

**OFFICE OF THE
PUBLIC ADVOCATE**

Supported Decision-Making: Options for Legislative Recognition

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Contact:
John Chesterman
Manager, Policy and Education
Ph: 96039567
Email: john.chesterman@justice.vic.gov.au

Executive Summary

This paper seeks to contribute to the discussion about how Victoria's guardianship laws might facilitate and enable supported decision-making. The paper follows on from, and should be read in conjunction with, Barbara Carter's 'Supported Decision-Making: Background and Discussion Paper' (November 2009).¹ This paper does not consider the range of informal ways in which supported decision-making can be encouraged, but looks at the legislative models that might be used to encourage supported decision-making. The paper ends by suggesting that legislative amendment in two areas in particular warrants further consideration. The first area concerns enduring powers of attorney, and the Office of the Public Advocate (OPA) has already made an extensive submission on ways in which these instruments may better encourage supported decision-making. The second area concerns the creation of the category of co-decision-making orders, which would be another way in which supported decision-making might be encouraged. This paper is intended to help guide and facilitate discussion, and does not purport to be OPA's final position statement on supported decision-making.

The following observations are made in this discussion paper.

Observation 1. The case for legislating in Victoria to recognise representation agreements is not yet convincing. This observation is made in view of the existence of general powers of attorney and three kinds of enduring powers of attorney in Victoria, and the various calls that have been made in the current review of them for these instruments to allow greater scope for supported decision-making.

Observation 2. New guardianship legislation could enable the Victorian Civil and Administrative Tribunal (VCAT) to make a Co-Decision-Making Order where:

1. A person meets the criteria for guardianship; and
2. VCAT determines that the person has sufficient capabilities to be able to contribute significantly to any guardianship decisions that need to be made.

Both co-decision-makers would need to agree in making any decisions under the order. Failure to agree would provide grounds for the revocation of the order.

Introduction

When Victoria's current guardianship legislation was enacted in 1986 it led the field in its attempts to balance the rights of those who might be subject to guardianship orders, with the protection of those who were deemed to be in need of guardianship. Since then there have been a number of developments in the rights status of people with disabilities, foremost amongst them being the adoption in 2006 of the United Nations *Convention on the Rights of Persons with Disabilities* and the passage

¹ Barbara Carter, 'Supported Decision-Making: Background and Discussion Paper', available at http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2009/Supported_Decision_Making_Nov09.pdf.

through the Victorian parliament of the *Charter of Human Rights and Responsibilities Act 2006*. Both of these developments entrench the view that the substituted judgement involved in guardianship should only ever be adopted as a last resort.

One of the contemporaneous developments, especially in the international arena, has been the rise of supported decision-making as an alternative to guardianship and other forms of substituted judgement. Barbara Carter's companion paper documents this rise and the various possibilities encompassed by it. As Carter's paper highlights (pp. 18-19), the range of supported decision-making formats stretches from informal arrangements that need no legislative backing to more formalised representation agreements. These are to be contrasted with substitute decision-making arrangements, in which another person makes decisions for a person with a disability (which can occur through guardianship and administration orders and through the activation of enduring powers of attorney). As the paper makes clear, a range of supported decision-making practices are already possible within the parameters of existing legislation, and some of these require no legislative amendments since they simply exist as one of the routine ways in which people get assistance or information before they make a decision.

Moreover, even some of those practices which do fall within the purview of the guardianship legislation can be thought of as forms of supported decision-making. Indeed many of OPA's Advocate/Guardians would classify much of what they do as a form of supported decision-making. On this point it is worth noting that OPA's substitute decision makers are termed 'Advocate/Guardians' and not simply 'Guardians', which is demonstrative of the philosophical commitment to ensuring that the wishes of the people with whom they work are sought out and, where possible, acted upon. It is also worth noting that Victoria's guardianship laws are currently being reviewed by the Victorian Law Reform Commission. OPA will, in its contribution to this review, be seeking further to constrict the situations in which guardianship orders are able to be made.

