A NEW AGED CARE ACT: PROGRESS IN IMPLEMENTING A SUPPORTED DECISION-MAKING APPROACH IN AUSTRALIA'S FEDERATION?

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This article evaluates the first legislative attempt by the Commonwealth to honour its commitments under the United Nations Convention on the Rights of Persons with Disabilities ('CRPD'), by introducing a supported decision-making framework into the federally funded aged care system. The article concludes that the consultative process to develop a new Aged Care Act incorporating such a framework has so far been both fruitful but also very deficient. It is suggested that the design of the two new appointments (supporters and representatives) cleaves closely to CRPD requirements. However, it is argued that the reliance on administrative processes for making and monitoring Commonwealth appointments and the relationship with state and territory equivalent powers and appointments is less than ideal. The proposed Act raises questions regarding how the new system will practically interface with existing state and territory regimes, how best to recognise the principle of subsidiarity in this context and presents a timely reminder of the limits of what the Commonwealth can and should seek to achieve within the Australian federation.

I INTRODUCTION

In Australia, the concept of supported decision-making advanced by Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* ('*CRPD*')[1]

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has been focused on within academia, the disability and aged care sectors and public bodies.[2] However, progress by state and territory legislatures to adopt any of the models advanced by multiple law reform inquiries[3] – favouring 'supporting' a person to make their own decision in accord with their 'will and preferences' rather than traditional guardianship and administration orders which remove decision-making and direct the substitute decision-maker to be guided by consideration of a person's 'best interests' – has been glacial. Outside guardianship regimes, Commonwealth provisions such as 'nominee' initiatives in social security and the National Disability Insurance Scheme ('NDIS') have received scant attention, praised as marginally more *CRPD*-compliant but queried for being too easily invoked and in practice overused and unaccountable.[4]

Consultative development of a new Aged Care Act (the 'Act', updating and combining the *Aged Care Act 1997* (Cth), *Aged Care (Transitional Provisions) Act 1997* (Cth) and *Aged Care Quality and Safety Commission Act 2018* (Cth)) began in August 2023. Through a range of online and in-person discussions, two consultation papers and a December 2023 exposure draft Bill ('Draft Act'),[5] the Commonwealth Government has taken action to introduce a supported decision-making approach in one of its areas of responsibility to which the *CRPD* applies.[6] This Draft Act, anticipated to commence in 2025, if passed, follows acceptance of recommendations of the Royal Commission into Aged Care Quality and Safety (the 'Aged Care

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

2 For an overview, see Piers Gooding and Terry Carney, 'Lessons from a Reformist Path to Supported Decision-Making in Australia' in Michael Bach and Nicolás Espejo Yaksic (eds), *Legal Capacity, Disability and Human Rights* (Intersentia, 2023) 255; Christine Bigby et al, 'Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-Making' (Research Report, Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability, January 2023); Older Persons Advocacy Network, 'Supported Decision-Making Must Be Embedded across Aged Care' (Position Statement, November 2022).

3 Shih-Ning Then et al, 'Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies' (2018) 61 (November–December) *International Journal of Law and Psychiatry* 64 <https://doi.org/10.1016/j.ijlp.2018.09.001>.

4 See Terry Carney, 'From Guardianship to Supported Decision-Making: Still Searching for True North?' (2023) 30(1) *Journal of Law and Medicine* 70.

5 Aged Care Bill 2023 (Cth) ('Draft Act'). See generally 'Consultation on the New Aged Care Act', *Department of Health and Aged Care (Cth)* (Web Page, 13 March 2024) <https://www.health.gov.au/our-work/aged-care-act/consultation#previous-consultation->.

6 For a summary of the applicability of the *CRPD* (n 1) to aged care and dementia, see Rachel Morrison-Dayan, 'Protecting the Right to Social Participation of Older Persons in Long-Term Care under Article 19 of the United Nations *Convention on the Rights of Persons with Disabilities*' (2023) 23(2) *Human Rights Law Review* ngad004:1–21, 2 <https://doi.org/10.1093/hrlr/ngad004>. For an illustration of the kinds of decisions involved for recipients of aged care services, see Poland Lai, 'Autonomous Care Decisions: What Can Article 12 of the *CRPD* Offer to Older Disabled Adults and Their Supporters?' (2023) 38(8) *Disability and Society* 1502 <https://doi.org/10.1080/09687599.2023.2198662>.

Commission').[7] Although mainly concerned with introducing a new financial, regulatory and consumer rights framework in aged care, it provided an opportunity to align aged care law with *CRPD* principles on supported decision-making and consider enacting 'model' legislation recommended by the 2014 Australian Law Reform Commission's ('ALRC') Report, encouraging states and territories to amend their own legislation.[8]

Realisation of these aspirations called for careful choice of legislative language, an understanding of what the Commonwealth realistically can achieve in a federated system, and an appreciation that aged care recipients have the highest likelihood of need for or usage of state and territory laws regarding enduring powers of attorney ('EPAs'), guardianship,[9] or health, advance care directives[10] or tribunal appointment of guardians and/or financial administrators,[11] or *other* existing Commonwealth nominee provisions.[12] This is especially true for decisions made by a recipient of residential aged care or aged care services delivered at home, the decision-making areas addressed by the Draft Act. Such recipients are also a group where cognitive decline and, therefore, assistance with decision-making – in a manner compliant with *CRPD* goals – is likely to be increasingly required. In short, older adults are a population for whom the potential for interaction between Commonwealth and state/territory laws about supported decision-making and guardianship will be most *frequent*, so the harmonisation or 'fit' between the two sets of laws is of the utmost importance. Paradoxically, the Draft Act highlighted some tensions and deficiencies of relying on uniform laws set by the Commonwealth. As discussed, these tensions include the respective competency of Commonwealth versus state and territory 'gatekeeper' bodies in deciding whether any supporter or substitute decision-maker is

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7 *Royal Commission into Aged Care Quality and Safety* (Final Report, February 2021) vol 1. For an overview of other relevant reforms, see eg, 'About the New Aged Care Act', *Department of Health and Aged Care (Cth)* (Web Page, 6 February 2024) <https://www.health.gov.au/our-work/aged-care-act/about>.

