

Evolution and Innovation in Guardianship Laws: Assisted Decision-Making

Shih-Ning Then*

Abstract

Guardianship laws in most Western societies provide decision-making mechanisms for adults with impaired capacity. Since the inception of these laws, the principle of autonomy and recognition of human rights for those coming within guardianship regimes has gained prominence. A new legal model has emerged, which seeks to incorporate 'assisted decision-making' models into guardianship laws. Such models legally recognise that an adult's capacity may be maintained through assistance or support provided by another person, and provide formal recognition of the person in that 'assisting' role. This article situates this latest legal innovation within a historical context, examining the social and legal evolution of guardianship laws and determining whether modern assisted decision-making models remain consistent with guardianship reform thus far. It identifies and critically analyses the different assisted decision-making models which exist internationally. Finally, it discusses a number of conceptual, legal and practical concerns that remain unresolved. These issues require serious consideration before assisted decision-making models are adopted in guardianship regimes in Australia.

I Introduction

The vast majority of Western societies have legal regimes that provide decision-making mechanisms for adults with some kind of impaired capacity.¹ Such mechanisms may allow adults to plan decisions in advance, allow close family members to make decisions on behalf of the adult, or enable courts to appoint a person as a guardian or administrator for the adult. These legal regimes are collectively referred to as 'guardianship laws'. Since their humble, property-focussed beginnings, guardianship regimes have become an increasingly important, and often contentious, area of law where different principles such as

* Lecturer, QUT's Health Law Research Centre, Faculty of Law, Queensland University of Technology. The author wishes to thank Professor Ben White, Associate Professor Ben Mathews, Dr Andrew McGee, Andrew Garwood-Gowers and the anonymous reviewers for feedback on earlier drafts of this article, and Mark Eade for research assistance and feedback given in its preparation. The author acted as a consultant for the Victorian Law Reform Commission's review of guardianship legislation; however, the views expressed here are the author's alone.

¹ The term 'adult' is used in this paper to refer to those who may come within a guardianship regime due to some kind of decision-making impairment.

beneficence and protection, autonomy and the notion of ‘human rights’ jostle for superiority.

A number of Western jurisdictions are currently considering, or have recently embraced, innovative legislation that allows for another form of decision-making — ‘assisted decision-making’, also known as supported, interdependent or co-decision-making.² Assistance or support for an adult provided by another person can take many forms, including help with accessing information, providing information to the adult, or giving explanations in a manner the adult can understand. It also extends to giving advice, communicating the decision made or acting to help implement the adult’s decisions.³ Modern legislation that recognises or implements this concept remains limited to a small but growing number of jurisdictions internationally. It is this *legislative* recognition in guardianship regimes that is the focus of this article

Legal and practical interest in this concept is growing in Australia. Australia’s ratification of the *Convention on the Rights of Persons with Disabilities* (‘CRPD’)⁴ and recent federal initiatives, such as the National Disability Insurance Scheme, which support providing more choice to those with disabilities and encourage personal management of funding (and which are being mirrored overseas),⁵ provide additional support for a new model of decision-making. In 2012, the Victorian Law Reform Commission (‘VLRC’) was the first Australian law reform agency to recommend that a legislative scheme of assisted decision-making be adopted.⁶ In South Australia and New South Wales, government departments and statutory bodies are piloting trials of assisted decision-making for personal and financial matters.⁷ This current impetus for adopting assisted decision-making has not yet been analysed in the Australian legal context. It is

² While Australian readers may be more familiar with the terminology ‘supported decision-making’, as this is associated with particular legislative models, this article uses the term ‘assisted decision-making’ to represent the broad concept, which includes ‘supported decision-making’ and ‘co-decision-making’ models used in some jurisdictions’ guardianship legislation. In the literature these terms are often used interchangeably.

³ Nandini Devi, Jerome Bickenbach and Gerold Stucki, ‘Moving Towards Substituted or Supported Decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities’ (2011) 5 *ALTER, European Journal of Disability Research* 249, 254–5. See also Leslie Salzman, ‘Rethinking Guardianship (Again): Substituted Decision-making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act’ (2010) 81 *University of Colorado Law Review* 157, 180.

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (‘CRPD’). Australia ratified the CRPD on 17 July 2008.

⁵ See, eg, the recently enacted *Social Care (Self-directed Support) (Scotland) Act 2013*.

⁶ VLRC, *Guardianship Final Report*, Report No 24 (2012) ch 8, 9.

⁷ Office of the Public Advocate, ‘Developing a Model of Practice for Supported Decision-making’ (June 2011) <http://www.opa.sa.gov.au/cgi-bin/wf.pl?pid=&mode=cd&file=../html/documents/09_Publications/Supported%20Decision%20Making>; New South Wales Attorney General and Justice, ‘New South Wales Trustee & Guardian, Annual Report 2010–11’ (2011) 37. See also Michael Bach, ‘Supported Decision-making under Article 12 of the UN Convention on the Rights of Persons with Disabilities’ (Paper presented as Conference on Legal Capacity and Supported Decision-making, Parents’ Committee of Inclusion, Athlone, Ireland, 3 November 2007); Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 49 (1996) 201–4; Alberta Justice and Alberta Seniors and Community Supports, *Legislative Review of the Dependent Adults Act and the Personal Directives Act - Final Report and Recommendations* (2007); Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* (2010) [5.62]–[5.102] (‘*Substitute Decision-Making Report*’).

important to do so to ensure Australian jurisdictions that choose to enact legislation adopting these models into guardianship regimes are mindful of the potential issues inherent in such schemes, and are aware of the experience of international jurisdictions.

Assisted decision-making is likely to be accessible and useful only to a limited group of individuals, and not all adults coming within a guardianship regime. Such an approach would co-exist with, and supplement, the substituted decision-making norm currently operating in Australia.⁸

This article examines this latest legal innovation against the backdrop of the historical development of guardianship laws in Western societies. Part II charts the social and legal changes which have led to today's 'modern' guardianship regimes. The purpose of this part is not merely to provide historical description, but to situate the development of modern assisted decision-making schemes and to inform subsequent critical analysis of such schemes. It will show that the concept of assisted decision-making and its subsequent legal recognition — through 'supported' and 'co-decision-making' models — is a natural evolution of guardianship regimes. Part III adopts an international perspective, identifying and examining the different legal models that currently exist in jurisdictions with assisted decision-making mechanisms. Finally, part IV investigates some unanswered questions about assisted decision-making schemes. While no particular assisted decision-making model is proposed, this part does identify a number of unresolved conceptual, legal and practical issues that need to be considered prior to the adoption of any assisted decision-making scheme in Australian jurisdictions.

This article cautions against rushing to embrace the concept of assisted decision-making through legal recognition (at least in all its manifestations) without due consideration of the potential problems that could result. It highlights the need for empirical research into the legal operation of assisted decision-making and whether such schemes would add any practical benefit to current Australian guardianship regimes.

II Understanding the Guardianship Context

Part II explains the context in which modern guardianship laws, and new legal guardianship reform, must be considered. Like any laws, modern guardianship

⁸ This is consistent with the declaration Australia made, on ratifying the CRPD, that it was Australia's understanding that the CRPD 'allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards': Attorney-General's Department (Cth), *Australia's Initial Report under the Convention on the Rights of Persons with Disabilities* (2008) Annex A. Others have argued more strongly that assisted decision-making could replace, or is inconsistent with, substituted decision-making: see the discussion regarding the drafting of the CRPD in Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2007) 34 *Syracuse Journal of International Law and Commerce* 429, 444–6, 448. However, this has less relevance in Australia where express declarations were made on ratification of the CRPD that it is Australia's understanding that the CRPD did not preclude the operation of substituted decision-making.

laws were not created in a vacuum. They have evolved from and are shaped by Western social circumstances and values. An understanding of this is necessary (particularly for those unfamiliar with guardianship regimes) to provide context to the latest call to create statutory assisted decision-making models. This part demonstrates that the historical and social factors that have led to recognition of individual human rights, and the increasing priority given to the principle of autonomy, also support acceptance of assisted decision-making today.

A *Societal Changes over Time*

1 *State Powers – Control and Institutionalisation*

Guardianship laws have existed, in a limited form, since Roman times.⁹ Historically, the primary aim of guardianship laws was the protection of property — that is, financial and real property interests of those people with impaired capacity.¹⁰ The exercise of the state's inherent *parens patriae* jurisdiction granted courts the power to make orders dealing with the vulnerable — in this case adults with impaired capacity — for their perceived protection and benefit.¹¹

These early forms of guardianship laws were dominated by the view that the monarch or state had a role to play in safeguarding those with impaired capacity through protection of their property and personal interests.¹² However, this was a very limited scheme; those with impaired capacity who had neither property nor family to look after them were often neglected and isolated.¹³

Later, advances in medical thinking led to a different view of those with impaired capacity; the medical profession, which had gained power and respect, developed the opinion that those with disabilities, including persons with impaired capacity, were sick and in need of health care.¹⁴ The 'medical model', which

⁹ See Sarah Burningham, 'Adult Guardianship and Co-Decision-Making Law' (2009) 18 *Dalhousie Journal of Legal Studies* 119, 126–7. Until the late 20th century, the distinction between mental health and guardianship laws was rather unclear. For a discussion of the historical development of mental health law compared with guardianship laws see Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (Springer, 2005) 19–20.

¹⁰ See, eg, Gerry W Beyer, 'Enhancing Self-Determination Through Guardian Self-Declaration' (1990) 23 *Indiana Law Review* 71, 72–4; *Substitute Decision-Making Report*, above n 7, [2.5]; Robert M Gordon and Simon N Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell, 1992) 1-18–1-19; Charles P Sabatino, 'Competency: Refining Our Legal Fictions' in Michael Smyer, K Warner Shaie and Marshall B Kapp (eds), *Older Adults' Decision-Making and the Law*, Springer Series on Ethics, Law and Aging (Springer, 1996) 1, 5.

¹¹ For a discussion of the historical basis of the *parens patriae* jurisdiction and its continued application in Australia today, see generally Philip Power, *The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales* (DreamWeaver, 2003) 1–14, 73–6. The position in England and Wales where the *parens patriae* jurisdiction no longer exists remains an exception.

¹² Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 10; Salzman, above n 3, 164.

¹³ *Substitute Decision-Making Report*, above n 7 [2.6]. See also Sabatino, above n 10, 5 where it is noted, '[w]hen the alleged incompetent did not possess substantial property, guardianship proceedings were rare'.

¹⁴ Carney and Tait, above n 12, 11–12, 15; *Substitute Decision-Making Report*, above n 7 [2.7]; A Frank Johns, 'Guardianship Folly: The Misgovernment of *Parens Patriae* and the Forecast of its

prevailed at this point, characterised the disabled as being ‘inherently and inevitably pathological’.¹⁵ Mental asylums were established in which persons with impaired capacity (often referred to as ‘lunatics’ or ‘insane’) were housed on a long-term basis; this form of institutionalisation dominated well into the 20th century.¹⁶ The Law Commission of England and Wales noted in its 1995 report that where adults with impaired capacity lived within such ‘highly-regimented institutions, issues about decision-making or the need for a substitute decision-maker were not likely to arise’.¹⁷ While this was likely to be true of personal decisions, many of those who were institutionalised had a public body, such as the Public Trustee, take control of their finances.¹⁸ These actions could be viewed as being consistent in principle (although perhaps not in practice) with the historical exercise of the *parens patriae* jurisdiction to ‘control and protect’ the incapable adult.¹⁹ At this time, the notion of individual rights, particularly for these adults, was largely a foreign concept.