The review of Victoria's guardianship legislation provides an opportune time to consider the ways in which legislative reform might further encourage supported decision-making. This paper considers a number of prominent options, including powers of attorney, representation agreements, supported decision-making authorisations and co-decision-making orders.

The purpose of this paper is not to detail the ways in which increased use of informal supported decision-making can be encouraged, but to consider some legislatively recognised forms of supported decision-making in order to suggest improvements to the law in Victoria.

Diagram 1. Possible Supported and Substitute Decision-Making Model
(Green areas require legislative amendment)

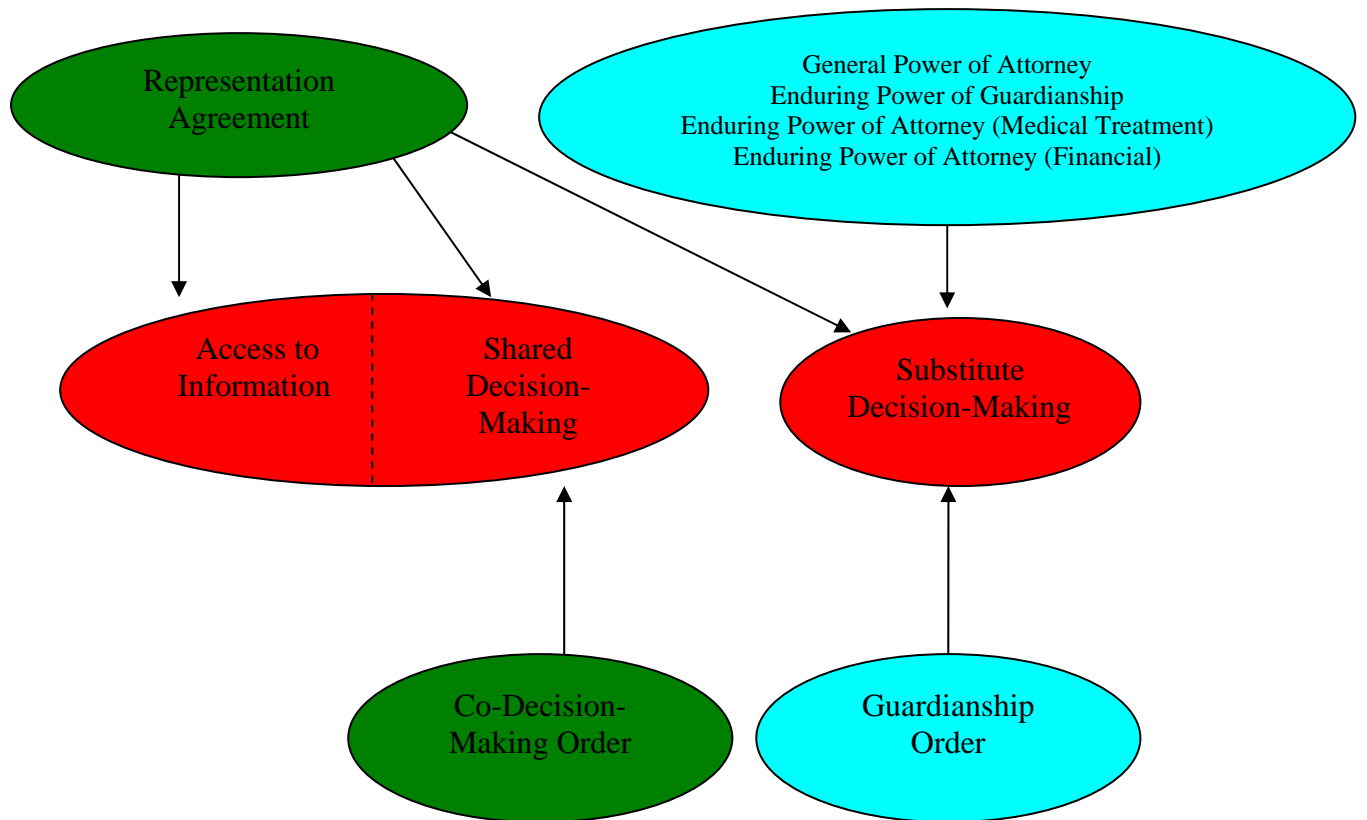
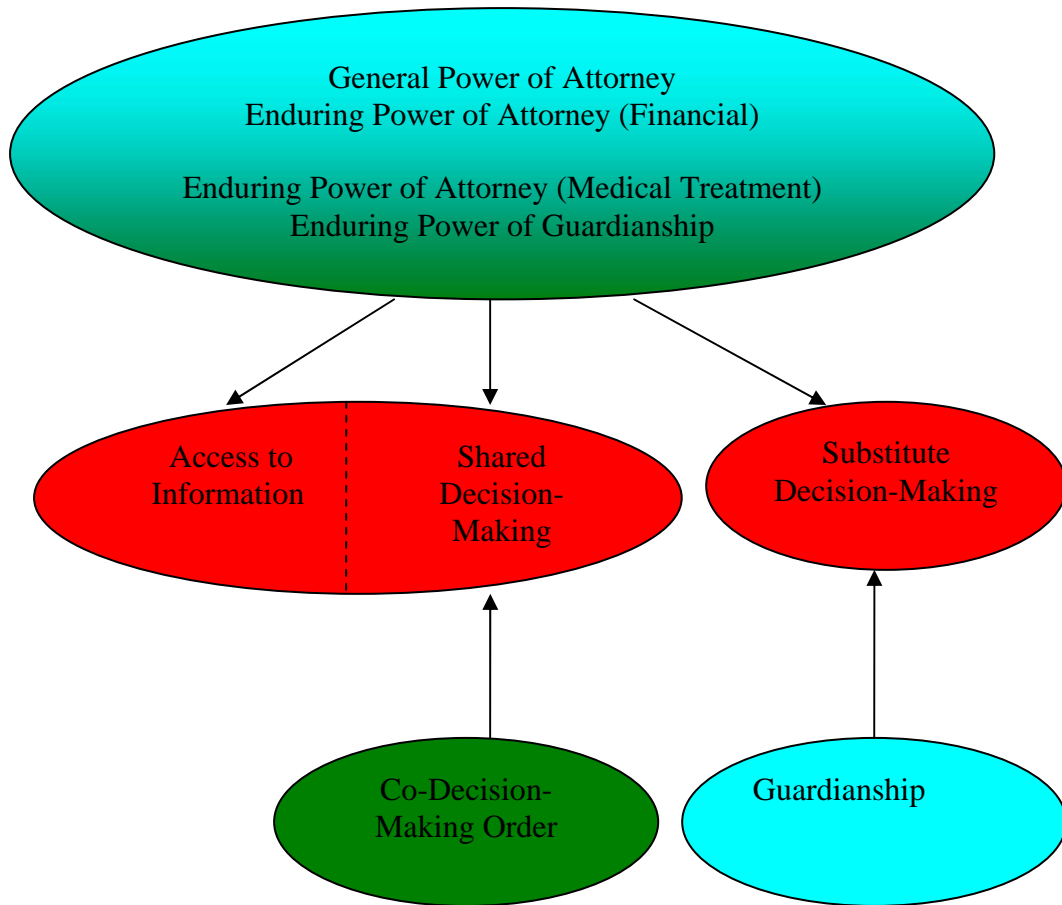


