may even change to suit the person they were speaking to at any given time.[42] Stewart argues that the Victorian Act's limited guidance for complex cases, and the vague hierarchy itself, is consequently allowing 'best interests' tests to be used when determining will and preferences. In any instance where a person's will and preferences conflict with one another, a substituted decision may ultimately involve a best-interests-styled value judgment.[43]

Carney and Gooding note that despite CRPD Committee endorsement of the words, paternalistic approaches can still be adopted through the terms 'will and preferences.'[44] Given the concerns surrounding the holistic purpose of the SA Act, it is doubtful whether the insertion of 'will and preferences' into section 5(b) would be any better than 'present wishes.' Alston further argues that the difference between SDM and traditional guardianship in hard cases might be non-existent, and a change in wording to 'will and preferences' might do little more than shift public perception of persons with disability, however important that itself may be.[45] Vague considerations and interpretations based upon 'rights' or 'personal and social wellbeing' bear the same risks.[46]

However, it should be acknowledged that persons have always been able to seek the guidance of a tribunal where the answer is unclear.[47] Solving the meaning of 'will and preferences' will inherently require far more than mere legislative change, and as much support as possible should be provided to all persons involved in the guardianship process. The risk of mistakes is unavoidable, and amendment should not be avoided on the basis that it is an imperfect solution.[48] Additionally, the lack of guidance can be mitigated through additional legislative amendments. The SA Office for the Public Advocate has suggested the inclusion of practice examples, and doing so alongside clear definitions of 'will' and 'preferences' may be a positive step when adopting the Victorian principles.[49]

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[41] Laura Pritchard-Jones, 'Exploring the Potential and the Pitfalls of the United Nations Convention on the Rights of Persons with Disabilities and General Comment No.1 for People with Dementia' (2019) 66 *International Journal of Law and Psychiatry*, 4.
[42] *NCX (Guardianship)* [2020] VCAT 919 (Steele) [48].
[43] Stewart (n 31) 419.
[44] Piers Gooding, Terry Carney, 'Australia: Lessons from a Reformist Path to Supported Decision-Making' in Michael Bach and Nicolas Espejo Yaksic (eds) *Legal Capacity, Disability and Human Rights: Towards a Comprehensive Approach* (Supreme Court of Mexico Human Rights Division, 2021) http://dx.doi.org/10.2139/ssrn.3928342 19-20.
[45] Alston (n 7) 38-39.
[46] Croucher (n 30).
[47] G&A Act (Vic) (n 12) ss 44,97; G&A Act (SA) (n 15) s 74.
[48] Alston (n 7) 22.
[49] Office of the Public Advocate, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Supported Decision-making and Guardianship: Proposals for Reform* (15 June 2022) 5.

So long as amendments prefer open and vague interpretation, accidentally permitting 'best interests' testing in SDM will be a constant threat. The duty to minimise this threat should be placed upon all relevant SA bodies, including both tribunals and the OPA.

Legislative Interpretation and the Purposive Rule:

These three sections speak to a larger issue within the SA Act, that the legislation's holistic purpose has little to do with SDM. As is the case for all Australian legislation, the overarching purpose of an Act will be critical for the interpretation of its individual provisions.[50] The SA Act was written years prior to the UNCRPD, whereas the VIC Act was able to enshrine the convention into its objects.[51] Where the Victorian Act considers persons with formal supporters or guardians as 'supported' or 'represented' persons, the SA Act considers them as 'protected persons', continually using paternalistic language throughout the legislation. As earlier illustrated by section 5(d), the SA Act is hardly concerned with the promotion of rights. The UNCRPD view of SDM requires this, and phrasing sections in this restrictive sense belittles the person with disability through continual caveats. Whilst each word used is minor, the sum of its parts creates a major detrimental effect upon the SA Act, impacting the interpretation of its most integral sections.

Additionally, the Victorian Act is intended to prevent the appointment of guardians that would act in a person's 'best interests'[52], yet the SA Act's emphasis upon 'protection', both via section 5(d) and by actively ignoring a person's current wishes through section 5(a), enables easy abuse of best interests concepts by guardians.

Whilst the exact nature of the consequence the SA Act's purpose would have upon any minor amendment is unknown, some further differences in interpretation can already be assumed. In the case of implementing the 'serious harm override' provision for example, some Victorian tribunals have considered this in combination with section 7 of the Victorian Charter of Human Rights.[53] Lacking such instruments could further fears that any amendment to the SA Act will continue to allow best interests testing, rather than the promotion of SDM principles.

[50] *Legislation Interpretation Act 2021* (SA) s 14; *Interpretation of Legislation Act 1984* (Vic) s 35(a).
[51] G&A Act (Vic) (n 12) s 7(1)(a).
[52] Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic), 20.
[53] *NCX* (n 42) [151] (Steele).

Admittedly, the SA Act provisions are not explicitly a 'best interests' test, nor is any one consideration determinative of a guardian's choices.[54] Furthermore, some tribunal practice has benefitted persons with disability through strategic use of the considerations. For example, section 5 has been used to promote the rights of the individual, including the right to privacy.[55] Some SA Tribunal cases have also emphasised that the current SA Act can reflect the UNCRPD. Most notably, Senior Member Rugless argues that whilst the convention is not enshrined, it is useful as 'a set of best practice principles' that decision-makers should incorporate regardless.[56] Unfortunately, there remains notable practice of SA tribunals explicitly using best interest arguments, Justice Parker stating that it is an 'essential part' of guardians to make decisions in the 'best interests' of a protected person, 'even though those decisions may clearly be contrary' to their wishes.[57] Such an approach, whilst reflective of the SA Act, is in direct conflict with the UNCRPD, necessitating sweeping changes if conformity is desired.

Conclusion:

Whilst the SA Act needs a multitude of improvements, the Victorian Act is far from a perfect solution. Some aspects of the framework, such as how serious harm overrides have been used for substitute decision making, is admirable. Effective implementation of 'will and preferences' is less clear, and continued reliance upon capacity terminology is cause for caution.

Legislative change is only one piece of the puzzle. Furthermore, mere changes in wording will not eliminate the constant threat of best interests testing. Newer amendment proposals should both limit the mention of capacity and take greater strides to avoid vague best interest interpretations in the hard cases, through the provision of clear definitional guidance to core terms and via explicit examples in distinguishing will and preferences.

The need for change in SA extends far beyond the three decision-making principles discussed. The SA Act may very well be broken, and an entirely new Act will need to be contemplated. Even if Victoria has not successfully addressed every issue for such a goal, the steps it has taken is integral for policy progress nationwide.

[54] *Re XHQ* [2018] SACAT 11 [72] (Stevens).
[55] Ibid [72] (Stevens).
[56] *Re KF; Re ZT; Re WD* [2019] SACAT 37 [24] (Rugless).
[57] *AMT v COT & GSZ* [2017] SACAT 2, [73] (Parker).

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