2 *De-institutionalisation, Community Care and Recognition of Rights*

Following this period of ‘institutionalisation’, philosophical shifts in thinking from the middle of the 20th century led to ‘de-institutionalisation’ and movement of those residents into community-based care. The drivers for this change came from various sources. The disability rights movement emerged and championed a shift in thinking from the ‘medical model’ to a ‘social model’ of disability.²⁰ This model was based on the understanding that restrictions experienced by those with disabilities were not an ‘inevitable consequence’ of having the disability but were often socially or politically constructed and could therefore be changed by such means.²¹

Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century — A March of Folly? Or Just a Mask of Virtual Reality?’ (1997) 27 *Stetson Law Review* 1, 20–2.

¹⁵ See Theresia Degener, ‘International Disability Law — A New Legal Subject on the Rise: The Interregional Experts’ Meeting in Hong Kong, December 13–17, 1999’ (1999) 18 *Berkeley Journal of International Law* 180, 121–2; Lawrence A Frolik, ‘Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform’ (1981) 23 *Arizona Law Review* 599, 611–12; Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2009) 8 *Human Rights Law Review* 1, 5–6.

¹⁶ Terry Carney and Peter Singer, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (Watson Ferguson and Co, 1986) 6, 46–8; Carney and Tait, above n 12, 11–12; Gordon and Verdun-Jones, above n 10, 1-13–1-15; Johns, above n 14, 20–2; Quinn, above n 9, ch 2. See also Law Commission (United Kingdom), *Mental Incapacity*, No 231 (1995) [2.32].

¹⁷ Law Commission (United Kingdom), above n 16, [2.32]. See also Neil Rees, ‘The Fusion Proposal: A Next Step?’ (Paper presented at the Rethinking Rights-Based Mental Health Laws Workshop, Prato, Italy, 22 May 2009) 6; Doug Surtees, ‘The Evolution of Co-Decision-Making in Saskatchewan’ (2010) 73 *Saskatchewan Law Review* 75, 76.

¹⁸ Carney and Tait, above n 12, 12. See also Gordon and Verdun-Jones, above n 10, 3-58.

¹⁹ Salzman, above n 3, 167.

²⁰ This was in part also driven by the civil rights movement, particularly in the United States: Quinn, above n 9, 13–14; Peter David Blanck and Michael Millender, ‘Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America’ (2000) 52 *Alabama Law Review* 1, 3; Birmingham, above n 9, 141.

²¹ Luke Clements and Janet Read, ‘Introduction: Life, Disability and the Pursuit of Human Rights’ in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People’s Most Basic Human Rights* (Routledge, 2008) 1, 2–3. See also Anna Lawson, ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ (2007) 34 *Syracuse Journal of International Law & Commerce* 563, 571–4; Kayess and French, above n 15, 4.

This recognition that all persons, regardless of disability, had a right to be treated equally as individuals, precipitated the shift in how persons with decision-making impairments were viewed and treated. Assumptions that they were dependent and reliant on state welfare were challenged and they began to be viewed as individuals with rights.²² The disability rights movement has continued to gain momentum and resulted in legal recognition of entitlement to universal human rights, regardless of impairment.

There was increasing recognition that not all ‘mentally disabling conditions’ were fixed and unchangeable; decision-making capacities could be developed, retained or, in some cases, exercised with assistance.²³ Adults moved from institutions to community care were recognised as being vulnerable; while some were capable of making decisions, many required assistance with making decisions or needed someone to act on their behalf.²⁴ At this point the seeds of recognition for assisted decision-making were sown.

This relocation of adults with impaired capacity into the community served, in part, as the catalyst for regulatory mechanisms to be put in place for others to make decisions legitimately on behalf of those with impaired capacity. Decisions regarding health care, finances or accommodation often needed to be made. In the absence of legal recognition, a substitute decision-maker could not be formally recognised and concerns about the liability of those who were caring for and treating those with impaired capacity became apparent.²⁵

Coupled with these factors was the challenge to the traditional paternalistic medical model. Until this point it was accepted, and expected, that patients would defer to the medical profession’s expertise. Regarding those with decision-making impairments, this extended to the medical profession having legal power to treat without the need for consent.²⁶ However, around this time the attitude of respected paternalism gradually changed to the recognition of patient rights. It was realised that assessments of capacity were being made by medical professionals without specific training, and often using different tests.²⁷ This shift in how health care was conceived also contributed to the push for modern guardianship laws.

(a) *Demographic Changes over Time*

Many of the drivers for change came from within the disability sector. However, aging ‘baby boomer’ populations in Western societies — such as Australia, the

²² Kayess and French, above n 15, 14; Peter David Blanck and Michael Millender, ‘Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America’ (2000) 52 *Alabama Law Review* 1, 3.

²³ Robin Creyke, ‘Who Can Decide? Legal Decision-Making For Others’ (No 19, Department of Human Services and Health Aged and Community Care Division, September 1995) 38.

²⁴ Law Commission (United Kingdom), above n 16, [2.32].

²⁵ See, eg, Gordon and Verdun-Jones, above n 10, 1-15.

²⁶ Carney and Tait, above n 12, 15.

²⁷ Law Commission (United Kingdom), above n 16, [2.41]; Heather Wilkinson, ‘Empowerment and Decision-making for People with Dementia: The Use of Legal Interventions in Scotland’ (2001) 5 *Aging & Mental Health* 322, 324; Carney and Tait, above n 12, 17; Jennifer Moye, ‘Guardianship and Conservatorship’ in Thomas Grisso (ed), *Evaluating Competencies: Forensic Assessments and Instruments* (Kluwer Academic, 2nd ed, 2003) 309, 317–18.

United Kingdom, Canada and particularly the United States — demanded to be heard and contributed to reform.²⁸

The growing number of older citizens pushed for recognition of legal advance planning documents — such as enduring powers of attorney and advance directives — to allow them to plan ahead to a time when they could no longer make decisions.²⁹ In addition, in some countries, the growing mobility of citizens resulted in increasing numbers of family members living at a distance from each other, decreasing the level of family support available for some older citizens.³⁰

(b) *Inadequacy of Existing Legal Structures*

As these two groups — the disabled and the elderly (and those that advocated for them) — pushed for more societal support and recognition, it became apparent that existing legal mechanisms for guardianship were inadequate.

Prior to major reform (which began in some places in the 1970s), archaic legal procedures derived from antiquated English law were relied upon for non-financial guardianship matters. The existing legal framework was inadequate in dealing with these issues. Procedures were generally costly, cumbersome and were not considered ‘user-friendly’; as such they were rarely utilised.³¹

The results of court applications were also inflexible. Generally, where substitute decision-makers were appointed, they were given plenary — that is, complete — power and authority to make all decisions on behalf of the person.³² This ‘all or nothing’ approach completely deprived the person subject to the proceedings of any autonomy to make their own decisions, regardless of their level of incapacity.³³ It also came to be recognised that placing an adult within the guardianship regime — which, at this time, usually meant appointing a plenary

²⁸ Gordon and Verdun-Jones, above n 10, 1-12-1-13; Law Commission (United Kingdom), above n 16, [2.35]; George H Zimny and George T Grossberg, ‘Guardianship of the Elderly’ in George H Zimny and George T Grossberg (eds), *Guardianship of the Elderly* (Springer, 1998) 3, 4; J K Mason and G T Laurie, *Mason and McCall Smith’s Law and Medical Ethics* (Oxford University Press, 8th ed, 2010) [12.02]; Pam Lambert, Joan McIver Gibson and Paul Nathanson, ‘The Values History: An Innovation in Surrogate Medical Decision-Making’ (1990) 18 *Law Medicine & Health Care* 202, 202.

²⁹ The initial push for guardianship legislation was galvanised by those advocating on behalf of people with intellectual disability; therefore legal recognition of advance planning documents was not initially a priority given that this group may have never initially had capacity. However, the growing number of older citizens led to legislative recognition of advance planning documents: W R Atkin, ‘Adult Guardianship Reforms — Reflections on the New Zealand Model’ (1997) 20 *International Journal of Law and Psychiatry* 77, 79–80. See also Terry Carney, ‘Abuse of Enduring Powers of Attorney: Lessons from the Australian Tribunal Experiment’ (1999) 18 *New Zealand Universities Law Review* 481, 482.

³⁰ Pamela B Teaster et al, *Public Guardianship: In the Best Interests of Incapacitated People?* (Praeger, 2010) 2.

³¹ This involved invoking the superior courts inherent *parens patriae* jurisdiction to appoint a ‘committee’ to look after property and person: Carney and Tait, above n 12, 10–11, 13; Gordon and Verdun-Jones, above n 10, 1-16-1-18; Terry Carney, ‘The Limits and the Social Legacy of Guardianship in Australia’ (1989) 18 *Federal Law Review* 231, 235.

³² Gordon and Verdun-Jones, above n 10, 1-20-1-21.

³³ Marshall B Kapp, ‘Legal Basis of Guardianship’ in George H Zimny and George T Grossberg (eds), *Guardianship of the Elderly* (Springer, 1998) 16, 21; Gordon and Verdun-Jones, above n 10, 1-20-1-21.

substitute decision-maker — could have ‘serious negative consequences’.³⁴ Removing the legal right to make one’s own decisions could lead to a ‘vicious cycle’ of decline:

[An] inability to manage one’s affairs diminish[es] the individual’s opportunities to test his or her abilities. The ‘disuse of decision-making powers’ may lead to further decline in the individual’s capabilities and sense or competence to act in the world, leading to further isolation and loss of abilities.³⁵

The lack of an accessible judicial system for guardianship, coupled with the growing need for access to such a regime and poor results when access was gained, provided the impetus for the creation of a modern system of guardianship.

The factors discussed above combined to push the agenda for legal reform. Increased recognition of these problems in academia, the media and by politicians led to an international wave of legal reform that started in the mid-1970s.³⁶ Subsequent ‘waves’ of reform have continued since that time and, arguably, we are riding the current ‘wave’ leading to the incorporation of legal assisted decision-making mechanisms.

B *Features of Modern Guardianship Laws*

The resulting legal reform led to guardianship regimes in most Western societies, including Australia, sharing certain key features. An examination of these fundamental features reveals how assisted decision-making fits well with, or in some cases challenges, the traditional features of modern guardianship regimes.

1 The Role of the Law, State and Society

What purpose guardianship laws should serve is closely linked to how society views the roles of the public state and the private citizen. Over time there has been a shift in emphasis from state responsibility for the safety and care of those with impaired capacity via a welfare system, to private care by families and non-public institutions. Similarly, the purpose of guardianship laws has shifted from a protective and ‘reactive’ primary aim, to dual functions of protection and facilitating or empowering those with impaired capacity to participate in society (often through ‘proactive’ measures implemented prior to the impairment).

Following de-institutionalisation, the role of the state in providing care for those with impaired capacity changed considerably. While previously the state took

³⁴ Penelope A Hommel, Lu-in Wang and James A Bergman, ‘Trends in Guardianship Reform: Implications for the Medical and Legal Professions’ (1990) 18 *Law, Medicine & Health Care* 213, 214; Jennifer L Wright, ‘Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA’ (2010) 33 *International Journal of Law and Psychiatry* 350.

³⁵ See Salzman, above n 3, 168–70; A Kanter, ‘The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law’ (2008) 25 *Georgia State University Law Review* 527, 561; Dhanda, above n 8, 436–7.

³⁶ See Johns, above n 14, 1; Gordon and Verdun-Jones, above n 10, 1–9–1–12; Quinn, above n 9, ch 2.

on the responsibility of housing and general welfare of many of those with impaired capacity, more responsibility began to be placed with families and community.³⁷

In modern guardianship regimes, although the state has set up structures that allow people to access public bodies to assist with decision-making, these are envisaged as measures of last resort.³⁸ Instead, guardianship regimes tend to recognise and legitimise, either expressly or impliedly, that the majority of decision-making takes place *informally* through a person's social support networks, often family.³⁹ The steps taken, or proposed to be taken, in the latest wave of reforms, seek to formalise these support networks by providing mechanisms through which these can be legally recognised.

