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CASE REPORT

People Living with Dementia: What Difference Does Statutory Change Make? A Case Study from Australia

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ABSTRACT

This paper examines the issue of supported decision-making as it applies to people living with dementia. It seeks to explain the importance of this mechanism as a concept which is central to promoting the human rights of persons with disabilities in Australia, within the context of broader global developments. The key aspects of the Australian guardianship system are outlined with a view to illustrating the way in which these legal frameworks have traditionally formally operated to exclude the participation of persons living with dementia from involvement in decision-making. The focus of the paper is the recent guardianship legislation in Victoria, which is currently the only Australian jurisdiction to adopt a formal supported decision-making model, and which explicitly privileges the 'will and preferences' of the person who is the subject of proceedings under the legislation. The author conducted desktop research analysis of 24 decisions of the Victorian Civil and Administrative Tribunal (VCAT) between 2021 and 2024 to ascertain the effect, if any, of these new provisions on the outcome of proceedings involving persons with dementia, building upon an earlier article which examined 27 decisions of VCAT between 2019 and 2020. Five key themes are identified, the most significant of which is the evident impact of the embedded statutory prioritising of the person's will and preferences on VCAT's decision-making processes.

Introduction

Escalating rates of dementia[1] expose the limitations of traditional approaches to decision-making in relation to a range of matters affecting persons living with this condition. Given the cognitive decline characterising dementia, the ability of the person to make independent decisions about their health care and lifestyle is inevitably impeded. In Australia, all states and territories have in place guardianship and administration legislation.[2] This provides a framework for the facilitation of both financial and health care and broader lifestyle decision-making in circumstances where an adult person's decisional capacity is found to be impaired. The frameworks vary in their operation, both in terms of the range of decision-making options available and in relation to the legal terminology and definitions. Australia's adoption of the Convention on the Rights of Persons with Disabilities 2006 (CRPD) in 2008 focused attention on the issue of decision-making for persons living with cognitive impairment, including those with mental illness, intellectual disability, and dementia. It has as its central tenet the requirements of States to secure, through legal frameworks, the rights, will and preferences of persons with a disability.[3] The subsequent Australian Law Reform Commission Report on Equality, Capacity and Disability in Commonwealth Laws[4] (ALRCR) highlighted the role that guardianship laws play in this space, particularly in relation to capacity determinations, and the basis upon which others can make decisions for those found to lack decisional capacity. There have subsequently been several Australian state-based law reform commission inquiries into the respective guardianship and administration laws[5] with all the ensuing reports recommending substantial changes to the existing laws to promote compliance with the CRPD requirements. At the date of writing only Victoria has amended its laws, with the introduction of the *Guardianship and Administration Act 2019* (Vic) (GAAV).[6] This article examines decisions taken by the Victorian and Civil Administrative Tribunal (VCAT) in proceedings considering the decisional capacity of persons living with dementia. It focuses on health and lifestyle matters and seeks to establish whether the new statutory regime is translating into different outcomes for persons living with dementia.

Traditional Legal Mechanisms for People Living with Dementia: Guardianship

Terminal cognitive decline is particularly challenging for the traditional way in which health and lifestyle decisions are made. Australian common law presumes that all adults have the capacity to make decisions about their health and related lifestyle decisions,[7] as do some statutes.[8] The traditional legal approach to capacity determinations involves a binary approach which divides the capacity 'haves' from the 'have nots', focusing on a person's ability to take in information, process it and weigh options to come to a decision.[9] Guardianship legislation provides the legal framework for decision-making for the 'have nots'. This framework has conventionally embedded a substituted decision-making model – that is, the appointed guardian makes the relevant decision on behalf of the person found to lack decisional capacity. It is therefore a model which implicitly excludes the person lacking capacity from the decision-making process. Moreover, in most Australian jurisdictions, that decision is made by applying the 'best interests' test,[10] a test which has long been subjected to both academic and judicial criticism[11] and which the ALRCR largely rejected, stating that the standard of best interests 'is still anchored conceptually in regimes from which the ALRC is seeking to depart.'[12] Some jurisdictions have incorporated a 'substituted judgement' standard,[13] one which has been recognised as more closely aligned with the person's autonomy interests as it involves the decision-maker 'stepping into the shoes' of the person who lacks decisional capacity. Privileging the autonomy interests of the person found to lack decisional capacity is also evident in the legislation of those jurisdictions which have introduced the opportunity for persons to make advance health/care directives (AHDs) and an appointment using the enduring power of guardianship (EPG).[14] These powers are currently notably under-utilised[15], hence the significance of the tribunal appointed guardianship powers, particularly considering that dementia is now the most common condition leading to guardianship applications[16]. The 'bright line' approach to capacity enshrined in the common law and most guardianship legislation is in its very nature unnuanced which has significant implications for those living with progressive cognitive impairment who may often appear 'just about capable but not completely' or 'probably capable' but still be properly aware of a series of issues relating to the decision.[17] Moreover, their cognitive abilities might be subject to fluctuation, so that one day they seem completely lost and on another perfectly aware of the world around them.[18]