8 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 7, 13 [4.1], 16 [6.2] ('*Equality, Capacity and Disability in Commonwealth Laws*'). The report summed up this approach as providing 'a model to encourage supported decision-making under Commonwealth laws and to provide the catalyst towards further initiatives at the state and territory level' writing that '[i]n adopting the model and leading its implementation federally, the Australian Government can maintain its leadership in championing and implementing reforms for persons with disability, ensuring their equal recognition before the law in accordance with art[icle] 12 of the *CRPD*': at [1.56]–[1.57].

9 Australian Institute of Family Studies, 'Elder Abuse in Australia: Wills, Powers of Attorney and Family Agreements' (Research Snapshot, August 2022).

10 Kim Buck et al, 'Advance Care Directive Prevalence among Older Australians and Associations with Person-Level Predictors and Quality Indicators' (2021) 24(4) *Health Expectations* 1312 <https://doi.org/10.1111/hex.13264>.

11 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66(1) *Australian Social Work* 26, 28 <https://doi.org/10.1080/0312407X.2012.715657>.

12 Such as the 164,000 Centrelink appointments of a 'payment nominee' to manage someone's pension or social security payment: Carney (n 4) 80.

required; and the access or otherwise of the Commonwealth not only to specialist tribunals but also to agencies like Public Advocates, Public Guardians and Public Trustees. In addition, questions arise as to the 'fit' between any new Act powers and the existing mosaic of state and territory recognised substitute decision-makers (and supporters in Victoria) such as Tribunal-appointed guardians and administrators; 'self-appointed' enduring attorneys/guardians for personal, financial and health matters; and 'automatic' or 'default' substitute decision-makers for health care decisions in state and territory legislation (eg, 'responsible persons',[13] and their equivalents).[14]

The argument we make is twofold. Firstly, although the *authority* and *powers* conferred by the Draft Act to appoint supporters and representatives have been comparatively well crafted, the criteria for appointment were too open-ended and the gatekeepers for triggering appointments (and for review of appointments by the Administrative Review Tribunal ('ART')) are inferior to state and territory processes (Part II(A)). Secondly, the default position that existing appointments of guardians/attorneys by the person or a tribunal are abrogated for the purpose of aged care decisions, but entitle holders to appointment as a representative on request (subject to a narrow unsuitability exception), was both crude and heavy-handed (Part II(B)).

We argue that despite genuine efforts to align the draft Act with *CRPD* goals and advances in implementing a supported decision-making approach, further work is needed, particularly to resolve multiple uncertainties regarding how the new system will practically interface with current state and territory substitute decision-making systems.

II JURISDICTIONAL INTERFACE AND OTHER ISSUES

A central issue in any law is where to set the boundary between leaving citizens to decide things for themselves (human autonomy and civil society) and when decisions should instead be made by executive government (public servants) and/or courts and administrative review tribunals.

In Australia's federation, allocation of responsibility is complicated by the further question of 'which' level of government (and associated judiciary/tribunal) is best entrusted with such responsibilities. For many human services such as welfare, disability and mental health, a principle of 'subsidiarity' presumes that the best level or body entrusted is usually that closest to home rather than distant central

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13 Clause 11 of the Draft Act (n 5) confusingly introduces another quite different meaning of a 'responsible person' for the purposes of aged care, adding to the difficulties of educating aged care staff and the public about the effect of existing default health care substitute decision-makers already called the 'person responsible' under state and territory legislation.

14 Shih-Ning Then, Ben White and Lindy Willmott, 'Adults Who Lack Capacity: Substitute Decision-Making' in Ben White et al (eds), *Health Law in Australia* (Thomson Reuters, 4th ed, 2024) 221.

administration.[15] Australia's allocation of powers between the two tiers of government is said to both reflect that principle[16] and guide reform,[17] while further 'uniform' legislation or national responsibility remains more contested.[18]

These questions of where and how responsibilities should lie and how such levels of government and their respective legal frameworks should 'interface', are of crucial practical importance, as well as for theoretical consistency. For people living with a disability and for older people with declining cognition, the key issue is likely to be *who* gets to make decisions and *how* decisions get made regarding important aspects of their lives – ie, where to live, etc. It matters little if the funding for a service comes from the state or Commonwealth, merely that the method of decision-making is (somewhat) consistent and respects their rights.

To protect the rights of those with disability or declining cognition, it is important that decision-making ability is respected for as long as possible (no 'anticipatory' appointments); that the will and preferences of the person are honoured (with support where required); and that any orders are made by 'competent' authorities, only regarding essential areas (partial rather than plenary) and for the shortest feasible time (time limited rather than indefinite).[19]

A How Well Constructed Is the Aged Care Supported Decision-Making Framework?

The Draft Act's proposed suite of principles, assumptions of decision-making abilities, and design of the powers and roles of supporters and representatives are generally in close fidelity to the *CRPD*, despite at times adopting some unfamiliar language. Unlike the 'self-contained' (or specific purpose) state and territory guardianship legislation they interface with, the provisions for supported decision-

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15 Mark Gallagher, 'From Associations to Action: Mental Health and the Patient Politics of Subsidiarity in Scotland' (2018) 4(1) *Palgrave Communications* 34:1–11, 2 <https://doi.org/10.1057/s41599-018-0085-9>.

16 Benjamen Franklen Gussen, 'Australian Constitutionalism between Subsidiarity and Federalism' (2016) 42(2) *Monash University Law Review* 383.