The law also provided mechanisms for proactive planning through legally recognised advance planning documents allowing those with capacity to appoint others close to them to act as decision-makers should they lose capacity. In a similar vein, new assisted decision-making agreements may also join the list of instruments allowing for private proactive planning by individuals. Such an approach recognises the importance of preserving close relationships between the person and their support networks, but also satisfies the state's secondary aim of achieving 'administrative simplicity; efficacy and efficiency in the care of its citizens'.⁴⁰

Even where the guardianship regime was formally engaged with — via advance planning documents or applications to courts for the appointment of substitute decision-makers — the preference has been for people to appoint, or have appointed for them, persons in a close relationship with them. Statutory officials will only be appointed as a measure of last resort.⁴¹ (As shown below, this trend continues in the context of assisted decision-making.) While this reflects the principle of the least restrictive approach, it has caused some commentators to question whether distributive justice is being achieved within the guardianship system.⁴² The burden — in terms of financial cost, time, and effort — of caring or assisting a person who has impaired capacity usually falls to family and friends. The community, in most circumstances, has therefore taken over the responsibility of caring for and assisting those with impaired capacity, a role previously undertaken solely by the state, at the state's cost. Essentially, what was once a public duty exercised by the state has, in the majority of circumstances, become a

³⁷ The Minister's Committee Considering Rights and Protective Legislation for Intellectually Handicapped Persons, *Report of the Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons* (1982) 48 ('*Minister's Committee Report*').

³⁸ Carney and Tait, above n 12, 49.

³⁹ *Ibid* 29–30, 54; Marshall B Kapp, 'Legal Interventions for persons with dementia in the USA: ethical policy and practical aspects' (2001) 5 *Aging & Mental Health* 312, 313–14.

⁴⁰ Carney and Tait, above n 12, 29–30; Kapp, above n 39, 313–14; Jay Chalke, 'Canadian Trends: Guardianship in British Columbia and Other Provinces' (Paper presented at the Law Reform Commission Annual Conference, Dublin, Ireland, 2 December 2005) 4.

⁴¹ Frolik, above n 15, 642–3. This was particularly so in the United States where, in the past, legislation frequently did not provide the option for a statutory official of last resort to represent the person: Teaster et al, above n 30, 16–18.

⁴² Terry Carney and David Tait, 'Guardianship Dilemmas and Care of the Aged' (1991) 13 *Sydney Law Review* 61. See also Allen E Buchanan and Dan W Brock, *Deciding For Others: The Ethics of Surrogate Decision-making* (Cambridge University Press, 1989) 207–11.

private duty subject to state oversight.⁴³ In the absence of such private social supports, an adult is left *particularly* vulnerable. The issue of who helps those without an existing support network is discussed below.

2 *Viewing the Individual: Autonomy and Beneficence*

The shift in responsibility from the ‘public’ (state welfare) to the ‘private’ (community/family care) aligns, to an extent, with the view that prizes autonomy over beneficence of the adult.

Beneficence in the form of ‘benign paternalism’ was, until the creation of modern guardianship laws, the predominant guiding principle in Western societies’ treatment of those with impaired capacity. Today, the emphasis has shifted from protection of those with impaired capacity to support for and inclusion of those adults in decisions affecting them; that is, promotion of their autonomy.⁴⁴

Autonomy in this context does not mean simply leaving adults in question alone to do what they want, but includes support for them to maximise the options available.⁴⁵ The promotion of autonomy was the primary rationale behind guardianship regimes statutorily recognising legally binding advance planning documents, and it remains a primary driver for enacting assisted decision-making mechanisms. While courts in most Western societies today still exercise their *parens patriae* power to make decisions on behalf of adults with impaired capacity, the application of the best interests test today incorporates taking into account the known views and wishes of the adult in question.⁴⁶ Today, the best interests test does not ignore the need to consider the individual’s wishes; however, it remains an essentially paternalistic approach.

It is arguable that assisted decision-making models promote autonomy by helping to modify third parties’ interactions with adults, allowing them to participate in society even when their decision-making abilities start to diminish.⁴⁷ As noted by Salzman, the notion of assisted decision-making:

⁴³ Carney and Tait, above n 12, 49. See also Frolik, above n 15, who makes a similar point: ‘Guardianship came to be seen less as a delegation of state authority and more of an example of the state monitoring the activities of private citizens’. States have, however, maintained obligations of investigation and protection of vulnerable adults (including those with impaired capacity) from abuse, neglect and exploitation. See generally Robert M Gordon, ‘Adult Protection Legislation in Canada — Models, Issues, and Problems’ (2001) 24 *International Journal of Law and Psychiatry* 117.

⁴⁴ Gordon and Verdun-Jones, above n 10, 1-29. Cf the approach in mental health legislation generally where paternalism, protection of the patient and protection of others are the key underlying principles: Genevra Richardson, ‘Balancing Autonomy and Risk: A Failure of Nerve in England and Wales?’ (2007) 30 *International Journal of Law and Psychiatry* 71, 71–2; Genevra Richardson, ‘Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions’ (2002) 65 *Modern Law Review* 702, 708.

⁴⁵ Wilkinson, above n 27, 323. See also Kathleen Glass, ‘Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence’ (1997) 20 *International Journal of Law and Psychiatry* 5, 30.

⁴⁶ Ben White, Lindy Willmott and Shih-Ning Then, ‘Adults Who Lack Capacity: Substitute Decision-Making’ in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2010) 149, 157.

⁴⁷ Another possible benefit of formalising an assisted decision-making model may be adhering to non-maleficent principles: Glass notes that models of assisted decision-making not only promote

is predicated on the basic principle that all people are autonomous beings who develop and maintain capacity as they engage in the process of their own decision-making, even if some level of support is needed to do so. In ...[an assisted] decision-making paradigm, the individual receives support from a trusted individual, network of individuals, or entity to make personal, financial, and legal decisions that must be followed by third parties (such as financial institutions, businesses, health professionals, and service providers).⁴⁸

While in the past informal assisted decision-making may have been successful, Western societies today are increasingly risk averse and many professionals and institutions are concerned with legal liability.⁴⁹ Where a person has questionable capacity, his or her ability to participate in day-to-day activities through necessary transactions is likely to be questioned.⁵⁰

This is particularly likely in transactions that take place commonly in society; for example, entering into contracts or leases, buying or selling property, dealing with banks, consenting to health care etc.⁵¹ Problems with informal supporters attempting to access information on behalf of an adult are increasing in a climate of privacy concerns.⁵² In the absence of some formal recognition of those acting to support those with some impaired capacity, it might be argued that these adults would be socially and legally excluded from many aspects of normal life. Formalising relationships might mean that third parties will have confidence relying upon those legally recognised roles.⁵³ In addition, such recognition may, in formalising the help of family and friends, act as a way for them to be involved without ‘taking over’ and falling into informal substitute decision-making. It may also increase the time and quality of support received, allowing adults to take more control over their lives.⁵⁴

autonomy, but also protect against ‘the harm of making an ignorant decision without the necessary assistance or of not being allowed to make a personal decision at all’: Glass, above n 45, 31.

⁴⁸ Salzman, above n 3, 180.

⁴⁹ Robert M Gordon, ‘The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making’ (2000) 23 *International Journal of Law and Psychiatry* 61, 64.

⁵⁰ See, eg, Lawrence A Frolik, ‘Is a Guardian the Alter Ego of the Ward?’ (2007) 37 *Stetson Law Review* 53, 60–1.

⁵¹ For example, the proliferation of legislation which legally recognises certain family members as appropriate decision-makers for those with impaired capacity can be seen as a legal response to the concerns expressed by the medical profession regarding their legal liability in providing treatment without legally valid consent. See, eg, Gordon and Verdun-Jones, above n 10, 6–31; Robert G Jones, ‘The Law and Dementia — Issues in England and Wales’ (2001) 5 *Aging & Mental Health* 329, 329; Carney and Singer, above n 16, 100–1; Frolik, above n 50, 75–6; White, Willmott and Then, above n 46, 199–202 [6.370]–[6.400].

⁵² VLRC, above n 6, [8.101].

⁵³ See, eg, Lana Kerzner, ‘Paving the Way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ (Paper presented at New Foundations for Personhood and Legal Capacity in the 21st Century, Centre for Inclusion and Citizenship at the University of British Columbia, April 2011) 35, 40, discussing British Columbia’s assisted decision-making model.

⁵⁴ Office of the Public Advocate South Australia, *SA Supported Decision-making Project: August 2011 Update* (August 2011) Office of the Public Advocate South Australia <http://www.opa.sa.gov.au/cgi-bin/wf.pl?pid=&hi=&mode=show&folder=../html/documents/09_Publications/Supported%20Decision%20Making&file=3-SDM%20-%20August%202011%20Update.htm>.

The persisting influence of beneficence in the law today is, however, evidenced by ‘best interests’ remaining as a guiding principle for those appointed under assisted decision-making schemes. As discussed in part IV, a tension therefore continues to exist between acting beneficently and promoting autonomy in adults.⁵⁵

3 *The Concept of Incapacity*

Moving from the values underpinning modern guardianship regimes to more concrete legal concepts, one key feature of guardianship regimes is reliance on the concept of incapacity. Guardianship laws generally operate on a threshold of a person becoming ‘incapacitated’. Today, the traditional view that capacity was an all-or-nothing assessment has been rejected; now it is generally acknowledged that the assessment of capacity for decision-making should be decision-specific and time-specific, and assessed based on a ‘functional’ approach.⁵⁶ In theory, modifications in court orders can be made to accommodate these limitations while still allowing the maximum extent of autonomy possible. At least in Australia, the practice of tribunals making limited — rather than plenary — guardianship orders where possible is generally preferred. This practice is not, however, reflected globally; literature suggests that both at a social/health care and judicial level this approach may not be the usual practice.⁵⁷

However, the use of incapacity as a threshold concept is being challenged by some assisted decision-making mechanisms.⁵⁸ Indeed, what distinguishes the existing legal mechanisms from the proposed assisted decision-making models is that ‘incapacity’ is not the trigger for operation of these proposed mechanisms. In fact, the assumption is that these operate to assist in *maintaining* the adult’s capacity for longer than would otherwise be the case.

4 *A Principle-Based Approach*

Another feature of modern guardianship regimes has been legislation that adopts a principle-based approach. Commonly, guardianship legislation expressly states a

⁵⁵ See, eg, Carney and Singer, above n 16, 3–6 discussing the competing goals of maximising the freedom of the individual and protecting the welfare of the individual.

⁵⁶ Surtees, above n 17, 81. While different methods of assessing capacity (‘status’, ‘outcome’ and ‘functional’ approaches) have been identified, the functional approach to determining capacity is seen as being most respectful to an adult’s autonomy: White, Willmott and Then, above n 46, 167–9 [6.120]–[6.140]; Cheryl Tilse et al, ‘Managing Older People’s Money: Assisted and Substitute Decision-making in Residential Aged-Care’ (2011) 31 *Ageing & Society* 93, 94–5.

⁵⁷ See Glass, above n 45, regarding assessments of capacity. See also Lawrence Frolik, ‘Guardianship Reform: When the Best is the Enemy of the Good’ (1998) 9 *Stanford Law & Policy Review* 347, 354.