Revising Traditional Mechanisms: the CRPD

Article 12 is the heart of the Convention with its privileging of the rights, will and preferences of the person with disability, the potentially transformational separation of the notion of 'mental capacity' from 'legal capacity', and the creation of a presumption that all persons enjoy an equal right to legal capacity. It has been claimed that the CRPD 'proposes a new human rights and support-orientated model of legal personality and legal capacity'[19]. Article 12(4) requires States Parties to introduce safeguards to ensure that the exercise of legal capacity respects the disabled person's rights, will and preferences. Article 12(3) of the CRPD states that:

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

These provisions together therefore identify supported decision-making as the main vehicle through which legal capacity is exercised and persons' rights, will and preferences realised.

What is supported decision-making?

As noted, supported decision-making emerged as a key strategy to addressing the human rights of people living with disability by facilitating their control over the decisions which affect them. The concept itself, however, is slippery in terms of its scope and substance. The scholarship identifies a wide range of decision-making models associated with the implementation of supported decision-making, including informal support and more

formal models involving the appointment of representatives and co-decision-makers. There is also a view that supported decision-making should be situated within the broader notion of 'assisted decision-making'.[20] It has been argued that if supported decision-making is regarded as the way to secure the rights, will and preferences of disabled persons, then there must be a true understanding of what privileging these concepts looks like in practice.[21] In this broader context, an analysis of how reforms introducing supported decision-making into a legal framework is of particular interest and significance and it is in this space where developments in Australia are notable.

As a signatory to the CRPD Australia is obliged to provide supported decision-making in its decision-making frameworks, both Commonwealth and State/Territory, as a means to securing the rights, will and preferences of persons living with disability. While the CRPD's Interpretation Committee has denounced guardianship regimes (being based on a model of substituted decision-making) as inconsistent with supported decision-making[22], Australia has issued a Declaration in connection with its interpretation of Article 12 which envisages the continuance of these regimes for the foreseeable future.[23] It is therefore within the guardianship legislation that supported decision-making is likely to be situated if it is to be effectively realised. In this context, which regards the continuation of guardianship regimes within Australia as the preferred mechanism for facilitating decision-making for those living with disability, it is important to recognise that the focus on the rights, will and preferences of these persons assumes a separate, and significant role. While Australia has committed to the introduction of supported decision-making mechanisms, it has also rejected the notion that there is no role for substituted decision-making. It is through this lens that the forthcoming analysis must be viewed.

The ALRC was set the task of reporting on how Australian law should and could incorporate the CRPD. Its Report on Equality, Capacity and Disability in Commonwealth Laws[24] recommended that the National Decision-Making Principles it developed be used to guide reform of laws at a Commonwealth, State and Territory level, and that changes legally recognising 'supporters' and their role in the expression of a disabled person's will and preferences in the NDIS, social security and aged care be reflected in changes to guardianship legislation.

Australian Guardianship Laws in Practice

The supported decision-making literature has tended to focus on persons living with mental illness and intellectual disability, with little engagement with conditions associated with progressive cognitive decline and the particular issues which this condition raises.[25] There has also been limited interrogation of the substantive content and practical understanding of rights, will and preferences separate to the idea of securing a person's well-being. As such there has been a conflation of the protective approach with the promotion of the disabled person's rights, associated with a failure to identify the latter as a separate consideration.[26]

These gaps in the scholarship render an understanding of what is currently happening in the tribunal space particularly relevant. Fifteen years on from Australia's adoption of the CRPD, only Victoria has introduced new guardianship legislation to specifically include a supported decision-making mechanism. The New South Wales Law Reform Commission (NSWLRC) has recommended that a new Act for supported and substituted decision-making be enacted and called the 'Assisted Decision-Making Act'.[28] Its' view is that this title describes in plain English what the Act would be concerned with, and 'moves away from the paternalistic language of "guardian" and "guardianship".'[29] The NSWLRC strongly recommended a human rights approach with the emphasis on respecting the will, rights and preferences of the person the subject of proceedings wherever possible.[27] As yet, though, no amendments or new draft legislation has come before Parliament.