Diagram 2. Possible Supported and Substitute Decision-Making Model
(Green areas require legislative amendment)



1. Enduring Powers of Attorney

In addition to the existence of general powers of attorney, which cease to operate on the donor's loss of capacity, Victorian law currently regulates the making of three different kinds of enduring power of attorney: the Enduring Power of Attorney (Financial), the Enduring Power of Attorney (Medical Treatment) and the Enduring Power of Guardianship. These three enduring powers of attorney enable a person to appoint someone to act for them in the event that they lose capacity to make decisions for themselves, though the Enduring Power of Attorney (Financial) can operate before this occurs. Enduring powers of attorney are routinely viewed as instruments that permit the making of substituted judgements, albeit that those judgements are made by people chosen by the donors of the power.

The Enduring Power of Attorney (Financial) can be used prior to a loss of capacity, and as such is a document that can be used to facilitate supported decision-making (which is why it is coloured blue in Diagram 2). It can be used by an attorney to gather information which can then inform the donor's decision-making, just as it can involve the attorney in assisting in the actual decision-making process. It is difficult to know how much use is made of the Enduring Power of Attorney (Financial) in this manner. The anecdotal view that comes to OPA through calls to the advice service is that the Enduring Power of Attorney (Financial) is often only used when the donor lacks capacity to make decisions, or when the donor has mobility problems that prevent, for instance, them easily being able to go to the bank. Clearly there is greater scope for the Enduring Power of Attorney (Financial) to be used as a tool of supported decision-making, and this does not necessarily require legislative change.

The other two enduring powers of attorney – the Enduring Power of Attorney (Medical Treatment) and the Enduring Power of Guardianship – are currently not able to be used as instruments of supported decision-making, since they are only operable after a loss of capacity. The legislation regulating powers of attorney is currently under review in Victoria by the Victorian Parliament's Law Reform Committee. OPA has sought significant reform of power of attorney laws in its extensive submission to the Victorian Law Reform Committee, and in oral evidence before the committee. These reforms would result in enduring powers of attorney being able to be used much more readily than is presently possible to facilitate supported decision-making.²

Key amongst these proposed changes, for present purposes, are two calls for reform:

1. That all enduring powers of attorney should be able to be activated from the date of signing (rather than the date of incapacity).
2. That the views of those who sign general and enduring powers of attorney (whom we have called to be labelled 'principals') should be required to be

² The Submission by the Victorian Office of the Public Advocate to the Victorian Law Reform Committee's Inquiry into Powers of Attorney can be found at: <http://www.parliament.vic.gov.au/lawreform/inquiries/Powers%20of%20Attorney/Submissions/POA9%20-%20Office%20of%20the%20Public%20Advocate.pdf> and at <http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2009/OPA%20Powers%20of%20Attorney%20submission%204%20August%202009.pdf?phpMyAdmin=fe8bb73b8ddef429ba268102bddcf16c>. The transcript of John Chesterman's evidence before the committee can be viewed at <http://www.parliament.vic.gov.au/lawreform/inquiries/Powers%20of%20Attorney/Transcripts/2009-10-22%20OPA.pdf>.

given greater weight than currently they are, in decisions made under those instruments.

These changes, if adopted, would more readily enable enduring powers of attorney to exist as tools of supported decision-making. For instance, if the call for immediate activation of enduring powers of attorney were accepted, then attorneys would be able to gather information on a principal's behalf without necessarily then making decisions for the principal. It would only be when principals were demonstrated to have lost capacity that they would no longer be able to make their own determinations. (Even then, their views would still need to be given serious consideration.) This suggested change would give rise to potential conflicts between principals' and attorneys' decisions, though that potential already exists in relation to any Enduring Power of Attorney (Financial) that is activated prior to the donor's incapacity. The power to revoke the instrument does help to guard against this.

The potential for enduring powers of attorney to be utilised as instruments of supported decision-making will be further considered at the end of this paper. The next section, however, considers various other reforms that could be made to encourage supported decision-making.

2. Supported Decision-Making through Representation Agreements and Authorizations

The least invasive end of legislatively recognised supported decision-making comes in the form of agreements that enable supporters to access information and thereby assist in the making of decisions.

The term 'representation agreement' can cover a range of practices, from entitling a supporter to access a person's otherwise private records, to actually enabling substitute decision-making (as is the case in British Columbia).

Under Alberta's *Adult Guardianship and Trusteeship Act 2008*:

- A person may authorize another person to have access to their private documents and to assist them to make decisions through the use of a 'supported decision-making authorization' (section 4).
- The test for the validity of an authorization (section 4(1)) is simply that the adult 'understands the nature and effect' of it.
- Decisions made with the assistance of an authorisation are deemed to have been made by the person (not the supporter), and the supporter retains no liability for decisions carried out in this way (sections 6 and 10).
- It is lawful not to recognise decisions made in this way if there are 'reasonable grounds' for suspecting 'undue influence' (section 6(2)).
- The Public Guardian and the Public Trustee are specifically prevented (section 5) from fulfilling the role of supporter.
- Only 'personal matters' can be covered, which extends to health care, accommodation, access to people, social participation, employment and non-financial legal matters (sections 1 and 3).