⁵⁸ In particular, the British Columbia representation agreements allow appointment of a person to act in the role of a supporter and substitute decision-maker but do not use the traditional idea of ‘capacity’ as a threshold concept. Instead, a more ‘flexible’ approach is used to determine whether a person can enter into an agreement, which includes: communicating the desire to have a representative assist in decision-making, demonstrating choice and an ability to express approval/disapproval of others, awareness of the role of the representative and the existence of a trusting relationship with the representative: *Representation Agreement Act*, BC 1996, c 405, s 8. While this different version of capacity has been welcomed by some, it also creates uncertainty in the law: Kerzner, above n 53, 39–40.

number of general principles that guide how those acting within the guardianship regime should act.⁵⁹

Common principles include the presumption of capacity, adopting the least restrictive option, a recognised respect for an adult's autonomy and an adult's inclusion as a valued member of their community.⁶⁰ Some guardianship regimes maintain the principle that the adult's best interests are a primary consideration for those acting in accordance with the legislation. Although these principles overlap and have been expressed in various ways, they remain the core principles on which modern guardianship laws are now shaped.

These principles, in general, favour the concept of assisted decision-making that seeks to maintain an adult's decision-making capacity for as long as possible. However, as discussed in part IV, when these principles conflict it presents difficulties for those appointed under assisted decision-making models.

5 *A Human Rights Approach*

Finally, the increased prominence of human rights in guardianship laws must be acknowledged. The disability rights movement that started in the 1970s has developed alongside, and into, a broader human rights approach that now dominates guardianship law reform.⁶¹ In jurisdictions where human rights charters have been implemented, they have provided an additional base from which guardianship laws have naturally evolved.⁶² This movement of recognising equal human rights is also reflected at the international level, with the CRPD being the most significant international instrument.

Article 12 of the CRPD provides for equal recognition before the law. Commentators suggest that art 12 marks a 'paradigm shift' from traditional

⁵⁹ In recent times, jurisdictions reforming guardianship laws have looked to align their legislation with those principles in the CRPD. Recent examples include the recommendations in the Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) ch 3; Alberta Justice and Alberta Seniors and Community Supports, above n 7, 22. See also Department for Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (The Stationery Office, 2007) ch 2; Gary Scot Stevenson, Tracy Ryan and Susan Anderson, 'Principles, Patient Welfare and the Adults With Incapacity (Scotland) Act 2000' (2009) 32 *International Journal of Law and Psychiatry* 120, 122.

⁶⁰ See, eg, World Psychiatric Association, *Yokohama Declaration* (at August 25 2002) art 3(1); Creyke, above n 23, 40–3; Carney and Tait, above n 12, 29; *Minister's Committee Report*, above n 37, 25–6; Gordon and Verdun-Jones, above n 10, 6–49–6–50; Kapp, above n 33; Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.3], [2.6]; Queensland Law Reform Commission, above n 59, vol 1, 40–1; Law Commission (United Kingdom), above n 16 [3.2]. See also *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

⁶¹ See, eg, Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 *Syracuse Journal of International Law & Commerce* 563. Note that some commentators disagree with the rights-based approach of modern guardianship laws: see Barbara Carter, 'Adult Guardianship: Human Rights or Social Justice?' (2010) 18 *Journal of Law and Medicine* 143; Alison P Barnes, 'Commentary: The More Things Change: Principles and Practices of Reformed Guardianship' in Michael Smyer, K Warner Schaie and Marshall B Kapp (eds), *Older Adults' Decision-Making and the Law*, Springer Series on Ethics, Law, and Aging (Springer, 1996) 254.

⁶² See, eg, Gordon and Verdun-Jones, above n 10, 1–16, 6–3–6–29.

guardianship practices of appointing a plenary substitute decision-maker, to promoting autonomy for as long as possible.⁶³ It relevantly states:

12.2. States Parties shall recognize that persons with disabilities enjoy legal capacity⁶⁴ on an equal basis with others in all aspects of life.

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

While subject to fierce debate, art 12 has proved instrumental in providing an additional driver for statutory recognition of assisted decision-making.⁶⁵ Since the CRPD, it has been increasingly recognised that *difficulty* in decision-making or in communicating a decision is not the same as an *inability*.⁶⁶ Article 12 envisages systems put in place by member states that allow an individual's decision-making to be supported or assisted to preserve their autonomy to the maximum extent. There has been a call for legal mechanisms that provide a 'sliding scale' of decision-making options for those who have trouble making decisions alone.⁶⁷ Indeed, Kerzner has argued that under arts 12 and 5, governments and third parties have obligations to take 'positive' steps to facilitate the use of supports.⁶⁸ Legally recognised assisted decision-making models therefore help society to transition from a view of adults either 'possessing capacity or not' and instead allowing legal systems to 'embrace a view of individuals as possessing a variety of faculties and abilities'.⁶⁹

Part II has demonstrated that the theory of assisted decision-making is consistent with many of the key features of modern guardianship regimes and with the overall trajectory of guardianship law reform to date. The attention that is being directed towards assisted decision-making globally, and within Australia, is therefore not surprising; it is unlikely that assisted decision-making will be abandoned now that interest has been stoked. As such, there is a need for critical legal analysis of how this might be implemented.

Part III examines how the theory of assisted decision-making has been incorporated into statutory regimes in overseas jurisdictions. As shown below, a number of different models have been adopted which embrace, to varying extents,

⁶³ See, eg, A Kanter, above n 35, 560. This terminology has also been associated with the CRPD generally, see Kayess and French, above n 15, 3.

⁶⁴ See Kerzner, above n 53, 13–15 for a discussion of the term 'legal capacity'.

⁶⁵ See generally Dhandu, above n 8; UN, OHCHR, IPU, 'From Exclusion to Equality Realizing the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol' (No 17, UN, OHCHR, IPU, 2007) 89–91; VLRC, above n 6, [8.1], [8.10]–[8.12].

⁶⁶ Rosemary Kayess and Ben Fogarty, 'The Rights and Dignity of Persons with Disabilities — A United Nations Convention' (2007) 32 *Alternative Law Journal* 22, 25.

⁶⁷ See also Janet Lord, David Suzzo and Allyn Taylor, 'Lessons from Experience of UN Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance' (2010) *Journal of Law, Medicine & Ethics* 564, 573: 'Article 12 essentially creates a continuum of support, thereby acknowledging that some disabled people require no support in making decisions, while others may need intensive support.' See also Kayess and Fogarty, above n 66, 25; Office of the Public Advocate, above n 7, 11–13.

⁶⁸ Kerzner, above n 53, 62–3.

⁶⁹ Surtees, above n 17, 82–3.

the assisted decision-making approach. Part IV goes on to examine critically the potential problems that arise from these legal approaches.

III From Theory to Legal Reality: Assisted Decision-Making in Guardianship Laws

A *Different Approaches to Decision-Making*

Four different types of decision-making approaches have been identified that broadly correlate with what has been legally recognised in some guardianship regimes:⁷⁰

1. *Supportive decision-making*: this presumes that the adult has the ability to make decisions but requires help in executing decisions.
2. *Shared decision-making*: involves shared decisional responsibility between the adult and another person.
3. *Delegated decision-making*: relies on delegation through advance planning tools such as enduring powers of attorney and advance health directives to ensure that the adult's preferences are known if the adult loses capacity.
4. *Surrogate decision-making*: occurs where the state vests another person with substitute decision-making authority for the adult.⁷¹

The third and fourth types of decision-making are already present in most modern guardianship regimes: these approaches mirror the ability to execute advance planning tools and the substituted decision-making norm where an appointed guardian or administrator makes decisions on behalf of the adult. These two approaches are standard in guardianship regimes and will not be discussed further.

The first and second types of decision — *supportive* and *shared decision-making* — are less common in legislation but are garnering increasing interest since the adoption of the CRPD. These two types of decision-making broadly fit within the concept of assisted decision-making. As noted by Surtees, legal recognition of these different forms of decision-making would allow societies to:

continue the movement that began with the move away from plenary guardianship ... toward limited or tailored guardianship. The next stage in this movement is away from limited guardianship, and where appropriate, toward supported decision-making.⁷²

While consistent with the aims of CRPD and with the evolution of guardianship laws in general, questions remain about how best to incorporate these concepts into modern laws.

⁷⁰ Others have included more categories of decision-making models: see, eg, Barbara Carter, 'Supported Decision-making: Background and Discussion paper' (Office of the Public Advocate of Victoria, November 2009) 18–19; Bach, above n 7, 4–8.

⁷¹ Kathleen Wilber and Sandra Reynolds, 'Rethinking Alternatives to Guardianship' (1995) 35 *The Gerontologist* 248, 249–50. The descriptions of the four categories are modified from this paper.

⁷² Surtees, above n 17, 82–3.

A legal mechanism for assisted decision-making would add to existing mechanisms (that is, enduring powers of attorney and advance health directives) to be used to allow adults to plan ahead and potentially gives courts more flexible options for adults. It fills a legal ‘gap’ by formally recognising the need for assistance in the grey area when an adult is between having capacity and being considered incapacitated. It also gives increased legal recognition to what is accepted in practice: that there is a sliding scale of decision-making capabilities, and not being at the top of the scale does not mean your legal right to make decisions should be denied.

B *Current Models of Assisted Decision-Making*

Currently three major models recognising the concept of assisted decision-making exist in guardianship legislation.⁷³ These range from implicitly recognising the existence of the practice, through to the extremely novel idea of court imposed co-decision-makers appointed for an adult. It should be emphasised that all of these assisted decision-making models operate when an adult is assumed still capable of making some decisions, albeit with varying levels of support. This differs fundamentally from normal substituted decision-making or advance planning documents which only operate when an adult loses decision-making capacity.

1 *Recognition of Assisted Decision-Making in Practice*

The first category includes those jurisdictions that recognise the informal practice of assisted decision-making but do no more. The concept of assisted decision-making is by no means foreign to modern guardianship regimes; a number of modern guardianship regimes impliedly support the notion through adoption of the principles of the ‘least restrictive approach’, ‘respect for autonomy’ and ‘presumption of capacity’. While not incorporating a full scheme of assisted decision-making, jurisdictions like England and Wales implicitly support the notion through one of the legislation’s general principles:

A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.⁷⁴

While provisions such as this recognise and seem to endorse the practice of assisted decision-making, these jurisdictions have not gone beyond merely recognising the informal nature of this support. The real innovation has come about in those jurisdictions that have created new legal mechanisms to give statutory recognition and power to those that previously acted informally in assisting an adult.

⁷³ Legal recognition and implementation of assisted decision-making comes in many forms. For the purposes of discussion, the different legal mechanisms have been divided into three categories. However, in some jurisdictions these mechanisms overlap.

⁷⁴ *Mental Capacity Act 2005* (Eng & Wales) s 1(3). Also included within the provision on best interests is a requirement for a person acting on behalf of a person with questionable capacity to, ‘so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him: s 4(4). See also Department for Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (The Stationery Office, 2007) 20–2, ch 3.

2 *Legally Recognised 'Supported' Decision-Making Models*

Some models — often referred to as ‘supported’ decision-making models — are designed for adults who have capacity to make their own decisions but would like someone, or a number of persons they trust, to help them in the decision-making process. This corresponds to the ‘supportive decision-making’ category. Today, express inclusion of statutorily recognised schemes — recognising persons who act as ‘assistants’, ‘associates’ or ‘supporters’ — is becoming more pronounced.

Modern assisted decision-making schemes have drawn inspiration from a variety of sources. Scandinavian countries led the way in the 1990s, introducing the concept of a legally recognised ‘support person’, whereas in Canada, the concept can be traced back to the Civil Code in the late 1800s.⁷⁵ Today it is incorporated as a key part of legislative schemes, particularly in Canadian jurisdictions, but aspects are evident in jurisdictions as diverse as Germany and Japan.⁷⁶ Hybrid schemes also exist in British Columbia where adults can enter into ‘Representation Agreements’ — a combination of a supported decision-making agreement and an enduring power of attorney — which provide the ‘supporter’ with a wide mandate to assist in decision-making through to making decisions on the adult’s behalf.⁷⁷

The most recent incarnation of statutorily recognised supported decision-making is from Alberta, which provides for three levels of decision-making for personal decisions,⁷⁸ the first of which is ‘supported decision-making’. A similar regime also exists in Yukon.