17 Nicholas Aroney, 'Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation' (2016) 44(1) *Federal Law Review* 1, 6 <https://doi.org/10.1177/0067205X1604400101>. But see, Jacob Deem, 'Federal Reform: The Case for Supportive Subsidiarity in Australia' (2021) 44(2) *University of New South Wales Law Journal* 613, 615–17 <https://doi.org/10.53637/IHMN9160>.

18 Guzyal Hill, *National Uniform Legislation* (Springer, 2022) 4–9. For a relevant uniform enduring power of attorney proposal, see, eg, John Chesterman, 'Model Financial Enduring Powers of Attorney Law' (Proposal, Queensland Public Advocate, 5 July 2023).

19 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (n 8) 12–13 [3-3]–[3-4]; Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 17–22; 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) 37(3) *Law in Context* 138 <https://doi.org/10.26826/law-in-context.v37i3.174>.

making account for an almost miniscule proportion of the Draft Act, so their location is rather scattered and the operative language is often folded in with other provisions of general application.[20] This has consequences not only for public understanding (such as developing a holistic picture of their intended operation), but also for exposition of the issues canvassed in this article.

1 Maximising Respect for Functional Ability

To date, Australian decision-making frameworks have adhered to the legal principle of decision-making 'capacity', where loss of capacity is notionally required before any substitute decision can be made on a person's behalf. Since the *CRPD*, the concept of capacity has been strongly critiqued as leading to wholesale removal of rights of persons with cognitive disabilities.[21]

Distinguishing itself from all previous Australian decision-making frameworks at any level of government, the draft Act largely avoids a decision-making capacity test.[22] Instead, its focus is on respecting a person's functional ability, with a presumption that a person retains the ability to govern their life in a practical sense (to 'do a thing') rather than in most state and territory legislation merely be presumed to have the capacity to 'decide' (understand, weigh and assess information). Support or representation in decision-making is provided where a person cannot otherwise 'do a thing'/'do any thing': clauses 24 (supporters, acting with a person's consent) and 27 (representatives, acting with discretion to do things required of a person unable to consent to representation). The unfamiliarity of this criterion does risk the overreach

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20 The Draft Act (n 5), despite leaving blank significant sections, eg, chapter 4 (Fees, Payments and Subsidies), ran to 413 clauses (spanning 325 pages), organised into eight chapters. The location of supported decision-making provisions is primarily across chapter 1 part 3 (Aged Care Rights and Principles) and chapter1 part 4 (Supporters and Representatives), with only the appointment and cancellation process given its own part at chapter 8 part 4 (Appointment of Supporters and Representatives).

21 See, eg, Jillian Craigie et al, 'Legal Capacity, Mental Capacity and Supported Decision-making: Report from a Panel Event' (2019) 62 (January–February) *International Journal of Law and Psychiatry* 160, 162 <https://doi.org/10.1016/j.ijlp.2018.09.006>. But see Wayne Martin et al, *Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (Report, 6 June 2016) 7–13. Piers Gooding, 'Navigating the "Flashing Amber Lights" of the Right to Legal Capacity in the United Nations *Convention on the Rights of Persons with Disabilities*: Responding to Major Concerns' (2015) 15(1) *Human Rights Law Review* 45, 48–50, 52 <https://doi.org/10.1093/hrlr/ngu045>; Eilionóir Flynn, 'The Rejection of Capacity Assessments in Favor of Respect for Will and Preferences: The Radical Promise of the UN *Convention on the Rights of Persons with Disabilities*' (2019) 18(1) *World Psychiatry* 50 <https://doi.org/10.1002/wps.20605>; Anna Lawson, 'The United Nations *Convention on the Rights of Persons with Disabilities*: New Era or False Dawn?' (2007) 34(2) *Syracuse International Journal of Law and Commerce* 563, 569.

22 The only provision expressly relying on 'informed consent' (and, therefore, mental capacity to decide to grant consent) relates to restrictive practices in aged care which is beyond the scope of this article: Draft Act (n 5) cl 17(1)(f).

of 'support' or 'representation' beyond cognitive limitations.[23] If a supporter or representative is appointed, their authority is subject always to the primacy of 'the individual's will and preferences' and an appointment in itself does not mean the person is unable to do *any* or *every* thing.[24] This is commendably clearer than current state and territory regimes, and is flexible about retaining an individual's decision-making authority even when a representative is appointed. Whether determination of a person's ability to 'do a thing' will, in practice, be equated with capacity remains to be seen, but further guidance on the distinction between these concepts seems necessary.

Further evidence of genuine engagement with past recommendations to embed supported decision-making, is that when a representative is in place they have a duty to not act unless the individual cannot do the thing or be supported to do so, or does not want to do the thing.[25] Here the second consultation paper expressed an intention to adopt recommendations of the ALRC and a Research Report produced for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the 'Disability Royal Commission') to prevent automatic authorisation of representatives (who do not need to act with consent),[26] and adopt principles to ensure a person's views, wishes and preferences are given effect.[27] This is consistent with findings that support and substitute decision-making sit on a spectrum instead of forming a binary dichotomy, and that in practice honouring will and preferences can involve nuanced interpretations of intent.[28] The bar was also set notably higher for any exceptional overriding of a person's will and preference based on risk of harm to the represented person, with the relevant threshold being 'to prevent serious risk to the individual's personal, cultural and social wellbeing'.[29]

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23 For example, a person with cognitive capacity who is unable to answer the phone to a service provider due to mobility or hearing impairments would be 'unable to do the thing' and might be in need of a technological solution or perhaps a 'supporter', but it would be a gross overreach to appoint a representative who intrinsically compromises their cognitive capacity no matter how assiduously the person's will and preferences are referenced, or how adequate is the training and monitoring of holders of such appointments.

