

**WHAT ARE THE IMPLICATIONS OF THE UN CONVENTION ON THE RIGHTS
OF PERSONS WITH DISABILITIES (UNCRPD) PRINCIPLES ON
THE PUBLIC ADVOCATE’S DECISION-MAKING POWERS UNDER THE
GUARDIANSHIP AND ADMINISTRATION ACT 1993 (SA)?**

I INTRODUCTION

The recent claim that the UN Convention on the Rights of Persons with Disabilities (*UNCRPD*)¹ ‘. . . completely rejected the continued use of prevailing ‘substituted decision-making’ schemes (such as Guardianship) as being incompatible with human rights principles’², has obvious implications for the guardianship schemes of all parties to the UNCRPD, including Australia.

This essay will focus on the implications of the UNCRPD principles on the decision-making powers of the Public Advocate in South Australia (*Public Advocate*) under the *Guardianship and Administration Act 1993 (SA)* (*GAA*).³ It will first provide a background to the role of the Public Advocate and the *GAA*, referencing the two sources of the Public Advocate’s decision-making powers under the *GAA*. This will be followed by an introduction to the UNCRPD including Australia’s obligations, the relevant principles and articles, and the influential role of the UNCRPD Committee. The substance of the essay will focus on Article 12 of the UNCRPD in light of the extensive literature around this topic focussing on the four main themes relevant to guardianship schemes – legal and mental capacity, will and preference, substitute and supported decision-making and safeguarding. The analysis will also consider the potential for law reform especially around the Australian Law Reform Commission’s (*ALRC*) ‘National Decision-Making Principles’⁴ and the reform achieved in other Australian jurisdictions and overseas. The essay will conclude with suggestions for the future of the Public Advocate and the *GAA* including recommendations for the short and long term to ensure compliance with the UNCRPD.

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (*UNCRPD*).

² Julian Laurens et al, *Good Practice in Supported Decision-making for People with Disability* (University of New South Wales Social Policy Research Centre, Final Report prepared for Australian Government, Department of Social Services, 2021) 41.

³ *Guardianship and Administration Act 1993 (SA)* (*GAA*).

⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 24 November 2014) 11 (*ALRC Report*).

Importantly substitute decision-making and specifically guardianship schemes are extremely topical especially given the upcoming hearings of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Royal Commission ('DRC) which will focus on Australia's compliance with the UNCRPD. Therefore, it is important for the Public Advocate to consider the implications of the UNCRPD and what it means for her role and the *GAA* into the future.

II THE ROLE OF THE PUBLIC ADVOCATE AND THE LEGISLATION

A *The Role of the Public Advocate*

The Public Advocate in South Australia is an independent statutory officer accountable to the South Australian Parliament⁵ and whose powers and functions are governed by the *GAA*.⁶ The *GAA* provides the Public Advocate with two distinct decision-making powers, as 'guardian of last resort'⁷ and the powers given under the 'general functions' provision.⁸ Therefore, the Public Advocate has two key decision-making roles which may be relevant when considering the implications of the UNCRPD.

As the 'guardian of last resort', upon the issue of an order by the South Australian Civil and Administrative Tribunal ('SACAT')⁹, the Public Advocate has authority to make decisions for South Australians with a 'mental incapacity'.¹⁰ These 'protected persons'¹¹ are deemed to be unable to make their own decisions and do not have anyone else who is willing or able to make decisions on their behalf.¹² The decisions include matters regarding accommodation, health, lifestyle and access, and can be delegated to a guardian within the Office of the Public Advocate ('OPA') under the *GAA*.¹³ This type of decision-making is considered 'substitute decision-making' as it involves the Public Advocate, or delegated guardian, making decisions on the person's behalf.

⁵ *GAA* (n 3) ss 3(1) (definition 'the Public Advocate'), 21(2).

⁶ *Ibid* pt 2 div 3.

⁷ *Ibid* s 29(4).

⁸ *Ibid* s 21(1).

⁹ *Ibid* s 29(4).

¹⁰ *Ibid* s 3(1) (definition 'mental incapacity').

¹¹ *Ibid* s 3(1) (definition 'protected person').

¹² *Ibid* s 29(4).