3 *Key Features of Supported Decision-Making*

While the legislation in Alberta and Yukon is not identical, a number of features can be identified that distinguish supported decision-making models from other assisted decision-making models.

Private adult controlled agreement: Under these regimes, an adult who ‘understands the nature and effect’ of the agreement can appoint a person of his or

⁷⁵ Kees Blankman, ‘Guardianship Models in the Netherlands and Western Europe’ (1997) 20 *International Journal of Law and Psychiatry* 47, 55; Gordon, above n 49, 63; Salzman, above n 3, 235–7; S Danielsen, ‘Guardianship, the Danish Approach’ in K Blankman (ed), *International IGN Conference on Guardianship — Conference Book* (2008) 79–80; Devi, Bickenbach and Stucki, above n 3, 255–6; Gordon, above n 49, 63. See also similar unsuccessful attempts in California to institute a similar regime in the 1960s: Robert J Hodgson, ‘Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem’ (1973) 37 *Albany Law Review* 407, 413–15.

⁷⁶ See generally, Kerzner, above n 53, 28–59, Makoto Arai, ‘Japan’s New Safety Net: Reform of Statutory Guardianships and the Creation of Voluntary Guardianships (2000) 13 *National Association of Elder Law Attorneys Quarterly* 1; Israel Doron, ‘Elder Guardianship Kaleidoscope — A Comparative Perspective’ (2002) 16 *International Journal of Law, Policy and the Family* 368, 373–9.

⁷⁷ See generally *Representation Agreement Act*, BC 1996, c 405. However, there is also the possibility of combined agreements like this leading to confusion regarding the role of the person appointed. Therefore some prefer the ‘purer’ supported decision-making models contained in Yukon and Alberta discussed in this paper: Kerzner, above n 53, 56.

⁷⁸ Alberta Justice and Alberta Seniors and Community Supports, above n 7, 29–31. The VLRC has recently recommended a similar three-tiered model in its review of guardianship legislation: VLRC, above n 6.

her choice to act as a supporter.⁷⁹ The agreements can be tailored by the adult to include certain roles or cover certain types of decisions.⁸⁰ In Alberta, the legislation provides that the adult is able to terminate the agreement (using a prescribed form) at any time.⁸¹

Decision remains the adult's: Decisions made under these agreements are recognised as being the adult's decision, not the supporter's.⁸²

No mandatory involvement by supporter: Generally a supporter need not have offered support for an adult's decision to be valid. In keeping with its focus on autonomy, there would seem to be no requirement for an adult to consult with their supporter. However, the Yukon legislation takes a slightly different approach; while it does not mandate that an adult consult with a supporter, it does allow an application be made to the court (by the adult or supporter) to declare an agreement between the adult and a third party void if the agreement is 'within the responsibilities' of the supporter, and the adult entered into the agreement without consulting his or her supporter.⁸³ Here, a clear tension exists between protecting the adult and allowing that adult to make 'bad' decisions. This is particularly so because decision-making capacity is explicitly preserved by these agreements.

Supporter has rights of access: The supporter has the legal authority to access, collect or obtain information that is relevant to a decision and to assist the person in decision-making and, if necessary, communicating his or her decision.⁸⁴

Supporter has duties: The supporter has obligations to act in accordance with the general principles of the legislation and may have specific requirements to act diligently, honestly and in good faith in the 'best interests' of the adult.⁸⁵ In Yukon, in order to avoid liability supporters must also exercise 'care... and skill of a reasonably prudent person'.⁸⁶ In Alberta there are also specific records which must be maintained by the supporter.⁸⁷

⁷⁹ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 4(1); *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 6. A more flexible notion of capacity exists in British Columbia: *Representation Agreement Act*, BC 1996, c 405, s 8. See also Kerzner, above n 53, 38–9.

⁸⁰ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 4(2); *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 9. Ideally the person appointed should be a *trusted* individual who is familiar with the adult and their communication needs and who is able to offer the support required: Bach, above n 7, 9.

⁸¹ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 7.

⁸² *Ibid* s 6(1); *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 11.

⁸³ *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 12.

⁸⁴ *Adult Guardianship and Trusteeship Act* A 2008, c A-4.2, s 9; *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 10. In Yukon the obligation extends to endeavouring to ensure the adult's decision is implemented: *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 5(1)(e).

⁸⁵ *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 13(1) (these obligations are stated in the context of the liability of the supporter). See also *Adult Guardianship and Trusteeship (Ministerial) Regulation*, Alta Reg 224/2009 s 4(1).

⁸⁶ *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 13(1)(b).

⁸⁷ *Adult Guardianship and Trusteeship (Ministerial) Regulation*, Alta Reg 224/2009 s 4.

Liability of supporter generally excluded: Where a supporter acts in good faith and in accordance with the duties imposed by the legislation, liability for things done while acting in that role is generally excluded.⁸⁸

Supported decision-making models with these features generally fit quite well within the existing guardianship decision-making paradigm. The notion of support to assist individuals making decisions is already implicitly included in many guardianship laws and taking the step of legally recognising the role formalises this more explicitly.

4 *Legally Recognised Co-Decision-Making*

The most innovative legal model of assisted decision-making is the concept of co-decision-making which corresponds to the ‘shared decision-making’ model. Legal models exist in a handful of jurisdictions such as the Canadian jurisdictions of Saskatchewan, Quebec and Alberta, which have stand-alone co-decision-making provisions, and there are ‘hybrid models’ in Japan, Norway and Denmark.⁸⁹ The VLRC has recently recommended that a co-decision-making model (together with supported decision-making) be introduced in Victoria.⁹⁰

The shared decision-making model creates a new legal concept whereby joint decision-making between the adult and the appointed co-decision-maker is mandated. The actual decision-making process is no longer a solo enterprise. This is a significant departure from the norm which recognises the individual adult being the decision-maker (albeit with assistance offered to arrive at that point) or a substitute decision-maker who makes a decision on behalf of an incapacitated adult.

The presumption appears to be that, once put in place, the adult only has decision-making capacity when the co-decision-maker assists the adult; the corollary being that the adult lacks decision-making capacity if they act alone. This requirement obviously limits the autonomy of the adult, but to a much lesser extent than if even a partial guardian or administrator was appointed. In some ways, co-decision-making orders recognise that decision-making capacity is contingent, in this case on the involvement of another person.

5 *Key Features of Co-Decision-Making*

The Canadian jurisdictions of Saskatchewan and Alberta provide for the most ‘fully-fledged’ co-decision-making schemes. In Saskatchewan, co-decision-making exists instead of a supported decision-making model, whereas in Alberta co-decision-making orders are available alongside supported decision-making agreements. A closer examination of the key features of this model is warranted.

Court appointed arrangement with adult’s consent: Co-decision-making schemes are generally court ordered with no option for an adult to personally

⁸⁸ *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 13(1); *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 10.

⁸⁹ In Japan, a hybrid supported/co decision-making model exists, see Arai, above n 76; Doron, above n 76, 373–7. For a discussion of the Scandinavian approach, see generally Danielsen, above n 75.

⁹⁰ VLRC, above n 6, ch 8, 9.

appoint a co-decision-maker.⁹¹ However, in Alberta it requires the consent of the adult and the adult can also end the agreement.⁹²

The role of a co-decision-maker is to assist, discuss or ‘advise’ the adult in relevant decisions, and the co-decision-maker is able to do all things necessary to give effect to the decision.⁹³ Generally, in making an appointment the court must consider:⁹⁴

- it to be in the best interests of the adult;⁹⁵
- that no less restrictive options are available;
- that the adult’s capacity is impaired, but the adult can make decisions if given the support of a co-decision-maker; and
- that there is a need for such an appointment.

It can be imagined that courts will face a difficult task in assessing whether the adult has the appropriate level of capacity for such an order to be appropriate.⁹⁶ Reliance on medical assessments regarding the level of an adult’s capacity seems likely to become increasingly important.

Courts in both jurisdictions can appoint more than one co-decision-maker and limit the order to specific matters.⁹⁷ The court can require the order to be reviewed after a period of time.⁹⁸

Regarding the appropriateness of the person appointed as a co-decision-maker, both Alberta and Saskatchewan require the court to consider the potential co-decision-maker’s ability to carry out his or her role and duties under the legislation and must take into account his or her existing relationship with the adult.⁹⁹ The court in Alberta must also consider if any potential conflict of interest

⁹¹ See, eg, *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 13; *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, s 14(1)(a); *Civil Code of Quebec*, Q 1991, c 64, 291. This aspect of the scheme has been criticised Kerzner, above n 53, 60. See also VLRC, above n 6, [9.51]–[9.57].

⁹² *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, ss 13(4)(c), 17(8).

⁹³ *Ibid* s 18(2); *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 17(1), 42(1).

⁹⁴ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 14, 40; *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 13(4)(a).

⁹⁵ In considering the adult’s best interests the court is required to consider the factors in *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 13(5).

⁹⁶ See John Chesterman, ‘Supported Decision-making: Options for Legislative Recognition’ (Office of the Public Advocate of Victoria, January 2012) 11. It is suggested that a co-decision-making order could be made, ‘where the person meets the guardianship criteria but where the tribunal believes that the person has sufficient capabilities to be able to contribute to the particular decisions that need to be made’: at 12.

⁹⁷ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 14(2)(b), 40(2)(b); *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, ss 16, 17(1)–(2). See also Surtees, above n 17, 90–1. The VLRC has proposed that only one co-decision-maker be able to be appointed under its legislative scheme: VLRC, above n 6, [9.67].

⁹⁸ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 14(3)(a), 22(1)(b), 40(3)(a), 47(1)(b); *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, 17(7).

⁹⁹ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 13(1)(e), 14(3)(b), 39(1)(f), 40(3)(b); *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, 14(1).

creates a substantial risk that the co-decision-maker would not act in the adult's best interests.¹⁰⁰

Decision-making recognised as shared, but decision deemed the adult's: The legislation in Saskatchewan deems the decision made with the co-decision-maker to have been taken by the adult.¹⁰¹ The Alberta legislation remains silent on this point.

Mandatory involvement by co-decision-maker in some circumstances: As noted above, the presumption in co-decision-making models is that the adult only has decision-making capacity for specified decisions when the co-decision-maker is involved. Specific provisions in the legislation also give this legal force, albeit limited to some circumstances.¹⁰² (However, it is worth noting that the VLRC has recommended this be expressly included in the Victorian legislation).¹⁰³

In Saskatchewan, a contract document is considered voidable unless signed by both the adult and the co-decision-maker.¹⁰⁴ However, the co-decision-maker must not refuse to sign such a document if a 'reasonable person could have made the decision in question and no harm to the adult is likely to result for the decision'.¹⁰⁵ Unlike the Saskatchewan legislation, the legislation in Alberta only has this effect if the court has specified in the order that a contract is voidable if not signed by both parties.¹⁰⁶ Where the order does specify it, the same limitation on the co-decision-maker applies (that is, he or she cannot refuse if a reasonable person could have made the decision).¹⁰⁷ As discussed below, this requirement seems at odds with the purported goal of promoting an adult's decision-making autonomy; the requirement for 'reasonableness' clearly places a restriction on the exercise of autonomy and seems to remove the adult's right to make 'bad decisions'.