24 Draft Act (n 5) cls 26(2)(a), 30(3)(e), 377.

25 Ibid cls 30(2)(a), (b)(i)–(ii). It could be argued that allowing a representative to 'do a thing' that the person has 'capacity' to do for themselves contravenes art 12(1) of the *CRPD* (n 1), but this defies common sense (people regularly 'delegate' or accept offers for others to take actions) and would contravene the *CRPD*'s 'equality principle' (art 12(2)) by depriving people with a representative of the ability to continue to do so in those areas where they remain capacious.

26 Restrictive practices are excluded from the powers of a representative to authorise: Draft Act (n 5) cls 16, 27(2).

27 Ibid cls 30(3)(a)–(e); Department of Health and Aged Care (Cth), 'A New Aged Care Act: Exposure Draft' (Consultation Paper No 2, 14 December 2023) 30 ('Exposure Draft Consultation Paper'); Bigby et al (n 2) 47–53.

28 Bigby et al (n 2) 29–34; Terry Carney et al, 'Paternalism to Empowerment: All in the Eye of the Beholder?' (2023) 38(3) *Disability and Society* 503 <https://doi.org/10.1080/09687599.2021.1941781>.

29 Draft Act (n 5) cl 30(3)(e)(ii).

A further step towards embedding respect for a person's will and preference comes about through legal recognition of a supporter role – currently only present in Victoria despite near universal calls from stakeholders for similar steps in other jurisdictions – the idea being that having a legally recognised person (a 'supporter') to help access information, discuss choices and communicate a person's decisions, will assist people to remain involved in decision-making for longer. The framing of the role and activities of a supporter is sound, but clause 24, which empowers seeking or providing information and conveying a person's will and preferences in support of doing 'a thing', being contingent on it being 'with the consent' of the person being assisted is potentially problematic. It is somewhat unclear whether this consent requirement is required to be satisfied only at the outset (meaning that the support can continue to be provided up until the person expresses their 'objections' to assistance with doing the thing, what might be termed a 'semi-enduring supporter') or whether – as with the Victorian legislation – the support ends once the person is no longer in a position to grant or withhold consent (the equivalent of ordinary powers of attorney which were of little practical value until 'enduring' powers of attorney were introduced).[30]

In principle, the consent to having a supporter *should* be capable of continuing unless and until a need for a representative is established to bring that support to an end; support confined to *continuance* of consent is of almost no utility (except saving the effort of an informal supporter in bringing the person to the phone when seeking information on their behalf). The draft Act confusingly seemingly walks both sides of this street. Clause 381 appears to state that both supporter and representative appointments are *ongoing* (ending only on cancellation, death or reaching a stipulated end date), but clause 385 regarding cancellation of supporter appointments at the *request* of either the individual or the supporter muddies the waters by implying that supporters are always 'assistive agents' of someone retaining the ability to consent; certainty is provided only in relation to what happens if orders overlap.[31]

This issue of durability (or otherwise) of supporter appointments clearly needs further clarification.

2 Who Decides upon, on What Criteria, and How Expert Are Aged Care Act Appointments?

The first substantial application of the subsidiarity principle is whether the Commonwealth can adequately match 'gate-keeping' roles of state/territory tribunals

30 Carney (n 4) 81–2. We discuss the relevant aspects of the Victorian supporter provisions below.

31 Clause 388 debatably ends either type of order if a different one is made: Draft Act (n 5). In principle, consistent with preservation of powers of the person to decide, there is a case for having a representative decide more complex matters and a supporter to 'assist' retention of power to decide less challenging ones, but this is unnecessary because in practice representatives continue to be under a duty to promote the person's ability to act for themselves and to only act on their behalf when they cannot 'do the thing', and then in a way to give effect to their will and preference.

in deciding when to appoint a supporter or representative instead of the person making their own decision or have decisions made for them by activating an EPA or similar instrument, and what statutory criteria or policy guidelines are laid down to guide those gatekeepers.

(a) The Decision-Maker for Appointments

In common with other 'nominee' powers under social security legislation or the NDIS,[32] the gatekeeper in all instances is an *administrator* – a delegate of the Secretary of the Department, here called the 'System Governor'.[33]

Consistent with other legislation, such as social security and employment services, where neoliberal contracting out of service delivery is the norm, the delegation powers in the Draft Act were very broad. On their face, appointment of a nominee or representative was able to be delegated to any public servant or employee of privately run providers of aged care or other services.[34] When the delegation is to a public servant who is not a member of the Senior Executive Service ('SES'),[35] consideration must be given to the adequacy of their skill set[36] and the same obligation applies to private sector appointees.[37] Despite that apparent breadth of any potential delegation, the stated *policy* was not to delegate appointment of supporters or representatives below SES level.[38] This policy should however have been written into the delegation powers as a statutory limitation.

Given that aged care delivery is fully privatised and in the eyes of commentators such as Mark Considine, almost beyond regulatory control due to that embrace of neoliberal principles of service delivery,[39] the risk was that the real gatekeepers of the need for appointments will be workers in residential aged care facilities or home care agencies, either as the effective 'advisors' of a public servant as delegate, or as the delegate, should policy change. Given the lack of frontline service delivery experience across the Commonwealth, even vesting decision-making no lower than SES level still placed it with someone likely to be unduly reliant on outside advice from social work

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32 In social security a correspondence nominee has similar powers to a supporter under the Draft Act; and a payment nominee has powers of a representative, while there are equivalent provisions for plan nominees and so on in the NDIS: Carney (n 4) 80–1.

33 Draft Act (n 5) cls 7, 188, 199.

34 Ibid cl 363(1).

35 For the role and responsibilities, see Senior Executive Service ('SES'), *Australian Public Service Commission* (Web Page, 5 January 2024) <https://www.apsc.gov.au/working-aps/information-aps-employment/senior-executive-service-ses/senior-executive-service-ses>.