¹³ *Ibid* s 23.

The ‘general functions’¹⁴ of the Public Advocate include promoting the rights and interests of ‘mentally incapacitated persons’¹⁵ which means acting as an advocate for both systemic and individual issues. The Public Advocate can also provide advice on the powers exercised by the *GAA*, how it operates generally and any alternative actions which can be taken.¹⁶ The *GAA* also gives the Public Advocate authority to make recommendations to the relevant Minister for legislative change.¹⁷

B *The Guardianship and Administration Act 1993 (SA)*

Guardianship and administration laws were established in Australia between 1986 and 2000, with Victoria the first state to form an independent guardianship tribunal and create a statutory Public Advocate in 1987.¹⁸ In South Australia the *GAA* was enacted in 1993, and, aside from some minor amendments, has remained unaltered since its inception.

Section 5 of the *GAA* sets out four principles to be observed by the Public Advocate and guardians when making decisions in relation to a person pursuant to the *GAA* or to powers conferred by or under the *GAA*.¹⁹ The first two principles refer to the person’s ‘wishes’²⁰ and that paramount consideration ‘must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated’.²¹ The principles also provide that ‘the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.’²²

These principles will be contemplated further when considering the implications of the UNCRPD on the Public Advocate’s decision-making powers under the *GAA*.

¹⁴ *Ibid* s 21(1).

¹⁵ *Ibid* s 21(1)(a)-(e).

¹⁶ *Ibid* s 21(1)f).

¹⁷ *Ibid* s 21(1)(g).

¹⁸ Natalie Wade, ‘Guardianship Law: a human rights approach’ (17 June 2022), *DSC – NDIS News and Analysis* (Web Page, 17 June 2022) <<https://teamdsc.com.au/resources/guardianship-law-a-human-rights-approach>> citing Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) 11.

¹⁹ *GAA* (n 3) s 5.

²⁰ *Ibid* s 5(a)-(b).

²¹ *Ibid* s 5(a).

²² *Ibid* s 5(d).

III UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A *Background to the UNCRPD*

‘The UNCRPD is a human rights treaty that is designed to protect the human rights and inherent dignity of person with disabilities.’²³ It came into force on 3 May 2008²⁴ and on 17 July 2008 Australia became party to the Convention and subsequently acceded to the associated Optional Protocol²⁵ on 21 August 2009. This means that Australia is bound by the UNCRPD and that any Australian who asserts ‘that any of their CRPD rights have been violated may complain directly to the CRPD Committee.’²⁶ However, under Australian law, the UNCRPD does not become Australian domestic law until the substance of the Convention is enacted into domestic legislation although, until that time, it will influence the interpretation of the relevant legislation.²⁷

The UNCRPD Committee on the Rights of Persons with Disabilities (*‘the Committee’*) was established in order to ensure compliance of state parties with the Convention.²⁸ This is achieved by the requirement for state parties to submit a ‘report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard’²⁹, initially two years after the state party’s entry into force³⁰ and at least every four years thereafter.³¹ The Committee, when it sees fit, publishes ‘General Comments’ to assist state parties to fulfil their obligations under the UNCRPD.³² Importantly, although the General Comments are authoritative rather than binding in law ‘such statements are influential when interpreting the Convention.’³³

²³ Ron McCallum AO, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia’s Level of Compliance* (Research Report, October 2020) 9.

²⁴ UNCRPD (n 1).

²⁵ United Nations General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 76th sess, UN Doc A/RES/61/106 (13 December 2006).

²⁶ McCallum (n 23) 9.

²⁷ *Ibid* 9.

²⁸ UNCRPD (n 1) art 34(1).

²⁹ *Ibid* art 35(1).

³⁰ *Ibid*.

³¹ *Ibid* art 35(2).

³² Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) (*‘General Comment’*).

³³ Terry Carney, ‘Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?’ (2015) 4 *Laws* 37, 41.

B The Relevant Articles of the UNCRPD

The articles of the UNCRPD which are relevant to the Public Advocate's decision-making powers, the *GAA* and guardianship schemes in general are outlined below.