The mandatory involvement of the co-decision-maker means that the relationship between the adult and the co-decision-maker is particularly important. However, like any relationships, these may deteriorate or break down.¹⁰⁸ Dispute resolution mechanisms are limited to applying to the court to review orders and, in Alberta, the adult is able to terminate the co-decision-making arrangement.¹⁰⁹

¹⁰⁰ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 14(2).

¹⁰¹ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 23(1), 48(1) states: 'Any decision made, action taken, consent given or thing done by a [personal/property] co-decision-maker in good faith respecting any matter within his or her shared authority with the adult is deemed for all purposes to have been made, taken, given or done by the adult'. This approach has been adopted by the VLRC: see VLRC, above n 6, [9.83]–[9.85].

¹⁰² See also *Civil Code of Quebec*, Q 1991, c 64, a 292.

¹⁰³ VLRC, above n 6, [9.86].

¹⁰⁴ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 16, 41.

¹⁰⁵ *Ibid* ss 17(2), 42(2).

¹⁰⁶ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, 17(5). See also *Civil Code of Quebec*, Q 1991, c 64, a 294.

¹⁰⁷ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, 18(5).

¹⁰⁸ Bach, above n 7, 9.

¹⁰⁹ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, ss 13(4)(c), 17(8). The VLRC has also recommended a mechanism for dispute resolution in circumstances of irreconcilable disagreement, allowing either party to be able to apply to VCAT for review of the order: VLRC, above n 6, [9.91]–[9.92].

Co-decision-maker has rights of access: Co-decision-makers have similar rights of access to information regarding the adult as supporters.¹¹⁰

Co-decision-maker has duties: The duties of a co-decision-maker in Saskatchewan are the same as that of an appointed guardian to:¹¹¹

- Ensure that the adult's civil and human rights are protected
- Encourage the adult to
 - participate to the maximum extent in all decisions affecting the adult: and
 - act independently in all matters in which the adult is able to; and
 - limit the [co-decision-maker's] interference in the life of the adult to the greatest extent possible.

In Alberta, once a co-decision-maker is appointed his or her role extends to acting diligently, in good faith and in the adult's best interests.¹¹²

In Saskatchewan and Alberta a number of general principles of the legislation are applicable to co-decision-makers as well.¹¹³ As discussed below, this leads to an appreciable tension in guiding co-decision-makers between acting paternalistically or in a way that promotes the adult's autonomy.

Liability of co-decision-maker generally excluded: Similar to supported decision-making models, the existing legislation generally excludes liability for a co-decision-maker acting in accordance with the legislation.¹¹⁴

The novelty and relatively recent introduction of co-decision-making models means we know little about how they operate in practice.

C *Legal Models of Assisted Decision-Making*

This part has outlined the three main approaches to assisted decision-making that currently exist in guardianship regimes. As already noted, in Australia the VLRC has recommended that the Victorian government adopt models of supported and co-decision-making based on the Alberta models described above. However, before embracing these models in Australia, it would be wise to consider what issues remain unanswered in these legislative models. Part IV considers these unresolved issues.

¹¹⁰ See, eg, *Adult Guardianship and Trusteeship Act*, A 2008, c A-4, s 22.

¹¹¹ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 25, 50.

¹¹² *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 18(1).

¹¹³ *Ibid* s 2; *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, s 3.

¹¹⁴ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 23; *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, s 70.

IV Unresolved Issues in Assisted Decision-Making Models

Despite the theoretical attractiveness of having supported and co-decision-making mechanisms, a number of unresolved issues deserve attention. While supported decision-making models present challenges, the potential problems are amplified when considering a co-decision-making model. The novelty of the concept, together with difficult questions regarding the power differential between the adult and his or her co-decision-maker, mean serious consideration must be given to the potential issues that may arise.

Unfortunately, lack of empirical research about how the existing schemes operate in practice means we do not yet know if the existing models are free from problems. In Australia, where limited guardianship orders are generally preferred, it might also be questioned whether assisted decision-making models would make any *practical* difference to the way those with some impaired capacity make decisions. Jurisdictions within Australia wishing to implement such schemes should consider the following issues in the context of their own social and legal environment before rushing to embrace the latest guardianship law innovation.

A Conceptual Issues

1 *Lack of Conceptual Clarity*

The foregoing discussion has demonstrated that supported and co-decision-making models are conceptually (and legally) distinct decision-making paradigms. The literature on this topic has, thus far, tended not to distinguish between these two models in discussing assisted decision-making and rather adopted a broad brush approach. However, given the distinct features of these models, this seems inappropriate and leads to a lack of conceptual clarity and understanding about what assisted decision-making entails.

2 *Autonomy versus Paternalism*

There are two major unresolved issues within existing assisted decision-making models, relating to their underlying principles and purpose. The first concerns the inconsistent principles within the current legislation that place those acting as supporters or co-decision-makers in an untenable situation. The second relates to whether the purpose of assisted decision-making models is truly the promotion of ‘full’ autonomy, or some lesser form of autonomy modified by paternalistic notions.

3 *Inconsistent Principles*

A significant question for assisted decision-making models is what guiding principles will be used to guide those appointed — beneficence or respect for the adult’s autonomy? While the driver for these models is to preserve the adult’s decision-making autonomy and to offer a less restrictive alternative to appointing a substitute decision-maker, some of the existing provisions only do this to the extent that the adult continues to make ‘reasonable’ decisions. This is at odds with the

recognition that those with some level of decision-making impairment have as much right to make ‘bad’ decisions as others. This has been described as the ‘dignity of risk’, and reflects a shift from the paternalistic attitude of protecting an individual from their own ‘unwise choices’ to respecting the autonomy of the individual and their right to choose.¹¹⁵ These provisions may prevent an adult with the financial means from entering into a particularly risky but high-gain investment (and as such might be considered equivalent to high-stakes gambling) if the co-decision-maker thinks that no reasonable person would enter into such an agreement and that major financial harm could result to the adult. No such limitation, of course, applies to those deemed fully competent. In this context, the limitation imposed by the need for ‘reasonable’ decisions would seem particularly incongruous, as in an assisted decision-making paradigm there is no finding of actual incapacity.¹¹⁶

In addition, the legislation in some jurisdictions continues to state that the best interests of the adult are the predominant guiding principle.¹¹⁷ Where no further guidance is given as to how to interpret this phrase, the test is essentially a paternalistic welfare test.¹¹⁸ The appropriateness of this as a guiding principle in assisted decision-making is questionable.¹¹⁹ While the best interests test as applied by the courts includes consideration of an adult’s expressed views, decisions by the adult which appear unwise, unhealthy, unreasonable or involve any risk of harm may be difficult for a supporter or co-decision-maker to agree to if one of their duties under the legislation requires them to place the best interests of the adult as the primary consideration. This puts those individuals in an unfortunate and conflicted position. These concerns are amplified in co-decision-making models due to the increased and mandatory involvement of the co-decision-maker. While this may be a way to ensure that co-decision-makers do not go to the other extreme and fail to act for fear that to ‘interfere’ would be against the principles of assisted decision-making, it seems incongruous with the overall intention of such

¹¹⁵ Hommel, Wang and Bergman, above n 34, 222. See also Robert Perske, ‘The Dignity of Risk’ in Wolf Wolfensberger (ed), *The Principle of Normalization in Human Services* (National Institute of Mental Retardation, 1972) 194. See also *Substitute Decision-Making Report*, above n 7 [5.87], [5.94], [5.101]; Carter, above n 70, 21. It is explicitly acknowledged in modern definitions of ‘capacity’ that just because a person makes a decision that is unreasonable, eccentric or considered to be a ‘bad decision’, this does not automatically mean that the person lacks capacity: *Guardianship and Management of Property Act 1991* (ACT) s 6A; *Protection of Personal and Property Rights Act 1988* (NZ) ss 6(3), 25(3) (discussed in Canadian Centre for Elder Law Studies and British Columbia Law Institute, ‘A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario’ (CCELS Report No 4, BCLI Report No 46, Canadian Centre for Elder Law Studies and British Columbia Law Institute, October 2006) 36).

¹¹⁶ See, eg, Gordon, above n 49, 74: ‘[T]here is dignity in the risk that attends poor judgment. Further, no one learns without experiences, both positive and negative.’

¹¹⁷ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, s 3(a). The first guardianship principle states: ‘adults are entitled to have their best interests given paramount consideration’. See also *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 18(1).

¹¹⁸ Creyke, above n 23, 41. Cf Alberta where, when examining the adult’s ‘best interests’, consideration must be given to any wishes known to have been expressed by the adult when the adult had capacity and values and beliefs known to have been held by the adult: *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 2(d).

¹¹⁹ Cf Surtees, above n 17, 85.

schemes.¹²⁰ This inconsistency in principles needs to be addressed by governments seeking to implement such reforms. It is noted that the recommendations of the VLRC attempt to address this through adopting new general principles.¹²¹

4 *Promoting 'Full' Autonomy?*

A second and related issue is what the legislation is attempting to achieve. In part II, autonomy was recognised as a key principle driving interest in assisted decision-making models. While the assumption has been that such models help to preserve the 'full' autonomy of the adult for a longer period than would otherwise be possible, an examination of the current legal models, and in particular the co-decision-making models, show that this is not what is being implemented.

The limitations placed on adults under co-decision-making models (and to a far lesser extent under supported decision-making models) clearly do not apply to adults exercising 'full' autonomy. As a consequence, one of two things must occur in order to understand what the models are trying to achieve. The first is that those implementing the models must avoid conceptual dishonesty and admit that what is achieved by these models is not 'full' autonomy granted to adults under such models, but rather a form of 'restricted' autonomy where most, but not all, the decisions made under such a scheme will be legally recognised. The reason for the restriction — the protection of adults — also needs to be explicitly articulated.

In the alternative, in order to live up to the promise of maintaining 'full' decision-making autonomy for those within such models, the limitations on 'unreasonable' decisions and considerations of the adult's 'best interests' must be removed. Implementing models like those in Canada without taking either of these steps would arguably be conceptually disingenuous and confusing.

B *Legal issues*

1 *What Happens to Informal Assistance?*

It has been questioned whether in implementing formal assisted decision-making mechanisms existing informal supports will be detrimentally affected.¹²² Some adults eligible to use supported or co-decision-making mechanisms may find such measures unnecessary as informal decision-making is sufficient. Any assisted decision-making regime must allow informal decision-making to be concurrently maintained.¹²³ As supported decision-making agreements are similar to personal advance planning document like enduring powers of attorney, they should in no way be mandated. The British Columbian approach may be useful in ensuring that

¹²⁰ Gordon, above n 49, suggests that neglect could occur in a health care situation where, '[A] supported individual refuses to give consent to a treatment that will prevent a worsening of his or her medical condition because the individual does not fully understand and appreciate the consequences of refusal': at 74.

¹²¹ VLRC, above n 6, ch 6.

¹²² VLRC, *Guardianship Consultation Paper No 10* (2011) [7.65].

¹²³ Carter, above n 70, 26; Queensland Law Reform Commission, above n 7, 201; Gordon, above n 49, 73; VLRC, above n 6, [8.73].

third parties do not *require* such appointments to be made. There, a provision states, ‘[a]n adult must not be required to have [an agreement] as a condition of receiving any good or service’.¹²⁴

2 *Should Arrangements Encompass Personal, Healthcare and Financial Matters?*

A question arises as to the appropriate scope for supported and co-decision-making arrangements. Should they be available for all types of decisions — personal, financial, health care — or should some kind of limitation be imposed? As a matter of maximising the autonomy of the adult, it would seem natural to allow such schemes to extend to all types of decisions. Support might be needed in all spheres of life and to limit its availability to only some areas would limit the utility of such arrangements.¹²⁵

Legally, however, implementing these arrangements may raise issues of liability and potential abuse (discussed further below) by supporters and co-decision-makers, particularly in relation to financial decisions.¹²⁶ For example, the legislation in Alberta excludes financial decisions from its supported and co-decision-making mechanisms.¹²⁷ However, in Australia, pilot studies regarding assisted decision-making in relation to financial matters are underway.¹²⁸ Such studies may shed light on whether such restrictions are really needed.