Consideration of the decisions of the Victorian tribunal consequent to the introduction of the new legislation is particularly important given that the reasonably accessible and affordable nature of guardianship in Australia has made guardianship proceedings a relatively popular option for persons whose decisional capacity is being questioned.[28] While this is concerning given the guardianship's regimes premise in substituted decision-making, it is also evident from recent research that a substantial amount of 'unofficial guardianship' occurs, where the tribunal is satisfied that the person brought before the tribunal is being satisfactorily supported by family and friends. Demonstration of a lack of decisional capacity is therefore not a pre-requisite for the issuing of a guardianship order – there must also be found to be a 'need' for a guardian, a question which is able to accommodate consideration of the support networks available to the person without decisional capacity. The persisting problem, however, is that there remains no way of knowing whether in the provision of this support the person's rights, will and preferences are the centre of the decision-making process. In this respect, 'informal guardianship' facilitates substituted judgment on an ongoing basis, absent the oversight of the Tribunal. A study of several jurisdictions has noted that in several cases, Tribunals have made guardianship orders in circumstances where informal care arrangements cease to work because of the increasing burden on carers, or conflict between family members.[29]

The new Victorian guardianship legislation specifically includes the ability of VCAT to make a formal 'supportive guardianship order', featuring the power to appoint a supportive guardian whenever an application is made to the Victorian Civil and Administrative Tribunal for the appointment of a guardian.[30] It therefore takes the notion of supported decision-making to a more general level of application.[31] Section 8 sets out key general principles which apply to a person 'exercising a power, carrying out a function or performing a duty' under the Act. Notably the first of these is:

'(1)(a) A person with a disability should be given practicable and appropriate support to make and participate in decisions, express their will and preferences and develop their decision-making capacity'.

That same subsection states that in providing this support the person should be enabled 'as far as practicable in

the circumstances' to 'express the person's will and preferences.'[32] The requirements for issuing a supportive guardianship order are found in s87(2) and include that the person consent to this order and have decision-making capacity 'when practicable and appropriate support is provided'. VCAT must specify the proposed support person, while the Act sets out the powers and duties of supported decision-makers.

Further evidence of the Act's regard to the CRPD is evident in general principle (1)(b) which states that 'the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person', and (1)(c) which requires the powers, functions and duties under this Act to be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances.

The emphasis on the wills and preferences of the person features in other key aspects of the Act. For example in deciding whether a person is in need of a guardian or administrator, VCAT must consider the following[33]:
'(a) the will and preferences of the proposed represented person (so far as they can be ascertained); (b) whether decisions in relation to the personal or financial matter for which the order is sought— (i) may more suitably be made by informal means'

The wills and preferences of the represented person also features heavily in section 9, which sets out the decision-making principles for the person making the decision (the guardian or administrator).

The introduction of these sections, mandating regard to the CRPD Article 12 requirements, represents a significant shift in the legislative narrative. But has it resulted in changed outcomes for people living with dementia who are the subject of tribunal proceedings?

Study of tribunal decisions 2019-2024

The study design employed a methodology of desktop research. It built upon a previous study in which the authors of that paper examined 27 decisions of VCAT between 2019 and 2020 using the identifiers 'dementia' and 'supported decision-making'.[34] Of these decisions, 19 were taken subsequent to the enactment of the new Victorian legislation.[35] This author has undertaken a further search of decisions between 2021 and June 2024 which uncovered a further 24 decisions using the same identifiers. The combined results of both searches failed to find a case in which a supportive guardianship order had been issued. Several observations are drawn from the examination of these decisions.

Firstly, while the tribunal consistently references the supportive guardianship provisions in a guardianship application[36], in only a handful of cases the tribunal asked whether the person could, if supported, demonstrate capacity.[37] In several cases, the tribunal seemed to dismiss the applicability of the supportive guardianship order on the basis that the person lacked capacity.[38] It is difficult to see from these cases how the new provision will change things given this evidence that the tribunal requires that the person have decisional capacity in order to consider a supportive order. This seems a deficit interpretation of supported decision-making, one which continues to cling to the 'bright line' approach, rather than focusing on the decision-making process.