1 Article 3 - General Principles

The general principles include '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.³⁴

2 Article 4 – General Obligations

The general obligations provide that legislation implements the rights recognised in the UNCRPD³⁵ and that parties must 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.³⁶

3 Article 12 - Equal Recognition Before the Law

Article 12 provides that people with disabilities 'have the right to recognition everywhere as persons before the law'³⁷, 'enjoy legal capacity on an equal basis with others in all aspects of life.'³⁸ and that they have access 'to the support they may require in exercising their legal capacity.'³⁹ It also provides that 'all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse . . .'.⁴⁰ This essay will specifically focus on the implications of Article 12 on the Public Advocate's decision-making powers under the *GAA* as it ultimately addresses equality in legal capacity which is the fundamental issue in substitute decision-making regimes.⁴¹

³⁴ UNCRPD (n 1) art 3(a).

³⁵ Ibid art 4(1)(a).

³⁶ Ibid art 4(1)(b).

³⁷ Ibid art 12(1).

³⁸ Ibid art 12(2).

³⁹ Ibid art 12(3).

⁴⁰ Ibid art 12(4).

⁴¹ McCallum (n 23) 47 quoting Gerard Quinn and Anna Arstein-Kerslake, 'Restoring the 'Human' in 'Human Rights'—Personhood and Doctrinal Innovation in the UN Disability Convention' in Conor Gearty and Costas Douzinas (eds), *Cambridge Companion to Human Rights Law* (Cambridge University Press, 2010) 47.

C Australia's Interpretative Declaration on Article 12 of the UNCRPD

It is important to note at the time of ratification of the UNCRPD, Australia made an interpretive declaration relevant to Article 12. Such interpretive declarations are made by parties to conventions to clarify their understanding of their obligations under the relevant convention.⁴² Consequently, Australia's interpretation of Article 12 is that substitute decision-making is permitted as a last resort subject to safeguards.⁴³ This interpretation conflicts with the Committee's General Comment No. 1 (*'General Comment'*)⁴⁴ as discussed below.

D The Committee's General Comment No. 1 on Article 12 of the UNCRPD

On 11 April 2014, the Committee released the General Comment⁴⁵ which specifically mentions guardianship regimes and substitute decision-making. The relevant paragraphs provide that guardianship laws must be reviewed with a view to replacing 'regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences'⁴⁶ and that this entails 'both the abolition of the substitute decision-making regimes and development of supported decision-making alternatives.'⁴⁷ It specifically states the two decision-making systems working in parallel will not comply with Article 12 of the UNCRPD.⁴⁸

The implications of the General Comment for the Public Advocate's decision-making powers under the *GAA* will be further considered concentrating on the major themes inherent in Article 12 which are included in the ALRC's National Decision-Making Principles⁴⁹ being legal and mental capacity, will and preference, substitute decision-making and safeguarding.

⁴² *ALRC Report* (n 4) [2.57].

⁴³ *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁴⁴ *General Comment* (n 32).

⁴⁵ *Ibid.*

⁴⁶ *Ibid* [26].

⁴⁷ *Ibid* [28].

⁴⁸ *Ibid.*

⁴⁹ *ALRC Report* (n 4) 11.

IV IMPLICATIONS FOR THE PUBLIC ADVOCATE AND THE LEGISLATION

A *Conflict between the UNCRPD and the Guardianship and Administration Act*

1 *Legal and Mental Capacity*

Legal capacity ‘is the recognition of an individual as a rights holder and legal agent on an equal basis with others’⁵⁰ and remains constant.⁵¹ Conversely mental capacity, a person’s decision-making ability, ‘can exist along a spectrum and can be context sensitive.’⁵² Importantly, legal capacity and mental capacity are distinct under the General Comment.⁵³ However, this distinction is lost under the *GAA* by the issue of a guardianship order⁵⁴ where if it is deemed that a person has a mental incapacity⁵⁵ they do not have sufficient legal capacity to make their own decisions. This is inconsistent with the UNCRPD ‘which prevents different levels of mental capacity being used as a standard to assess and deny legal capacity.’⁵⁶ Therefore, in this context, the *GAA* is inconsistent with Article 12 in maintaining the right for people with disabilities to ‘enjoy legal capacity on an equal basis with others in all aspects of life’.⁵⁷