36 Draft Act (n 5) cl 363(2).

37 Ibid cl 363(3).

38 Exposure Draft Consultation Paper (n 27) 90.

39 Mark Considine, *The Careless State: Reforming Australia's Social Services* (Melbourne University Publishing, 2022) ch 4.

or nursing/medical staff. While the power remains unrestricted there is a real possibility of its exercise by a future government, as occurred when social security breach powers formerly reposed in public servants were delegated to staff of employment service providers.[40]

The quality of Commonwealth gatekeeping of appointments of supporters and representatives appears greatly inferior to that available at state/territory level. John Chesterman rightly described such administrative appointments as 'potentially … process free, and … [seeming] to privilege administrative efficiency over everything else'.[41] The experience and expertise of guardianship tribunals, and in many jurisdictions, the expert professional reports provided to tribunals by the Offices of the Public Advocate/Public Guardian on functional need and social networks and living conditions, may not be perfect from an article 12 *CRPD* standpoint, but are surely far more compliant with its obligation to ensure that such measures 'respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, *are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body*'.[42]

The yet to be drafted clause 362 and other provisions of part 2 ('Review of decisions') in proposed chapter 8 of the Act ('Miscellaneous') will make appointments reviewable decisions by the newly constituted Administrative Review Tribunal (replacing the Administrative Appeals Tribunal ('AAT')).[43] However, full merits review of all aspects of the decision is by tribunal members lacking the experience and expertise of state guardianship tribunals; and, rather than being a routine requirement as part of state laws, occurs only after the event (and rarely likely to be used given the situation of most aged care recipients). Experience with similar AAT review avenues of social security nominee decisions bears out both these concerns about the extreme rarity of exercise of external review avenues and the limited expertise of members when adjudicating such matters,[44] compared to the long experience and expertise of state tribunals and associated bodies.

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40 Simone Casey, '"Job Seeker" Experiences of Punitive Activation in Job Services Australia' (2022) 57(4) *Australian Journal of Social Issues* 847 <https://doi.org/10.1002/ajs4.144>; Select Committee on Workforce Australia Employment Services, Parliament of Australia, *Rebuilding Employment Services* (Final Report, November 2023) 444–6.

41 John Chesterman, 'More Work Needed on Aged Care Bill', *Australian Ageing Agenda* (Blog Post, 22 January 2024) <https://www.australianageingagenda.com.au/contributors/opinion/more-work-needed-on-aged-care-bill/> ('More Work Needed on Aged Care Bill').

42 *CRPD* (n 1) art 12(4) (emphasis added).

43 Exposure Draft Consultation Paper (n 27) 90.

44 See, eg, *Confidential and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 745; *Noonan and Secretary, Department of Social Services* [2016] AATA 803; *CLMY and Secretary, Department of Social Services* (2017) 156 ALD 638; *Andrew and National Disability Insurance Agency* [2019] AATA 249; *Selkirk and National Disability Insurance Agency* [2021] AATA 3478; *Lamb and National Disability Insurance Agency* [2021] AATA 3373.

(b) The Statutory Criteria and Overarching Statements of Rights and Principles

Relevant to both the 'who' and 'how' decisions are made under the Draft Act are the statutory criteria guiding when supporters or representatives are an appropriate appointment, and the impact of overarching statements of rights and principles.

Surprisingly, the Draft Act was completely *silent* regarding substantive criteria for appointing or not appointing supporters or representatives (at most these might be included in subordinate legislation – the rules).[45] Thus there was no equivalent of state and territory injunctions that a representative only be appointed for a current as distinct from anticipated future need, or that it be a last resort and the least restrictive measure[46] (though the principles and some other provisions capture the partial and time-limited qualities). This lack of criteria appeared to be deliberate rather than inadvertent. Revealingly, the diagram providing an overview of how the new appointments are intended to operate stated that a person may request appointment of a representative, 'to have the power to make decisions on their behalf (eg, if they do not want to make a decision *or if their ability may decline later*)'.[47]

The lack of criteria for appointment in the Draft Act was a blatant failure to meet the requirements of article 12(4) of the *CRPD* to ensure measures 'are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body', and provided no protection against routine applications for and unwarranted rubberstamp appointment of representatives by a SES delegate to initiate an appointment even if no request was made by anyone. The Draft Act should have expressly prevented anticipatory appointments of representatives, leaving all forward planning in the hands of people choosing to express their will and preference via state and territory instruments such as EPAs, advance directives or appointments of supporters. It also might have contemplated including criteria such as Chesterman's proposal that an uncontroversial appointment should be 'consistent with the "will and preferences" of the person' and that a 'representative has "a close and continuing relationship with the person"'.[48]

The Draft Act includes both a Statement of Rights (at clause 20) and Statement of Principles (at clause 22). The Statement of Rights relates to what older people who wish to access (or are accessing) aged care services under the Act can expect from

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45 The System Governor must not appoint a person to be a representative of an individual unless they have 'taken into consideration any other matters prescribed by the rules': Draft Act (n 5) cl 376(6)(d).

46 For a recent detailed comparative review of state and territory guardianship principles, see Then, White and Willmott (n 14) 236–43, 271–5.