It needs to be acknowledged that the consideration of an appointment of a supported decision-maker may be complicated by difficulties in separating the issue of the capacity of a person to be supported, with the operational aspects of a supported decision-maker. For example, in a very recent decision the appointment of a supported decision-maker was regarded as not available as the person the subject of proceedings was 'not willing to communicate sufficiently to do this.'[39] This decision appears to conflate the question of whether a person can be supported to make decisions, with considerations of the practicality of making an appointment. The significance of the latter point arose in the recent case of *VWT (Guardianship)* [2023] VCAT 1151. The tribunal found that even if the person had the capacity for a supportive decision order (it concluded the person didn't), such an order would not have been possible in the circumstances as VWT's preference was for RKO to be appointed supportive guardian but RKO was not prepared to do this (he lived many hours away and was 92 years of age). This case raises the issue of the availability of supports to a person who is the subject of an application, one which has arisen in other cases,[40] and which highlights the importance of increased resourcing for supported decision-making.[41]

Secondly, there is significant reliance upon medical evidence to deny decisional capacity. This is in many respects predictable, but it is interesting to note the extent of the reliance. In some jurisdictions this reliance has been essentially mandated by court decisions. For example, in Western Australia a 2012 Supreme Court decision requires the State Administrative Tribunal to follow the medical evidence unless there is 'clear and cogent evidence' which rebuts this.[42]
In this audit of the Victorian decisions, the almost wholesale reliance on medical evidence was evident in cases where there was a strong contestation of its truth. For example, in *RCF (Guardianship)* [2023] VCAT 893 the son strongly disagreed with the medical professional's assessment of his mother's decisional capacity. In relation to the son's claim that his mother was assessed at a time and in an environment which her decision-making capacity could not be assessed accurately the tribunal member noted:
'I preferred Dr Bird's evidence about this important issue, given her expertise in this field and her independent status…His (the son's) ability to observe his mother's state and report correctly was in my view clouded by his own objection to the assessment…'[43].

The member concluded that Dr Bird had complied with section 6 of the GAA – 'That is, she took reasonable steps to conduct it at a time and in an environment where capacity could be assessed most accurately'[44]. The tribunal accepted Dr Bird's assessment, noting of the son – 'He is not an expert or even medically trained.'[45]

In a recent rehearing of this same matter by a different tribunal member - *RCF (Guardianship)* [2024] VCAT 748

– there was some evidence of the tribunal's unwillingness to blindly accept the medical evidence which concluded that, due to the disability resulting from dementia, RCF did not have decision-making capacity for any financial or personal matters, even when provided with support. RCF and her carer, her son EMY, again strongly disputed this, giving evidence that RCF's disability did not impact her decisional capacity. The tribunal member noted the importance of 'taking RCF's express wishes into account when considering all the evidence'.[46] The member references an earlier Supreme Court decision in which it was stated that:

'…where evidence extends beyond medical evidence to the evidence of law witnesses; the danger of privileging medical evidence over other relevant evidence must be borne steadily in mind by the Tribunal' and that 'the Tribunal could not abdicate its decision-making role by simply accepting the opinions of Dr Genardini and Dr Straw as conclusive of the question of capacity. It had to make its own findings of fact on material issues, and explain how it arrived at them.'[47]

Ultimately, however, in RCF the tribunal preferred the medical evidence of the neuropsychologist above that of the medical evidence of a GP and the lay evidence, concluding that she had a disability and that this accounted for her lack of decisional capacity.[48]

In other cases, VCAT noted that there was little other evidence to contest the medical opinion and no further evidence was available to the tribunal. In all such cases the medical evidence determined the outcome of the capacity inquiry.[49] The medical evidence in relation to accommodation, however, was not followed in the case of *ONJ (Guardianship)* [2023] VCAT 48 which, as noted below, strongly emphasised the importance of the will and preferences of ONJ.

The recent Office of the Public Advocate report (Vic) notes VCAT's reliance, whether 'entirely or predominantly on medical evidence', and observes that the 'broad-brush' approach to decision-making capacity may result in over-broad powers being conferred on guardians.[50] The Report gives examples of this approach in a number of extracts from decisions:

'Based on the medical reports, I am satisfied that YXG now lacks the capacity to make decisions about her medical treatment, where she is able to lie, what services she needs, and about her financial and property affairs'.[51]

'[U]pon the medical evidence, I was satisfied that NKT did not have decision-making capacity in relation to accommodation, access to services, or medical treatment and also did not have decision-making capacity in relation to financial matters.'[52]

Thirdly, the impact of family conflict on the tribunal's decision was evident in rejecting the option of a supportive guardianship order option even where this was considered possible. For example, in *MGB (Guardianship)* [2021] VCAT 206 while the tribunal contemplated a supportive guardianship order its ultimate rejection seemed to lie in the deep and ongoing conflict between the person's two parents.[53]

The risk posed by family conflict, or the risk to the person because of the relative's conduct, also featured as reasons for not considering a less formal arrangement or appointing a supportive guardian.. This was evident in *ESU (Guardianship)* [2024] VCAT 340 (based on the risk posed by a sister taking ESU from her aged care residence) and *XEX (Guardianship)* [2024] VCAT 26 in which the 'highly conflictual' relationship between XEX's two sons led to the tribunal concluding that the only viable option was the appointment of the Public Advocate as guardian. In *BHP* [2024] VCAT 276 there was clear evidence of BHP's abusive behaviour towards his wife. Despite both BHP and his wife's preference that he remain in the family home, VCAT concluded that this was not possible, and he was in need of a guardian and placement in residential care.