3 *Liability under Supported and Co-Decision-Making Arrangements*

To avoid confusion, the legal liability of supporters and co-decision-makers must be dealt with in legislation. If supported and co-decision-making arrangements are simply viewed as an extension of the situation where a competent person exercises his or her right to make decisions, then the adult should have sole responsibility for the consequences of that action. An argument could certainly be mounted that this is how supported decision-making models should operate; it has been suggested that supporters should not be liable unless they have failed to provide ‘adequate support’ or have a conflict of interest in a decision.¹²⁹ However, in co-decision-making arrangements some would argue that the decision-making is *shared*. As such, there is a stronger argument — both practically and ethically — for the consequences and liability of the action also to be shared.¹³⁰

Of course, it would seem unfair for a supporter or co-decision-maker who disagrees with an adult’s decision and advises accordingly to then be held liable for that decision. Some legislation has recognised this problem and offers a solution. For example, in Yukon, the legislation removes doubt by explicitly stating that a supporter is not liable for a decision made by an adult if the supporter did not agree

¹²⁴ *Representation Agreement Act*, BC 1996, c 405, s 3.1.

¹²⁵ Kerzner, above n 53, 35 notes that this exclusion ‘limits the usefulness’ of the regime. This is also the view of the Victorian Law Reform Commission: VLRC, above n 6, [8.92]–[8.96].

¹²⁶ VLRC, above n 122, [7.110]–[7.112].

¹²⁷ VLRC, above n 6, [8.52], [9.71]–[9.77].

¹²⁸ New South Wales Attorney General and Justice, above n 7, 37.

¹²⁹ See VLRC, above n 6, [8.128]; Bach, above n 7, 11.

¹³⁰ Carter, above n 70, 26.

with the decision and advised the adult against it.¹³¹ In Victoria, the current recommendations provide that where disagreement exists, recourse can be made to the tribunal — no decision can be made without the agreement of both parties as the recommendations expressly state that the adult is deemed incapable of making certain decisions without the support of the co-decision-maker.¹³²

Outside of a disagreement, however, the approach of the legislative models has been to exclude supporters and co-decision-makers from liability incurred when acting in good faith. Deliberate abuse in such a position would be subject to penalties equivalent to that of guardians and administrators.¹³³

A further question arises as to the nature of the relationship between the adult and the supporter or co-decision-maker. While the relationship between an appointed substitute decision-maker (that is, attorneys, guardians or administrators) and adults with impaired capacity can be characterised as a fiduciary one (although the scope and content of that fiduciary relationship remain unclear),¹³⁴ it is not clear whether this would also apply to supporters and co-decision-makers.¹³⁵

Substitute decision-makers appointed by courts have obligations towards the adult they represent as well as obligations to the court that appointed them.¹³⁶ It may be questioned whether similar obligations exist, particularly in relation to court-appointed supporters or co-decision-makers. The argument against such a fiduciary relationship arising in relation to supporters is that the adult essentially retains full decision-making responsibility. However, the same cannot be said of co-decision-makers.

The VLRC has sought to clarify this issue and has recommended that a provision be included which states that a supporter and co-decision-maker's role is fiduciary in nature. While a general exclusion of liability provision similar to that in Alberta has been suggested in the Commission's model,¹³⁷ the recognition of a fiduciary relationship arguably introduces new uncertainties into the role. For example, traditional fiduciary relationships involve duties of loyalty and to avoid conflict of interests. Some aspects of these duties may sit uncomfortably with the supporter and co-decision-maker's role, particularly where decisions made by the adult may be considered harmful to the adult or have (sometimes inadvertent) beneficial consequences for those appointed. In any new legislation, provisions dealing with liability of supporters and co-decision-makers should take these matters into account.

¹³¹ *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 13(2).

¹³² VLRC, above n 6, [9.86].

¹³³ *Ibid* [9.109]–[9.110].

¹³⁴ Frolik, above n 50; Karen E Boxx, 'The Durable Power of Attorney's Place in the Family of Fiduciary Relationships' (2001) 36 *Georgia Law Review* 1.

¹³⁵ Boxx, above n 134. This has also been recognised by Australia's guardianship tribunals: see Queensland Law Reform Commission, above n 59, vol 3, 113 n 425.

¹³⁶ Frolik, above n 50, 56–7.

¹³⁷ VLRC, above n 6, recommendation 90, 170.

4 *What Legal Safeguards are Needed?*

Article 12.4 of the CRPD mandates that certain safeguards should exist to prevent abuse, including ensuring that an adult's exercise of capacity is 'free of conflict of interest and undue influence'.¹³⁸ While some suggest that an 'adult who has a trusted and skilled friend to assist with making important decisions is often well protected from exploitation',¹³⁹ history suggests that this will not always be the case. From experience with attorneys, guardians and administrators, we know, and the CRPD is right to anticipate, that there may be those that abuse positions of power.¹⁴⁰ It would be naïve not to expect similar abuses in supported and co-decision-making models. Governments wishing to comply with the CRPD by implementing supported or co-decision-making models must consider how potential abuses can be curbed. Admittedly, the consideration of abuse in this context is very similar to the issues that arise with enduring powers of attorneys.

Obviously, where the court appoints co-decision-makers, some initial means of ensuring the appointee is appropriate can be exercised and extended to encompass court monitoring, review and removal of such persons.¹⁴¹ However, it has been noted that privately executed agreements may result in undetected abuse: '[t]he more private and informal the arrangement the more likely it is that it will go undetected and unresolved if it does occur.'¹⁴²

While some legislation like that in Yukon explicitly states that supporters 'shall not exert undue influence upon' or 'make decisions on behalf of' the adult, these provisions lack teeth.¹⁴³ Placing strict reporting and monitoring requirements on these private arrangements may assist,¹⁴⁴ but could also be seen as 'imping[ing] on the freedom of action' of the adult concerned. It may also prevent family or friends from taking on a role that not only requires administering and a significant time commitment, but also the potential to be brought before a court for failing one's duties under the Act.

¹³⁸ CRPD, above n 4, art 12 states that measures relating to the adult must be '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'. Discussion of these measures is beyond the scope of this article.

¹³⁹ Surtees, above n 17, 84.

¹⁴⁰ See, eg, Cheryl Tilse and Jill Wilson, 'The Mismanagement of the Assets of Older People: the Concerns and Actions of Aged Care Practitioners in Queensland' (2003) 22 *Australasian Journal on Ageing* 9, 11; United States Government Accountability Office, 'Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors' (Report to the Chairman, Special Committee on Aging, US Senate GAO-10-1046, United States Government Accountability Office, September 2010).

¹⁴¹ For example, in Saskatchewan, property co-decision-makers have obligations to keep records and provide accounting records to the court: *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 54–5. Also, in Alberta the court is able to remove persons who have acted improperly or not in accordance with the legislation under a review of a co-decision-making order: *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 21(b).

¹⁴² Carter, above n 70, 27.

¹⁴³ *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 5(2).

¹⁴⁴ Such record-keeping requirements already exist for supporters: *Adult Guardianship and Trusteeship (Ministerial) Regulation*, Alta Reg 224/2009, s 4.

In addition, provisions like that in Alberta, where third parties dealing with adults with supporters may refuse to recognise a decision made if there are reasonable grounds to believe that the supporter exercised undue influence or that there may be fraud or misrepresentation on the part of the supporter, may be helpful.¹⁴⁵ However, this may place an (unrealistic?) onus on third parties to be wary of such exploitation.¹⁴⁶

Supported and co-decision-making arrangements become difficult where an adult's decision-making ability begins to diminish or fluctuates downward.¹⁴⁷ While it would appear logical that such arrangements would be unable to continue where an adult's decision-making capacity drops below a certain level, the mechanism for detecting this and ending the arrangement is not clear in some legislation. In the current models, a level of responsibility is placed on those appointed, and on third parties to monitor this.

While most co-decision-making arrangements are, or can be, made subject to periodic review by courts in Canada, outside of this the onus is presumably on co-decision-makers and third parties to notify the court of concerns or changes in capacity that effect the arrangements.¹⁴⁸ In Alberta this obligation on co-decision-makers is express, placing an onus on them to approach the court if a change in capacity means that a variation or termination of the order may be in the adult's best interests.¹⁴⁹ Alternatively, more general provisions can be relied upon that allow any interested person to apply for a review of co-decision-making arrangements.¹⁵⁰ But, how does the third party, supporter or co-decision-maker know how to assess when a sufficient level of capacity is lost in the adult to make the arrangement no longer legal? Legislation may also provide for termination of arrangements when more restrictive orders are made (that is, a co-decision-making order or guardianship order) or where an advance directive comes into effect.¹⁵¹

Safeguards to overcome some of these issues have been suggested. For example, some advocate that:¹⁵²

- a statutory official's office (eg each jurisdiction's 'Public Advocate'), should have legislative power to investigate allegations

¹⁴⁵ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 6(2). The Yukon legislation is phrased slightly differently: 'A decision made or communicated with the assistance of an associate decision-maker shall be recognized for the purposes of any provision of law as the decision of the adult, subject to the laws regarding fraud, misrepresentation, and undue influence: *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 11.

¹⁴⁶ See also VLRC, above n 6, [9.84].

¹⁴⁷ The Alberta Public Advocate suggests this is not a problem: VLRC, above n 6, [9.12].

¹⁴⁸ However, in Saskatchewan reviews will only be ordered by the court if it is in the best interests of the adult, so there may be circumstances where no review is ordered: *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, ss 22(1)(b), 47(1)(b). And, for example, in Alberta in 2011, two complaints were received about the actions of co-decision-makers, but none were removed as a result of the complaint: Email from Patrick McManus to Shih-Ning Then, 15 May 2012.

¹⁴⁹ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 21(2)(b).

¹⁵⁰ *The Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, s 66; *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 21(1).

¹⁵¹ *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 8.

¹⁵² Carter, above n 70, 25; VLRC, above n 122, [7.114]; VLRC, above n 6, [8.123]–[8.124], [9.81], [9.100]–[9.103].

that a supporter or co-decision-maker has acted improperly and should have responsibility for resolving conflicts within such an arrangement;

- a court should have powers in relation to these arrangements similar to the powers it can exercise in relation to enduring powers of attorney — for example the power to revoke an agreement;
- police checks are mandatory for court-appointed persons;
- prohibitions on acting in conflict transactions be put in place; and
- lodgement of records for financial transactions be required.

The monitoring of roles by government departments and courts requires significant resources and, realistically, every decision cannot be reviewed by public bodies. As an alternative, ensuring the involvement of more than one person in an arrangement may also act as a safeguard. Some suggest appointing at least two persons in such positions¹⁵³ or, under the hybrid British Columbian model, adults can appoint ‘monitors’ as well as those to assist them make decisions. The monitors are given power under the legislation to oversee how decisions are made and to ‘monitor’ the actions of the appointed person. Such a model could be adapted to apply to both supported and co-decision-making models and perhaps offers a good middle ground in providing safeguards against abuse of the intentional and non-intentional kind.

5 *Consistency with other Laws*

A final legal issue relates to how well supported or co-decision-making models fit with existing laws. For example, will any adjustment need to be made to laws regarding execution of wills or advance health directives if there is a co-decision-maker involved? Should there be limitations imposed on supporters or co-decision-makers being appointed as attorneys? New schemes should anticipate and expressly provide for how they will operate with existing laws.