47 Exposure Draft Consultation Paper (n 27) 28 (emphasis added).

48 Chesterman, 'More Work Needed on Aged Care Bill' (n 41).

registered providers, while the Statement of Principles relates more to 'the expected actions of persons or bodies that will perform functions or exercise powers under the new Act'.[49] For this article, the Statement of Principles is more relevant as administrative decision-makers approve appointments of both supporters and representatives under the Draft Act.[50]

The Statement of Principles expressly recognises the 'rights of individuals under the Statement of Rights'.[51] This includes a person's right to 'be supported (if necessary) to make … decisions, and have those decisions respected; and … take personal risks, including in pursuit of the individual's quality of life, social participation and intimate and sexual relationships'.[52] This recognises a person's right to supported decision-making and the dignity of risk – certainly a step in the right direction in honouring article 12 of the *CRPD* and the Disability Royal Commission's vision of a supported decision-making framework.[53] However, this is somewhat offset by the fact that clause 23 makes clear that, while the intention is for the SES delegate to 'have regard' to those principles in exercising their powers, these duties are not enforceable nor does a failure to comply affect the validity of any decision made, or provide a ground for review or challenge.[54] The provisions for review of decisions of delegates were not included in the Draft Act, and it is hoped that in spite of clause 23 an arguable failure by the delegate to take into account a critical *CRPD* consideration such as a person's rights to supported decision-making or enabling risk, will be included as a ground for challenge of a decision regarding appointment of a representative.[55]

While capable of subsequent rectification through stipulation of grounds for review, it was telling that the Draft Act did not see the wisdom of recognising that relevant knowledge gained by existing state/territory safeguarding mechanisms (eg, Public Advocates and Public Guardians) would provide valid grounds for review of supporter and representative appointments. Consideration also ought to have been given to what happens when a state/territory-based substitute decision-making appointment expires, or is revoked or cancelled – should this result in an automatic

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49 Exposure Draft Consultation Paper (n 27) 21–2. Any practice standards of providers that may be relevant to the Statement of Rights and ensuring adherence to the tenets of the supported decision-making framework, and the adequacy of any policing of those standards by a body such as the Aged Care Quality and Standards Commission is speculative and outside the scope of the present article.

50 Draft Act (n 5) cls 374, 376. Separate principles apply to representatives: see at cls 30(3)(a)–(e).

51 Ibid cl 22(2)(c).

52 Ibid cl 20(1).

53 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 123.

54 Draft Act (n 5) cl 23; Chesterman, 'More Work Needed on Aged Care Bill' (n 41).

55 An alternative way of strengthening these protections would be through the creation of explicit obligations for aged care providers in relation to supported decision-making pursuant to Draft Act (n 5) clause 88, alongside more direct regulatory oversight and educational input through the Aged Care Quality and Safety Commission. However this measure alone would not address the merit or procedural aspects of the decisions made by others, such as the System Governor.

review/suspension of the Commonwealth representative appointment? Or can reliance in most cases be placed on the general ground that allows suspension of an appointment where a 'supporter or representative has caused, or is likely to cause, physical, sexual, financial, psychological or emotional abuse or neglect to the individual'?[56]

B How Well Do Aged Care Act Appointments Harmonise with State and Territory Legislation?

The challenge in a federal system of harmonising laws made by two levels of government responsible for different areas is well-known. This aspect of the Draft Act somewhat surprisingly fell short of the answers suggested a decade ago by the ALRC.[57]

The Departmental Consultation Summary claimed late in 2023 to have heard and responded to stakeholder concerns about the 'fit' between the newly proposed system and existing state and territory provisions, writing that, '[t]he new supported decision-making arrangements do not duplicate or eclipse existing appointments' and that 'where a person who is already appointed under another legislative framework as a guardian (or similar) applies to be a representative under the aged care legislation, the *System Governor will be required to appoint them as a representative unless there is clear evidence to the contrary (i.e. allegations of abuse)*'.[58] It is true that, in rather convoluted language, clause 376(4) *required* appointment as a *representative* of any of the listed guardians and other substitute decision-makers who *requests* to be so appointed (unless unsuited for the role[59]) and if appointing someone else, that the delegate must consider whether there is someone already holding guardianship.[60] But the drafting separation between the beginning (see, eg, clauses 24–8) and end of the Draft Act (clause 376), the convoluted language, and mix of mandatory and discretionary directives all muddies the waters, as now discussed.

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56 Ibid cl 382(2). Clause 382 provides the circumstances when the Systems Governor can suspend the appointment of a supporter or representative (ie, if they cause or are likely to cause harm to the individual or have not complied with a relevant duty). However, it does not seem to provide information about how the Systems Governor gets information about those circumstances, how it links in with other safeguarding mechanisms at a state/territory level, or who has a right to seek a suspension or cancellation.

57 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (n 8).

58 Department of Health and Aged Care (Cth), *A New Aged Care Act: The Foundations* (Consultation Summary Report, 2023) 43 (emphasis added).

59 Draft Act (n 5) cl 376(6).

60 Ibid cl 376(5).

1 The Model Proposed in the ALRC Report

Specifically on harmonisation of supporter and guardianship powers, the ALRC observed that this interaction was '[o]ne of the major difficulties in applying the Commonwealth decision-making model'.[61]

The ALRC reviewed various ways of meshing such provisions, including: stakeholder preferences for having the same person empowered where appropriate to have both Commonwealth and state/territory appointments;[62] responsibility of a Commonwealth agency to assess the need for any appointment and then a *presumption* of appointment by the Commonwealth of anyone already appointed under state/territory law;[63] and Commonwealth override only when it is a federal issue.[64] The ALRC considered whether the presumption of appointment of the same person should be stronger in the case of an EPA because that embodies the 'will and preference' of the person, but noted tribunal appointments could also warrant high deference due to the 'procedural standards and safeguards' provided.[65]

The ALRC also canvassed knotty areas where the Draft Act remained silent, eg, where no suitable person is available to accept appointment. Only the states and territories have an acceptable 'default' of appointing the Public Advocate/Guardian or Public Trustee[66] meaning any Commonwealth access to that option would also require reimbursement.[67] The ALRC also broached the human and legal difficulties posed by conflicts between the respective duties and obligations of a person holding both state/territory and Commonwealth appointments,[68] and logistical and administrative arrangements for information exchange between the two levels of government when required.[69]

The failure to address these aspects of interaction with state and territory laws and bodies during the development of the Draft Act risked undermining respect for and confidence in Commonwealth laws as pace-setting catalysts for reform. It also risked creating new uncertainties and inefficiencies in a new system that will require time, resources and commitment from state/territory and Commonwealth stakeholders to resolve. Heading these types of inefficiencies off 'at the pass', was an essential component of viable system design lost during the development phase.