The tribunal concluded that 'It was not possible to leave decisions about BHP's personal circumstances (accommodation and services) to be made by informal means, as suggested by s31(b), because there was no consensus amongst his family members.'[54]

Moreover, it noted that:

'The less restrictive alternative of appointing supportive decision makers was not available in this case, as those appointments requires the consent of the person and BHP was not willing to communicate sufficiently to do that.'[55]

In reference to a medical report which mentioned that BHP had been physically violent towards his wife the tribunal distinguished the relevance of this behaviour to the question of the appointment of a guardian (concluding that it was not relevant) and to where he resided (where it was relevant):

'it was not relevant to the question of whether BHP meets the criteria for appointment of a guardian…There was sufficient other evidence about BHP's need for care and his difficult behaviour. However, the questions of whether BHP has dementia-related challenging behaviours and if so whether they can be managed at home will be relevant to the guardian's decisions about where BHP lives and what services he needs.'[56]

Fourthly, the tribunal's decisions indicated a distinct preference for considering less restrictive options to guardianship and referencing this to the principles in the new legislation. In a number of cases the tribunal referred to the alternative substitute decision-making mechanism under the *Medical Treatment Planning and Decisions Act 2016* (Vic) (MTPD Act). In *EIS (Guardianship)* [2024] VCAT 100 the tribunal looked to principles in the GAAV but also to Division 2 of the MTPD Act which it regarded as creating a less restrictive framework for medical treatment decisions to be made:

'This is a preferable approach than the imposition of a guardianship order, which will act to place an unnecessary restriction on EIS. This is especially the case given that there are no medical treatment decisions which are proposed or anticipated…The operation of the MTPD Act to provide a framework for medical treatment decisions is also more appropriate given the requirement in section 8 of the Act that powers, functions and duties must be used in the way that is the least restrictive of the

ability of the person with a disability to decide and act as is possible in the circumstances. The imposition of a guardianship order in this case would act to place an additional restriction on EIS which is unnecessary when decisions are able to be made less restrictively.'[57]

This approach was also evident in *UAC (Guardianship)* [2023] VCAT 101 a case in which a 76 year old woman with dementia was moved from her aged care centre to hospital after she locked herself in a room and threatened to self-harm. While the tribunal noted that the medical report concluded she lacked the capacity to make decisions about appointing or revoking an EPG, based on the discussions between the parties at the hearing about her accommodation concerns, it found that there was no need for a guardian to make lifestyle decisions at this time. At para 53 the tribunal noted, relying on section 55 of the MTPD Act, that:

'VCAT is required to take the least restrictive approach to appointment of a guardian for UAC, and it is clear that there are alternatives to guardianship for medical treatment decision makers for UAC. '

A less restrictive approach was also evident in *NBY (Guardianship)* [2023] VCAT 39 in which the tribunal found that although dementia affected NBY's decision-making capacity but she 'can, of course, make decisions and choices about many day-to-day personal matters and the evidence was that the Manager and care staff at her residence support her to do so'.[58]. Ultimately the tribunal concluded that there was no need for a guardian as the disruption and distressing events had abated – 'There is no prospect of NBY travelling, and she has all the services and supports she needs.'[59]

Fifthly, and perhaps most significantly, more recent decisions have indicated an emphasis upon another provision of the new Act, which, like the supported decision-making mechanism, reflects a central tenet of Article 12 of the CRPD. As noted above, prioritising the rights, will and preferences of the person with a disability is the underlying premise of Article 12; supported decision-making is regarded as the optimal way to secure this premise. Privileging the will and preferences of the person who is the subject of an application is a consistent feature of the provisions relating to the appointment of guardians and the basis upon which decisions are made for the represented person. The result of this emphasis on will and preferences has brought to the forefront the situation where the person who is the subject of the application has a preference for an option which appears to raise some risk to their health and safety. This has notably arisen in relation to accommodation decisions. In *RXO (Guardianship)* [2033] VCAT 872, the daughters applied for appointment of a guardian and an administrator in circumstances in which their 79 year old mother and her husband were to imminently move from Victoria to Queensland. They opposed this believing that this didn't reflect her genuine will and preferences. The tribunal referred to alleged incidents of family violence, including a recent event which involved police attendance at the home, but concluded that:

'The difference between the 2019 guardianship legislation and the 1986 legislation that preceded it is that RXO's will and preferences have greater consequences in the context of implied coercive control. Such consequences can only be addressed when there is overt evidence of actual harm and risk. The evidence in this case did not reach that threshold.'[60]

The tribunal noted that there was no evidence that RXO had ever expressed a wish not to move to Queensland.[61] It accepted that relationships and conversations within this family were difficult primarily because of the husband's personality - a 'domineering man' - but concluded that the implication that RXO is coercively controlled by her husband would need 'much clearer evidence' before drawing a conclusion that RXO's repeated statements 'do not reflect her genuine will and preferences'[62]. The emphasis on her preferences is clear in the tribunal's reference to their 'very long marriage' and 'her clear wishes to return to their home after leaving twice in 2022'.[63]

In *RCF (Guardianship)* [2023] VCAT 893 the tribunal considered a challenge by one of RCF's children to the appointment of an enduring guardian, and an application for the appointment of a guardian, for RCF. It clearly gave priority to the wills and preferences of RCF in deciding that there was no need for the appointment of a guardian, stating:
'Applying the principles in the GA Act to the question of whether to appoint a guardian, I considered that as long as RCF's wishes (her will and preferences) are respected and her appointed decision makers are complying with their duties under the POA Act to give effect to her wishes as far as practicable and serve her personal and social well being, there is no need to interfere with the arrangements she herself made at the time when (I assume) she had the capacity to decide who should make decisions for her in the event she was unable to do so.'[64]

It should be noted that even with this evidence of explicit reference to a person's will and preferences, the tribunal has desisted from appointing the preferred person as the guardian for the person the subject of proceedings where that is regarded as unworkable. For example, in *BHP (Guardianship)* [2024] VCAT 276, the tribunal concluded that BHP's clear preference for his wife as his decision-maker could not be given effect because of the tribunal decision-maker's belief that she could not fulfil the duties of a guardian under section 41 of the Act – 'to protect him from neglect or to exercise reasonable skill and care.'[65]

Another recent decision which appears to demonstrate the effect of the provisions of the new GAAV is *ONJ (Guardianship)* [2023] VCAT 48. In this case ONJ wished to live in her home with the support of her partner KAV. She expressed wanting KAV to help her, and not requiring or wanting the support of her children, stating that she wanted to make her own decisions.

The decision emphasised the centrality of section 8 of the GAAV. The tribunal relied on medical evidence to the effect that ONJ did not have capacity to engage in supported decision-making and that she needed the full support of a substituted decision-maker, concluding that decisions about her residence could not be made by informal means.[66]

Ultimately the tribunal decided to appoint KAV as the guardian, with the outcome that ONJ's preference to remain in her home was able to be respected. The tribunal noted that there no reports submitted to confirm the view that doctors said she was better in residential care, an uncommon rejection of the medical evidence.[67] It further noted that she was physically fit and spent most weekends with her partner. It also formed the view that neither of the children were able to contribute directly to ONJ's care.[68]

Indeed, the tribunal's most notable observations and findings are in relation to the children's position. It found that they:
'had interests that conflicted with those of ONJ…This was not assumed by me but based on the decision they had made by which they stood. They did not suggest or agree that assessments might indicate that ONJ's wish to live in her home might be possible with community supports. They disagree with what OMJ wanted and saw no way of accommodating that wish or any willingness to explore the feasibility of it'.[69]

The tribunal member further observed that:
'I was satisfied that KAV has an enduring relationship with ONJ, was suitable to be appointed as guardian for ONJ and that such an appointment was consistent with ONJ's will and preferences. KAV demonstrated an understanding of the legislation and stated that he would comply.'[70]

Perhaps most tellingly the tribunal concluded that:
'This matter was not about the rights of a person's adult children versus the rights of a partner. This matter was about ONJ's rights. A person does not lose their rights because of a disability. While the appointment of any guardian or administrator affects rights, I was satisfied that the appointments made were necessary, were limited to the matters in dispute and intended to promote ONJ's rights.'[71]