2 *Wishes vs Will and Preference*

The UNCRPD Committee’s General Comment refers to a supported decision-making process which ‘respects the person’s autonomy, will and preferences.’⁵⁸ However, the *GAA* does not take this approach and instead simply considers a person’s ‘wishes’ in making a decision.⁵⁹ Arstein-Kerslake and Flynn define ‘will’ as ‘the person’s long-term vision of what constitutes a ‘good life’’, while a person’s ‘preferences’ tend to ‘refer to likes and dislikes’.⁶⁰

⁵⁰ Anna Arstein-Kerslake & Eilíonóir Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law’ (2016) 20(4) *The International Journal of Human Rights* 471, 474.

⁵¹ McCallum (n 23) 46.

⁵² Laurens et al (n 2) iii.

⁵³ Arstein-Kerslake and Flynn (n 50) 475; General Comment (n 32) [13].

⁵⁴ *GAA* (n 3) s 29(1).

⁵⁵ *Ibid* s (3)(1) (definition ‘mental incapacity’).

⁵⁶ McCallum (n 23) 46.

⁵⁷ *UNCRPD* (n 1) art 12(2).

⁵⁸ *General Comment* (n 32) [26].

⁵⁹ *GAA* (n 3) s 5(a)-(b).

⁶⁰ Arstein-Kerslake and Flynn (n 50) 484.

Alternatively, ‘wishes’ refer to a person’s desires or aspirations.⁶¹ Therefore, the *GAA*’s approach in only considering a person’s wishes during decision-making is clearly more constrained compared with the UNCRPD’s ‘will and preference’ approach.⁶²

3 *Substitute vs Supported Decision-Making*

The ALRC refers to the ‘paradigm shift towards supported decision-making in the CRPD’⁶³ and that ‘the implementation of this approach in state and territory guardianship laws will lead to a change in the way in which individuals with diminished decision-making ability are supported to make decisions.’⁶⁴ Article 12(3) specifically requires that appropriate measures are taken ‘to provide access by persons with disabilities to the support they require in exercising their legal capacity’.⁶⁵ As previously illustrated, the concepts of legal and mental capacity and the will and preference approach to decision-making inform this supported decision-making process.

In essence the *GAA* authorises the Public Advocate, and delegates, to perform ‘substitute decision-making’, as it is defined under the Committee’s General Comment.⁶⁶ The *GAA*’s approach of conflating mental and legal capacity means that guardianship orders are made resulting in the guardian making decisions for the person which is, in effect, substitute decision-making. Therefore, the *GAA* is fundamentally undermining the person’s legal capacity and, subsequently, conflicts with the UNCRPD.⁶⁷ Conversely, ‘supported decision-making enables the individual to retain legal capacity regardless of the level of support needed.’⁶⁸

As established, Article 12 of the UNCRPD is predominantly interpreted as entirely rejecting substitute decision-making schemes.⁶⁹ This interpretation is certainly supported by the UNCRPD Committee’s General Comment that guardianship laws must be reviewed with a view to replacing ‘regimes of substitute decision-making by supported decision-making’⁷⁰ and

⁶¹ *The Australian Pocket Oxford Dictionary* (1st ed, 1982) ‘wish’ (def 1).

⁶² *General Comment* (n 32) [26].

⁶³ *ALRC Report* (n 4) [5.14].

⁶⁴ *Ibid.*

⁶⁵ *UNCRPD* (n 1) art 12(3); McCallum (n 23) 46.

⁶⁶ *General Comment* (n 32) [27].

⁶⁷ *UNCRPD* (n 1) art 12(2).

⁶⁸ Carney (n 33) 38.

⁶⁹ Laurens et al (n 2) 41.

⁷⁰ *General Comment* (n 32) [26].

that supported decision-making schemes are indeed a replacement and not to be run in parallel.⁷¹ However, the ALRC, and some scholars, concedes that there is still room for substitute decision-makers, but only as a last resort⁷² and ‘where the individual’s will and preferences are unknowable and a decision needs to be made.’⁷³ This concession may provide some options for the future of substitute decision-making under the *GAA*, albeit in a revised form.