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61 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (n 8) 119 [4.128].
62 Ibid 119 [4.130].
63 Ibid 120–1 [4.135]–[4.138].
64 Ibid 121 [4.139].
65 Ibid 121 [4.137].
66 Ibid 122 [4.141]–[4.145].
67 Ibid 122 [4.146].
68 Ibid 123 [4.148]–[4.150].
69 Ibid [4.151].

2 The Proposed Aged Care Act Model

By contrast with these more nuanced ALRC proposals, the Draft Act opted for a more arbitrary and less flexible regime.

(a) Difficulties Associated with 'Blanket' Ousting of Existing State/Territory Orders

A suite of provisions in the Draft Act, starting with clause 28, prevented reliance on state and territory guardianship appointments and enduring powers for aged care purposes.

While perhaps an unintentional result of choosing to draft it as a *blanket* overriding of state and territory appointments (rather than override mechanism applicable *only* when a Commonwealth presumptive appointment is made in a particular case), clause 28 may have been designed to stop the practice of many aged care providers in refusing residential admissions or other services unless the person in question had either already executed a relevant EPA or an equivalent order had been made by a Guardianship Tribunal. This obnoxious 'risk averse' practice was rightly heavily criticised,[70] but the blanket override was surely too crude a way of overcoming it, particularly when it generated other unintended consequences now discussed.

Clause 28(1) of the Draft Act invoked the Commonwealth 'override' power in section 109 of the *Constitution* by flatly stating that no decision within the terms of the Act was able to be made by someone holding guardianship or equivalent powers under state and territory legislation, unless and until a representative was appointed under clause 376. Clause 28(2) expressly listed the overriding of any *guardian* of the person (clause 28(2)(a)); court, tribunal or panel appointments giving *decision-making powers* to another person (clause 28(2)(b)); holders of an EPA (clause 28(2)(c)); social security or NDIS nominees (clause 28(2)(d)); and 'a person of a kind described by the rules' (clause 28(2)(e)).

No definition of an EPA was provided, so it appeared to cover any enduring statement regarding health care (whether as part of an EPA or in a separate instrument as in some jurisdictions), while sub-paragraph (a) caught appointments of an enduring guardian (as in Victoria). Given the breadth of sub-paragraph (b), on its face it caught not only any court and tribunal exercise of *statutory* authority to appoint someone to exercise decision-making power, but also the *inherent* powers of supreme courts.[71]

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70 Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017) 12 [4–13]; Bigby et al (n 2) 140.

71 This rarely invoked but still extant prerogative jurisdiction of supreme courts to appoint a person as a 'committee' (as the ancient term is called) of the person or their finances can, however, only be ousted by clear and forceful statutory language, and sub-paragraph (b) may fall short of that High Court test: *Minister for the*

Of much greater practical moment was the Draft Act's overriding the authority conferred on social security or NDIS nominees. As noted earlier, in 2021 there were over 164,000 people subject to a payment nominee given decision-making over social security monies to someone other than the person qualifying for that payment. How an aged care resident reliant on the pension was supposed to pay their aged care provider or retain their social security payment nominee for managing the portion quarantined for personal spending, without having an Aged Care representative appointed, was left without answer. This risked becoming an unnecessary 'driver' of overuse of representative appointments.

Finally, the statutory construction of the rule making power in sub-paragraph (e) left some uncertainty about the breadth of what was able to be covered. The most plausible statutory construction[72] arguably empowered rule-makers to stipulate that holders of 'automatic' or 'default' health substitute decision-making powers (which operate when no other substitute decision-making appointments apply) under state and territory legislation could be included in this override provision. This was an unnecessary overreach needing correction by amending sub-paragraph (e).

(b) Difficulties with an Overly Strong Presumption of 'Pre-approved' State/Territory Appointments

The Draft Act also used this list of identified substitute decision-makers as a kind of 'pre-approved' list of people able to be appointed as representatives.

Clause 376(4) relevantly stated that the departmental delegate *must appoint* someone holding a role within that list who requests appointment as a representative of a person where satisfied they can fulfil those duties and the wishes of the person have been taken into account,[73] along with other potential considerations included in any rules. The choice of the more mandatory 'must' in this sub-clause at best made this an overly strong presumption, but at worst removed all discretion (other than regarding the exception), effectively turning it into a 'rule' which must be applied. While the true meaning of 'must' is not always that it is a mandatory directive as a matter of statutory interpretation, there was a compelling case for at least making clear

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Interior v Neyens (1964) 113 CLR 411, 419 (Barwick CJ); *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345, 353 [10] (McTiernan J).

72 The now dominant purposive approach to statutory interpretation and the ejusdem generis rule appeared to converge on a construction of sub-paragraph (e) as allowing making of a rule designating *anyone* holding cognate powers of *substitute decision-making*, on the basis that this is the essence of a 'class' of people already expressly specified in sub-paragraphs (a)–(d).

73 However, as Chesterman points out, the person may well be very unhappy about their current substitute decision-maker under state or territory laws, and it is not at all uncommon for families to be riven by conflict about whether an appointment is needed and if so who is selected and with responsibility for what areas: Chesterman, 'More Work Needed on Aged Care Bill' (n 41).

that it was a true presumption. The best approach, however, would have been adoption of the ALRC's case-by-case application,[74] in place of 'rubber-stamping'.

Under the Draft Act it was also only the *fact* of the appointment rather than its *scope* that was relevant to making the 'pre-approved' list for appointment as a representative. By contrast, the ALRC considered that any 'presumption of appointment' or 'recognition' of state/territory substitute decision-makers was dependent on 'the nature and scope' of such an appointment.[75] The fact that a guardian appointed for a narrow range of decisions for a limited time within a state/territory regime could, on becoming a representative, wield ongoing plenary powers in relation to significant aged care funding, was problematic. The lack of ability for a delegate to consider the scope of the state/territory appointment when dealing with a request for appointment under clause 376 added further weight to the concern that the 'pre-approval' form of drafting was unduly crude (not a true presumption) and paradoxically went somewhat too far in the pursuit of harmonisation (subsidiarity).