Most recently, in *QBZ (Guardianship)* [2024] VCAT 687, the tribunal again demonstrated this privileging of the person living with dementia's will and preferences. In that case the tribunal found that QBZ was in need of a guardian. While she had been confused during the hearing, the tribunal member concluded from all of the evidence that it was her clear preference to live with her husband MID at home. QBZ's children from her first marriage gave evidence that she needed to be in residential care, with her son WOA arguing that he was the most appropriate guardian. The tribunal found that the evidence 'supports an inference that QBZ would likely prefer MID to be appointed as guardian to make a decision on this issue, as it would most likely give effect to her own will and preference'.[72] Moreover, while the tribunal accepted that there was evidence that MID could not provide the care and supervision that QBZ required, it noted that a reassessment of her needs ultimately supported her staying at home. The decision demonstrates again the willingness of tribunals to privilege the will and preferences of a person appearing in proceedings even where there is evidence of some risk of harm to that person.

Conclusion

Respecting the rights, will and preferences of older persons is associated with improved wellbeing and quality of life, and this has particular relevance for those living with dementia.[73] The GAAV's introduction of a formal supported decision-making mechanism and its' explicit privileging of the rights, will and preferences of those who are subject to proceedings under the Act has the potential to promote a person with dementia's autonomy, and is a development which is aligned with global human rights protections of those living with disability. This article's analysis of VCAT's approach to the application of the recent Victorian legislation suggests that the introduction of a formal supported decision-making mechanism has to date struggled to impact tribunal proceedings for people living with dementia. There are, however, clear indications that the legislative embedding of a person's will and preferences as the primary consideration in proceedings has affected the way that VCAT approaches decisions where respecting a person's preference may expose them to risks of harm. In this respect there is evidence that the new legislation has encouraged a revised weighting of interests in the decision-making process, ultimately resulting in different outcomes for people living with dementia.

References

[1]The Australian Institute of Health and Welfare (AIHW), *Dementia in Australia* (23 Feb 2023) estimates that in 2022 almost 400,000 people have dementia and this is projected to increase to almost 850,000 by 2058.

[2] See, eg., the Guardianship and Administration Act 1990 (WA); Guardianship and Administration Act 2000 (Qld); Guardianship Act 1987 (NSW)

[3] See the United Nations Convention on the Rights of Persons with Disabilities Article 12 - https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html

[4] ALRC Report No. 124 (2014).

[5] NSW, Victoria and one is currently underway in WA.

[6] Note that the Guardianship and Administration Amendment Bill 2023 (Tas) has been introduced into Parliament, while several amendments were introduced into the Guardianship and Administration Act 2000 (Qld) to align the general and healthcare principles with human rights, particularly the CRPD.

[7] *Brightwater Care Group v Rossiter* [2009] WASC 229

[8] For example, the *Guardianship and Administration Act 1990* (WA) s4(3), *Guardianship and Administration Act 2019* (Vic) s592

[9] *Re C (Adult: Refusal of medical treatment)* [1994] 1 WLR 290, *Re MB* [1997] 2 FLR 426

[10] The guardianship legislation in Western Australia, New South Wales, Tasmania, and the Northern Territory prescribes this standard. The ALRC Report on Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124, 2014) recommended replacing the best interests standard with one which reflects the person's will and preferences – see National Decision-Making Principles 3 and 4.

[11] See, eg., *Department of Health and Community Services (NT) v JWB and SMB* (1992) 175 CLR 218 per Brennan J citing I Kennedy, 'Patients, Doctors and Human Rights' in Blackburn and Taylor (eds), *Human Rights for the 1990s* (1991), pp 90-91

[12] ALRCR at para 3.54

[13] The South Australian Guardianship and Administration Act 1993 s5 requires the decision-maker to make the decision which the incapacitated person would have made had they the capacity to do this. The Victorian legislation specifically requires the substituted decision-maker to 'give effect as afar as practicable in the circumstances to what the person believes the represented person's will and preferences are likely to be, based on all the information available.' – Guardianship and Administration Act 2019 (Vic) s9(1)(b).

[14] These are found, eg. in Part 9 of the Guardianship and Administration Act 2000 (WA), but in other Australian jurisdictions advance health care planning provisions are found in separate legislation – eg. see the Medical Treatment Planning and Decisions Act 2016 (Vic), and the Advance Care Directives Act 2013 (SA).

[15] Evidence derived from the Advance Care Planning Legal Subject Matter Expert Group 27/11/2024

[16] Office of the Public Advocate (SA)< Annual Report 2016-2017 (2018)

[17] K De Sabbata, "Dementia, Treatment Decisions and the UN Convention on the Rights of Persons with Disabilities: A New Framework for Old Problems' (2020) 11 Frontiers in Psychiatry 2

[18] De Sabbata, at 2 .