4 *Safeguarding*

Safeguarding of people with disability is a balancing act between ensuring their safety from potential abuse whilst not removing their right to be equal before the law.⁷⁴ The UNCRPD states that ‘safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’⁷⁵ Additionally, the Committee’s General Comment obliges ‘states not to deny an individual’s legal capacity in the name of protecting them against abuse.’⁷⁶ As Arstein-Kerslake and Flynn assert ‘[t]his requires a radical shift away from paternalistic safeguards currently used in the name of protecting persons with disabilities.’⁷⁷

It is likely the *GAA* would be considered to include these ‘paternalistic safeguards’ as a result of ensuring the ‘protected person’s’⁷⁸ safety through a guardianship order which removes the person’s legal capacity.⁷⁹ Therefore, the *GAA* is again in conflict with the UNCRPD. However, there are scholars who are concerned that those being supported in making decisions through supported decision-making ‘may be too greatly influenced by the support person . . .’⁸⁰ Nevertheless, this balancing act between ensuring a person’s safety without impinging on their right to equality before the law is encapsulated in Article 12 of the UNCRPD.⁸¹

⁷¹ *General Comment* (n 32) [28].

⁷² *ALRC Report* (n 4) 11; Arstein-Kerslake and Flynn (n 50) 477.

⁷³ Arstein-Kerslake and Flynn (n 50) 477.

⁷⁴ *UNCRPD* (n 1) art 12(1)-(2).

⁷⁵ *Ibid* art 12(4).

⁷⁶ Arstein-Kerslake (n 50) 479.

⁷⁷ *Ibid*.

⁷⁸ *GAA* (n 3) s 3(1) (definition ‘protected person’).

⁷⁹ *Ibid* s 29.

⁸⁰ Nandini Devi, Jerome Bickenbach and Gerold Stucki, ‘Moving towards substituted or supported decision-making? Article 12 of the Convention of the Rights of Persons with Disabilities’ (2011) 5 *ALTER, European Journal of Disability Research* 249, 255 citing L Salzman, ‘Rethinking guardianship (again) substituted decision-making as a violation for the integration mandate of Title II of the Americans with Disability Act’ (2009) 81 *University of Colorado Law Review* 157-205.

⁸¹ *UNCRPD* (n 1) art 12(4).

B *The UNCRPD and Other Jurisdictions*

In Australia, Victoria⁸², New South Wales⁸³ and the Australian Capital Territory⁸⁴ have initiated guardianship law reform which is ‘explicitly driven by the perceived desirability of greater compliance with the CRPD and reference the National Principles.’⁸⁵ In Victoria decision support is included in the amended *Guardianship and Administration Act 2019* (Vic)⁸⁶, but whether this supported decision making scheme will work in practice is yet to be seen. Both Queensland⁸⁷ and the Northern Territory⁸⁸ ‘mandate that a supported decision-making approach must be attempted before turning to substitute decision-making on behalf of an adult’.⁸⁹

Overseas jurisdictions also vary in their approach to guardianship law and supported decision-making. Canada is considered ‘one of the leading countries in the legal implementation of supported decision-making models’⁹⁰, with, as one example, the Yukon legally recognising people in supporter roles.⁹¹ Interestingly Sweden has completely revoked formal guardianship laws for adults with disabilities⁹² and in Germany ‘new reform guardianship law is based on three guiding principles, necessity, self-determination and rights of preservation’.⁹³ However, ‘[s]ubstituted decision-making in various guises remains a feature of the decision-making landscape, both in Australia and [i]nternationally, with no jurisdiction technically fully compliant with the CRPD.’⁹⁴

⁸² Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012); *Guardianship and Administration Act 2019* (Vic).

⁸³ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018).

⁸⁴ ACT Law Reform Advisory Council, *Guardianship Report* (July 2016).

⁸⁵ 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) *Disability, Rights and Law Reform in Australia* 21, 42.

⁸⁶ *Guardianship and Administration Act 2019* (Vic) pt 4.

⁸⁷ *Guardianship and Administration Act 2000* (Qld) s 11B.

⁸⁸ *Guardianship of Adults 2016* (NT) s 4(4)(b).