C *Practical Challenges*

1 *Increased Complexity and Limited Utility?*

Undoubtedly, adding yet another advance planning tool to the swathe of documents (enduring powers of attorney, advance directives, appointment of health care decision-makers etc) and layers of legislation and regulation that exist in most guardianship regimes adds an additional layer of complexity to what is already a

¹⁵³ Cf VLRC above n 6, [9.67].

very complex system.¹⁵⁴ This may present particular problems for the target cohort — adults with some decision-making impairment.¹⁵⁵

Any legal initiatives to introduce supported and co-decision-making mechanisms need to be buttressed by significant education for the general public, but more importantly for those likely to be dealing with supporters or co-decision-makers; for example, government departments, financial institutions, private accommodation and aged care providers, and so on.¹⁵⁶ Despite the existence of enduring powers of attorneys for some time now, there is evidence that segments of the community dealing with adults with impaired capacity still misunderstand the nature and requirements of such documents.¹⁵⁷ Similar problems might be expected with new supported or co-decision-making arrangements. The cost of continuously running education sessions for these third parties must also be considered.¹⁵⁸

If these legal initiatives are introduced without sufficient resources, people will remain unaware of changes, inertia about changing existing culture will not dissipate, and anticipated benefits of reform will not be realised.¹⁵⁹ Critical to the success of these legal reforms is investing sufficient resources and gaining the support of relevant sections of the community.¹⁶⁰

Even with sufficient resources and cultural change, whether these types of arrangements would be utilised to a *significant extent* is a difficult question to answer. For some adults, assisted decision-making arrangements may simply not be suitable; Alberta's approach has been that where adults are likely to suffer periods where they cannot communicate or make decisions (for example, advanced multiple sclerosis, dementia), then guardianship will be preferred. Similarly, those with bipolar conditions may not be able to utilise co-decision-making as an adult's delusions of grandeur or persecution during a manic phase will interfere with the co-decision-making relationship when it is most crucial.¹⁶¹

In those jurisdictions with existing supported decision-making agreements, the actual number of agreements in existence is unknown.¹⁶² Evidence regarding

¹⁵⁴ VLRC, above n 122, [7.80]; Kerzner, above n 53, 35.

¹⁵⁵ Kerzner makes this point in the Alberta context referring to problems it may create for those with intellectual disabilities: Kerzner, above n 53, 35. See also community responses in VLRC, above n 6, [8.49].

¹⁵⁶ Terry Carney, 'Challenges to the Australian Guardianship and Administration Model?' (2003) 2 *Elder Law Review* 11, 8 (noting the significance of private accommodation/aged care services in Australia). See also Tilse et al, above n 56, 103-4, noting the barriers to supported decision-making in residential aged care facilities.

¹⁵⁷ Tilse et al, above n 56, 104.

¹⁵⁸ Email from Kelly Cooper to Shih-Ning Then, 12 April 2012. See also comments by Michelle Browning, 'Report by Michelle Browning 2010 Churchill Fellow: To Investigate New Models of Guardianship and the Emerging Practice of Supported Decision-making' (Winston Churchill Memorial Trust of Australia, 2011), 24, that engaging the health and legal communities has proved challenging in Alberta and the UK. The VLRC has also acknowledged these challenges: VLRC, above n 6, [9.76]–[9.77].

¹⁵⁹ See Salzman, above n 3, 231; Carney, above n 156, 9; Tilse et al, above n 56, 104; Frolik, above n 57, 352–3.

¹⁶⁰ Tilse et al, above n 56, 106; Devi, Bickenbach and Stucki, above n 3, 263.

¹⁶¹ Email from Patrick McManus to Shih-Ning Then, 15 May 2012.

¹⁶² This is because these agreements are usually personal (not court appointed) and no requirement to register agreements exists.

co-decision-making orders is also limited. In 2010, Surtees reported that fewer than seven per cent of applications to the court were for co-decision-making orders, with a total of 30 applications over a span of nine years.¹⁶³ In Alberta, a total of 37 co-decision-making applications have been granted by the court since October 2009, with some guardianship orders being ‘re-issued’ as co-decision-making orders each year.¹⁶⁴

2 *Third-Party Enforcement*

A further practical issue is how to ensure third parties respect assisted decision-making; an issue linked with the need to educate third parties likely to come across such arrangements. Without such education, third parties will be less likely to accept decisions made via an assisted decision-making paradigm. Paradoxically, Yukon has reported that attempts to make supported decision-making forms accessible and understandable to adults who may wish to use them have raised fears that third parties may refuse to recognise them as they do not look ‘official enough’.¹⁶⁵

Establishing registers of supported or co-decision-making arrangements to be held by a government office as proposed by the VLRC may help with such reluctance, but has significant resourcing implications.¹⁶⁶

3 *The Complexity of the Supporter and Co-Decision-Maker Role*

The roles of legally recognised supporters, and in particular co-decision-makers, are novel. Those taking on such positions will require education and guidance if they are to act successfully. This may not be easy; the concept of co-decision-making in particular is conceptually, legally and practically difficult to grapple with. This statement by the Victorian Public Advocate, while applicable to both roles, seems particularly apposite to co-decision-makers who have a greater role and influence in an adult’s decision-making.¹⁶⁷

It is important to not underestimate the difficulty of determining whether a person is capable of making a particular decision or the difficulty of assisting a person with a disability to make and communicate their decisions without influencing or interfering with the final decision and becoming a de facto decision-maker.

While it has been noted that no decision-making process is free from influence,¹⁶⁸ this does not diminish the danger of coercion or slipping unintentionally into de facto substituted decision-making without the proper authority to do so. This seems most likely where an appointed person lacks understanding of his or her role or when an adult’s decision-making ability begins to deteriorate.

¹⁶³ Surtees, above n 17, 92.

¹⁶⁴ Email from Patrick McManus to Shih-Ning Then, 15 May 2012. It was also noted that nine applications were currently in process.

¹⁶⁵ Email from Kelly Cooper to Shih-Ning Then, 12 April 2012.

¹⁶⁶ VLRC, above n 6, [9.101]–[9.103]. See also Carter, above n 70, 25.

¹⁶⁷ Carter, above n 70, 26. Gordon, above n 49, 74 also notes that it is an ‘immensely difficult task given the laudable human propensity to protect those perceived to be vulnerable from the exercise of their own poor judgment.’ See also Burningham, above n 9, 12.

¹⁶⁸ See Devi, Bickenbach and Stucki, above n 3, 255; Salzman, above n 3, 233, 237.

In addition, the conceptual novelty of a legally recognised ‘shared’ decision-making process arguably makes explanation of a co-decision-maker’s job even harder. It is difficult to produce a comparable decision-making paradigm that provides an appropriate analogy where other shared or joint decisions — as joint trustees or joint bank account holders — will involve two equal adults with full decision-making abilities. In supported and, to a much greater extent, co-decision-making models, it is a lopsided relationship.

Different adults can have very different decision-making styles in making choices (known as ‘metapreferences’) which include variances in the amount of information collected prior to decision-making, time taken to make a decision and use of intuition.¹⁶⁹ Supporters and co-decision-makers need to be mindful not to replace the adult’s decision-making method with their own preferred decision-making style.¹⁷⁰ Education and training of those proposing to act as supporters and co-decision-makers seems crucial to these models working as intended. In Yukon and Alberta, limited resources have been devoted to providing information and, where possible, adults and their supporters or co-decision-makers are contacted.¹⁷¹

Who will explain their role and educate them as to what is too much or little in this shared decision-making paradigm? How will they know when the adult’s capacity has diminished to the point where the co-decision-making arrangement no longer truly represents shared decision-making? These are difficult and decision-specific questions that place significant responsibility on co-decision-makers. Jurisdictions which plan to introduce such positions arguably have a responsibility to resource, educate and advise those who take on such roles appropriately.¹⁷²

4 *What Happens When No One is Available?*

Another pressing question is: what happens to people who have no support network and have no one suitable to act as supporters or co-decision-makers? This is particularly relevant in light of the fact that government entities like the Public Trustee or Public Advocate are often excluded from acting as supporters and co-decision-makers.¹⁷³ It seems the problem is quite common for a proportion of adults who might otherwise be eligible to participate in these legislative

¹⁶⁹ See also Jack Dowie, ‘The Role of Patients’ Meta-preferences in the Design and Evaluation of Decision Support Systems’ (2002) 5 *Health Expectations* 16, cited in Office of the Public Advocate South Australia, ‘Developing a Model of Practice of Supported Decision-making’ (Office of the Public Advocate South Australia in collaboration with the Julia Farr MS McLeod Benevolent Fund, June 2011) 14.

¹⁷⁰ Office of the Public Advocate South Australia, above n 54.

¹⁷¹ Email from Kelly Cooper to Shih-Ning Then, 12 April 2012; Email from Patrick McManus to Shih-Ning Then, 15 May 2012.

¹⁷² See also Devi, Bickenbach and Stucki, above n 3, 263, who provide a number of examples where it is not clear how supported decision-making models will operate.

¹⁷³ See, eg, *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, ss 5, 15; *Representation Agreement Act*, BC 1996, c 405, s 5(1)(b). See also VLRC, above n 6, [9.65]–[9.67]. This is consistent with the suggestion by Glass that government and non-government bodies should not be providing these roles where family and friends are available and appropriate: Glass, above n 45, 32. Other jurisdictions may also exclude other categories of persons: see, eg, *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 7; *Representation Agreement Act*, BC 1996, c 405, s 5(1).

schemes.¹⁷⁴ In South Australia, where a small-scale, non-statutory scheme of supported decision-making arrangements is being undertaken, strategies to deal with this problem under consideration include programs that develop social networks for people and the use of ‘volunteer’ supporters.¹⁷⁵ If no legislative solution is provided (and adequately funded) for those without appropriate existing social supports, this will essentially deny these legal options to a significant number of individuals who could benefit.¹⁷⁶

Kerzner suggests that government should have a role to play;¹⁷⁷ however, if such a responsibility exists, how should this be actioned? Potential models include governments directly providing such supports (that is, utilising government funded social workers, health care workers, etc) or funding non-governmental organisations to provide such services.¹⁷⁸

V Conclusion

There is little doubt that the goals of assisted decision-making are laudable and consistent with the current trend in guardianship legislation to maximise the autonomy of adults with diminishing capacity. However, this article has demonstrated that, depending on how assisted decision-making is implemented in legislation, recognising these models legally can lead to a number of conceptual, legal and, in all probability, practical problems.

To date, discussion of the different assisted decision-making models and the concepts underpinning them has been relatively scarce, with literature often taking a broad-brush approach in discussing potential problems. This article has situated the new impetus for assisted decision-making within the historical social and legal context of guardianship laws to inform a thorough discussion of its nature and potential. Informed by this exegesis and by analysing international developments, this article has identified and analysed key legal, conceptual and practical issues which jurisdictions wishing to implement assisted decision-making models should consider in the context of their own guardianship regimes.

Given the unanswered questions about how existing systems operate in practice, empirical research in this area is required to assess how well assisted decision-making models work and whether the aims of legislation are being achieved.

¹⁷⁴ See, eg, Office of the Public Advocate South Australia, above n 54; Email from Kelly Cooper to Shih-Ning Then, 12 April 2012.

¹⁷⁵ Office of the Public Advocate South Australia, above n 54.

¹⁷⁶ Note that this has been an issue in the context of appointing substitute decision-makers, particularly in the United States: see Carney, above n 156, 4.

¹⁷⁷ Kerzner, above n 53, 59: ‘A complete supported decision-making scheme also requires that the government assume responsibility for providing supports and assisting in the development of support networks’.

¹⁷⁸ See also Carney, above n 156, 2–3.