[19] De Sabbata, at 8

[20] SN Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35 Sydney Law Review 133.

[21] M Blake, C Stewart, P Castelli-Arnold and C Sinclair, 'Supported Decision-Making for People Living with Dementia: An Examination of Four Australian Guardianship Laws', (2021) 28 JLM 389

[22] Committee in the Rights if Persons with Disabilities, General Comment No 1, 11th sess, UN Doc CRPD/C?GC/1 (20140 (General Comment No 1)

[23] Australia, Convention on the Rights of Persons with Disabilities Declaration (2007)

[24] ALRC Report No. 124 (2014).

[25] D Tait and T Carney, 'Too Much Access: The Case for Intermediate Options for Guardianship', (1995) 30(4) Australian Journal of Social Issues 445

[26] N Munro, 'Taking Wishes and Feelings Seriously: The Views of People Lacking Capacity in Court of Protection Decision-Making', (2014) 36(1) Journal of Social Welfare and Family Law 59

[27] In the recommended Guiding Principles section

[28] D Tait and T Carney, 'Too Much Access: The Case for Intermediate Options for Guardianship', (1995) 30(4) Australian Journal of Social Issues 445

[29] See, eg., *Re JH* [2016] WASAT 20

[30] Guardianship and Administration Act 2019 (Vic) s87

[31] The *Medical Treatment Planning and Decisions Act 2016* (Vic) s31 already provided for the possibility of an appointment of a support person to represent another person's interests in connection with their medical treatment, including where the person lacks decisional capacity

[32] (1)(a)(ii)

[33] section 30(2)(b

[34] M Blake, C Stewart, P Castelli-Arnold and C Sinclair, 'Supported Decision-Making for People Living with Dementia: An Examination of Four Australian Guardianship Laws', (2021) 28 JLM 389

[35] The Victorian Guardianship and Administration WAC 2019 was enacted (came into effect) on the 1st of March 2020.

[36] The provision was not referenced in *XEX* [2024] VCAT 26

[37] *WMO (Guardianship)* [2023] VCAT 53; *ALG (Guardianship)* [2023] VCAT 344; VWT (Guardianship) [2023] VCAT 1151; BHP [2024] VCAT 276; QBZ (Guardianship) [2024] VCAT 687

[38] *BEZ (Guardianship)* [2021] VCAT 314; *RYZ (Guardianship)* [2023] VCAT 295; *BXE* (Guardianship) [2023] VCAT 87; EIS [2024] VCAT 100; ONJ [2023] VCAT 48

[39] BHP (Guardianship) [2024] VCAT 276 at para [36]

[40] PVU (Guardianship) [2020] VCAT 1161

[41] Also see 'Reflections on Guardianship; The Law and Practice in Victoria', Office of the Public Advocate (Feb 2023) at p32

[42] S v SAT (2012) WASC 306 at 1991.

[43] At para [52]

[44] At para [53]

[45] At para [75]

[46] RCF (Guardianship) [2024] VCAT 748 at para [156]

[47] LG v Melbourne Health [2019] VSC 183 at paras [49] and [51] per Richards J (a decision on the previous Vic GAA)

[48] RCF (Guardianship) [2024] VCAT 748 at para [244]

[49] NJA [2023] VCAT 572; ESU [2024] VCAT 340; XEX [2024] VCAT 26; UAC [2023] VCAT 101; OIC [2023] VCAT 144; RXO [2033] VCAT 872

[50] 'Reflections on Guardianship; The Law and Practice in Victoria', Office of the Public Advocate (Feb 2023).

[51] YXG (Guardianship) [2022] VCAT 900 at para [20]

[52] NKT (Guardianship) [2022] VCAT 362 at para [34]

[53] *MBG (Guardianship)* [2021] VCAT 206.

[54] At para [41]. The tribunal also noted the wife's denial of his diagnosis as a relevant factor to this being impracticable.

[55] At para [36]

[56] At para [40]

[57] At paras [35]-[36]

[58] At para [26]

[59] At para [30]

[60] At para [36]

[61] At para [26]

[62] At para [29]

[63] At para [32]
[64] At para [110]
[65] BHP (Guardianship) [2024] VCAT 276 at para [46]
[66] At para [54]
[67] At para [59]
[68] At para [60]
[69] At para [55]
[70] At para [62]
[71] At para [64]
[72] in QBZ (Guardianship) [2024] VCAT 687 at para [51]
[73] L Pritchard-Jones, 'Ageism and Autonomy in Health Care: Exploration Through A Relational Lens', (2017) Health care analysis 25 (1); 72-89