⁸⁹ Shih-Ning Then et al, ‘Moving from Support for Decision-making to Substitute Decision-making: Legal Frameworks and Perspectives of Supporters of Adults with Intellectual Disabilities’ (2021) *Law in Context* [3.2].

⁹⁰ Devi, Bickenbach and Stucki (n 80) 255.

⁹¹ *Decision-making, Support and Protection to Adults Act 2003* (Yukon); Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Roundtable: Supported decision-making and guardianship: proposals for reform* (16 May 2022) 37 (‘DRC Roundtable Report’).

⁹² Devi, Bickenbach and Stucki (n 80) 255.

⁹³ *Ibid* 254.

⁹⁴ Laurens et al (n 2) 44 citing Alston (n 85) and Arstein-Kerslake et al, ‘Future direction in supported decision-making’ (2017) 37(1) *Disability Studies Quarterly*.

C Potential for Guardianship Law Reform in South Australia

1 Australian Law Reform Commission: National Decision-Making Principles

‘The CRPD and the General Comment served as the single most important starting point for the ALRC report and for its recommended National Principles.’⁹⁵ Unfortunately, so far, these principles have not yet been formalised into legislation although, as mentioned, some states have considered the principles as a basis for law reform.⁹⁶

The four National Decision-Making Principles ensure that ‘supported decision-making is encouraged, representative decision-makers are appointed only as a last resort and the will, preferences and rights of persons direct decisions that affect their lives.’⁹⁷ These principles represent the essence of the UNCRPD and the Committee’s General Comment, and, therefore, should be used as the foundation for any future reform⁹⁸ around guardianship and administration law in South Australia.

2 The Disability Royal Commission

The DRC ‘was established in April 2019 in response to community concern about widespread reports of violence against, and the neglect, abuse and exploitation of, people with disability.’⁹⁹ The extensive terms of reference¹⁰⁰ embrace the UNCRPD and Australia’s subsequent obligations.

The public hearings to be held in November 2022 concerning guardianship and supported decision-making are particularly relevant to the Public Advocate and her decision-making powers under the *GAA*. Supporting material for the hearings includes twenty reform proposals and an expansion of the ALRC’s National Decision Making Principles.¹⁰¹ The Public Advocate has already been involved in two preliminary policy roundtables, held on 31 May and 1 June

⁹⁵ Alston (n 85) 27 citing *ALRC Report* (n 4) [2.97]-[2.99].

⁹⁶ Alston (n 85) 42.

⁹⁷ *ALRC Report* (n 4) 11.

⁹⁸ Then et al (n 89) [7]; Alston (n 85) 22.

⁹⁹ ‘About the Royal Commission’, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page) <<https://disability.royalcommission.gov.au/about-royal-commission>>.

¹⁰⁰ *Letters Patent* (Cth), 4 April 2019 amended 13 September 2019.

¹⁰¹ *DRC Roundtable Report* (n 91) 14.

2022, as a precursor to the public hearings. The outcomes and recommendations of the DRC will be highly influential in determining the future of guardianship law reform in South Australia.

D Future for the Public Advocate and Guardianship Legislation in South Australia

I believe, based on the preceding analysis, that there is definitely a future for the Public Advocate and, to a lesser extent, the *GAA*. However, this will require substantial amendments to the *GAA*, specifically regarding guardianship, in order to allow for supported decision-making to replace the current substitute decision-making regime and only permit the latter as an absolute last resort. As the outcomes of the DRC will impact law reform across Australia regarding supported decision-making and guardianship legislation which will take time to evolve, I suggest some short-term solutions to ensure that that the Public Advocate and the *GAA* are complying with the UNCRPD as closely as possible in the meantime.

The OPA has already undertaken a large volume of work around supported decision-making, including the employment of a designated Project Officer. It is also trialling supported decision-making¹⁰² within the parameters allowed by the *GAA*¹⁰³ displaying the importance the OPA places on the role of supported decision-making in the guardianship scheme.