Questions also arose regarding possible unintended or unforeseen practical consequences in day-to-day operationalisation of the proposed regime. What for example was to happen to the presumed 'override' rationale of clause 28 if a service provider inappropriately insisted on an unnecessary state/territory EPA or tribunal appointment and that person then subsequently requested appointment as a representative? Where was the discretion to refuse? What happened if the holder of an EPA, out of frustration at what they perceive as 'bureaucracy gone mad', refused to go through the Commonwealth hoops by also 'requesting' appointment as a representative (or of accepting an appointment made at the initiative of a delegate)? Was such an aged care recipient to be denied any effective representative at all? What confidence could be held in the ability of the delegate to draw a representative agreement that sufficiently mirrored the state/territory instruments or orders continuing to operate in other service systems and fields, eg, Medicare nominees?[76] Would flows of information from state departments and tribunals to the System Governor (when requested) be hampered by concerns about confidentiality or perceived cost shifting? The Draft Act left these questions unresolved.

And, given Victoria already has the ability for the person or the tribunal to appoint a supporter[77] (with New South Wales ('NSW') honouring an election commitment to

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74 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (n 8) 120–1 [4.135]–[4.138].

75 Ibid 121 [4.137].

76 Nominees can also be appointed for child support: see 'Someone to Act for You', *Services Australia* (Web Page, 24 April 2024) <https://www.servicesaustralia.gov.au/someone-to-act-for-you-with-medicare-centrelink-aged-care-or-child-support?context=22201>.

77 *Power of Attorney Act 2014* (Vic) pt 7 divs 1–5.

respond to a similar law reform commission recommendation[78]), why was there no equivalent provision giving effect to the federal Department of Health and Aged Care's acceptance of harmonisation of the 'supported decision-making framework'?[79] Arguably it is desirable for state appointments of a supporter to operate without an appointment as an Act supporter. But it remains unclear whether that is what the Draft Act intended by omitting an explicit 'override' provision akin to clause 28 with regard to representatives. This requires clarification.

(c) Difficulties for Representatives/Substitute Decision-Makers Operating across Two Systems

A further practical issue for those holding appointments under a state/territory regime and the new Commonwealth aged care system is the potential for confusion and conflict regarding which decisions come within which regime and how such decisions should be made.

The Draft Act referred to people and representatives 'doing things' under the Act. However, the scope or extent of the 'things' needing to be done was not clear on an initial reading of its provisions.[80] While the main 'things' would likely relate to accessing services and funding, there would seem to be the possibility of some crossover with decisions considered the realm of state/territory appointees – for example, health care decisions taken within aged care settings. In those circumstances, the decision-making scope for representative or state/territory-based substitute decision-makers should have been clarified.

On the second issue of how decisions should be made, while the Draft Act's guiding principles aligned well with the *CRPD* – adopting a supported decision-making approach that places a person's will and preference as a central component of any substitute decision[81] – some state legislation still relies on outdated 'best interests' guiding principles.[82] For a person appointed as a representative and as a guardian in NSW, substitute decisions on behalf of a person would need to be guided by different considerations in order to follow duties under each legal framework. While such inconsistency might (hopefully) prompt those states and territories to reform their

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78 New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 67–72.

79 Exposure Draft Consultation Paper (n 27) 29.

80 The *breadth* of the functional concept of 'doing a thing' in clause 24 was not replicated in the appointment provisions for supporters or representatives. This seemingly confined the powers and responsibilities to matters with respect to a category of *people*, namely those 'accessing, or seeking to access, funded aged care services': Draft Act (n 5) cls 374(1), 376(1). It is unclear whether this apparent conceptual shift was intended to have any consequences or was merely reflective of the difficulty of finding wording to describe the scope of the provisions, with all of the provisions being designed to address any and all decisions arising in the course of being a recipient of aged care. Regardless, it calls for clarification.

81 Ibid cl 30(3).

82 See, eg, *Guardianship and Administration Act* 1990 (WA) s 4(2); *Guardianship Act 1987* (NSW) s 4(a).

outdated guardianship principles to be more *CRPD*-compliant, in the meantime, appointed individuals would be in the unenviable position of having potentially conflicting duties in their roles as representative and guardian.[83] Consideration ought to have been given to managing these conflicts in affected jurisdictions.

III CONCLUSION

The Draft Act was a commendable advance over past Australian models on issues such as largely avoiding capacity tests, recognising and enabling the right to supported decision-making, and provision for appointments that do not necessarily deny the ability to make other decisions.

Late 2023 saw a belated but welcome recognition of a need to better harmonise appointments of supporters or representatives with existing appointments under state and territory legislation. It recognised that the tier of government closest to the person is best able to accommodate the will and preferences of people when drawing up enduring powers or when tribunals harness their experience and expertise to make equivalent orders (the principle of subsidiarity). However, the mode of implementation of this in the Draft Act was unduly crude and possibly incomplete (essentially 'automatic' replication of *only some* state and territory decision-making and support arrangements). Its reliance on administrative rather than tribunal adjudication of the need for orders and the lack of delineation of the need for protection against 'precautionary' appointments was also highly questionable.

Despite genuine efforts to align the new Act with *CRPD* goals and advances in implementing a supported decision-making approach, the administrative carriage and mode of implementation of the Act's objectives left much to be desired. In addition, answers to multiple uncertainties regarding how the new system will practically interact with current state and territory substitute decision-making systems are sorely needed before the new system comes into effect.

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83 Chesterman, 'More Work Needed on Aged Care Bill' (n 41).