In the short-term the current section 5 principles of the *GAA* could possibly be interpreted and slightly amended to further increase the use of supported decision-making by the Public Advocate and guardians of the OPA. This could be achieved under the ‘general functions’ provision of the *GAA*.¹⁰⁴ As suggested by Alston, ‘[t]he pragmatic way to proceed with legislative reform is to prioritise relatively simple amendments to introduce the ‘will, preferences and rights’ concept into guardianship law . . . ‘.¹⁰⁵

There is also a possibility, in the short-term, for the Public Advocate to draw on the ‘general functions’ to promote supported decision-making within the guardianship scheme.¹⁰⁶ For example, this could be achieved through the OPA guardians endorsing supported decision-

¹⁰² ‘What we do – advocacy’, OPA (Web Page) <http://www.opa.sa.gov.au/what_we_do/advocacy>.

¹⁰³ *GAA* (n 3) s 21.

¹⁰⁴ *Ibid* s 21(1)(g).

¹⁰⁵ Alston (n 85) 42.

¹⁰⁶ *GAA* (n 3) s 21(f).

making and legal capacity in line with the UNCRPD at SACAT hearings which could potentially lead to the revocation of a guardianship order, but still lie within the parameters of the *GAA*.¹⁰⁷ There is also the potential, depending on how this function is applied in practice, that guardianship orders could be prevented entirely.¹⁰⁸

Significantly the future of the role of the Public Advocate and the *GAA* in South Australia will depend on the outcomes of the DRC. As the background material for the supported decision-making and guardianship roundtables¹⁰⁹ includes reform proposals around supported decision-making¹¹⁰ and guardianship¹¹¹, including a national ‘best practice’ model focussing on supported decision-making¹¹², it is likely that the Public Advocate’s role as ‘guardian of last resort’ will, at the very least, be reduced. Nevertheless, the extensive nature of the introduction of supported decision-making to potentially replace guardianship and other substitute decision-making schemes in Australia will be a slow and expensive process¹¹³, which will fundamentally rely on generous federal and state government resourcing.

However, even if guardianship legislation is diminished or even abolished¹¹⁴ there will still be a role for the Public Advocate¹¹⁵ and the OPA, but it will mean a shift of focus away from guardianship. Instead it will see an expansion of the work adopted under the ‘general functions’ of the *GAA*¹¹⁶, in systemic and individual advocacy, in order to ensure that people with cognitive impairment are treated equally as required by the UNCRPD.

¹⁰⁷ *Ibid* s 21.

¹⁰⁸ Conversation with Emily Thwaites, Project Manager – Supported Decision Making, OPA (Christie Richards, OPA, 25 May 2022).

¹⁰⁹ *DRC Roundtable Report* (n 91).

¹¹⁰ *Ibid* 12-34.

¹¹¹ *Ibid* 35-48.

¹¹² *Ibid* 38.

¹¹³ Arstein-Kerslake and Flynn (n 50) 484.

¹¹⁴ Laurens et al (n 2) 41.

¹¹⁵ Conversation with Natalie Wade, Principal, Equality Lawyers (Christie Richards and Emily Thwaites, OPA, 9 June 2022).

¹¹⁶ *GAA* (n 3) s 21.

V CONCLUSION

I believe the UNCRPD has significant implications for the Public Advocate's decision-making powers under the *GAA*. The analysis of the conflict between the *GAA* with the UNCRPD clearly shows that the substitute decision-making powers authorised by the *GAA* for guardianship orders¹¹⁷ are non-compliant. Also, considering the extensive literature available on this topic, including the ALRC's recommendations¹¹⁸ and the DRC's proposals¹¹⁹, it is likely that substitute decision-making schemes will be replaced by those which instead promote supported decision-making.

However, given the alternative source of decision-making power provided under 'general functions'¹²⁰ even if the Public Advocate's role as guardian is diminished she would have the opportunity to expand her role in systemic and individual advocacy. Therefore, any reform in this space will provide the Public Advocate and OPA guardians with an opportunity to further promote and enable a supported decision-making framework in addition to providing an enhanced advocacy service. I believe, in this way, that South Australians with cognitive impairment will be better served and the principles of the UNCRPD more effectively realised.

¹¹⁷ *Ibid* s 29(1).

¹¹⁸ *ALRC Report* (n 4).

¹¹⁹ *DRC Roundtable Report* (n 91).

¹²⁰ *GAA* (n 3) s 21.

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