Similarly, the Yukon enables supported decision-making agreements to be made under the *Decision Making, Support and Protection to Adults Act*. Under this legislation:

- ‘Supported decision-making agreements’ are said to be appropriate when the person in question is ‘substantially able to manage’ his or her affairs, ‘but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired’ (section 4(a)).
- The Act enables supported decision-making agreements to be signed whereby an ‘associate decision-maker’ is empowered ‘to assist the adult to make and express a decision’ and ‘to assist the adult to obtain relevant information’ (section 5(1)).
- The adult must ‘understand the nature and effect of the agreement’ for it to be valid (section 6).

Under current laws in Victoria, general and enduring powers of attorney enable a person to access otherwise private records. The two main differences between these and representation agreements (or supported decision-making authorisations) are that:

1. The Enduring Power of Guardianship and Enduring Power of Attorney (Medical Treatment) are only operative when the donor no longer has capacity.³
2. General and enduring powers of attorney enable the attorney (or agent, or enduring guardian) to substitute their decision, whereas the kind of representation agreements mentioned in this section do not.

As mentioned earlier, OPA is seeking amendments to the legislation governing enduring powers of attorney which would make them actionable immediately upon signing and which would require attorneys to have greater obligations to ascertain the views of principals.

If these changes are adopted then the only significant difference between the representation agreements (and supported decision-making authorisations) considered in this section and enduring powers of attorney will be that enduring powers of attorney do still provide an avenue for substituted judgement. At the same time, however, these changes would mean that general and enduring powers of attorney could be instruments that simply enable information to be gathered which then assists a principal in making a decision.

Another factor that would need to be considered here is the potential for confusion that would arise were representation agreements to be created alongside enduring powers of attorney. This is a further consideration that will need to be borne in mind before any move should be made to create the kind of representation agreements and authorizations mentioned here.

³ The Enduring Power of Guardianship comes into force when the donor loses the ability ‘to make reasonable judgements’, and the Enduring Power of Attorney (Medical Treatment) comes into force when the person ‘becomes incompetent’. See Submission by the Victorian Office of the Public Advocate to the Victorian Law Reform Committee’s Inquiry into Powers of Attorney, p. 13.

3. Substitute Decision-Making via Representation Agreements

A number of jurisdictions provide for forms of supported decision-making which actually also authorise the making of substitute decisions. The agreements in this category share much in common with powers of attorney.

The Yukon's *Decision Making, Support and Protection to Adults Act* enables the signing of 'representation agreements' which permit the making of substitute decisions.

- Representation agreements are said to be appropriate where a person 'is capable of managing most or all of their affairs under some circumstances but has difficulty doing so under other circumstances' (section 14(b)).
- The Act permits a person to sign a representation agreement allowing 'two or more' people to access otherwise private records and 'to make a limited range of daily living decisions regarding the adult's personal or financial affairs' (sections 14 and 24).
- The formal requirements for a valid representation agreement include the requirement that the agreement be witnessed by a 'designated witness' (section 17) and that the person entering the agreement is able to 'understand the nature and effect of the agreement' (section 15).
- A representation agreement ceases to have effect if the person loses the capacity necessary to make a representation agreement (section 19).

A more extensive form of representation agreement, which also permits substitute decision-making, exists in British Columbia under the *Representation Agreement Act*. Under that Act:

- An adult may appoint 'another adult' or the Public Guardian and Trustee, amongst others, to be a representative (section 5).
- As section 7 specifies: 'In a representation agreement an adult may authorize his or her representative to help the adult make decisions, or to make decisions on behalf of the adult, about any or all of the following:
 - (a) the adult's personal care, including, for example, where and with whom the adult is to reside;
 - (b) routine management of the adult's financial affairs ...
 - (c) major health care and minor health care [with some exceptions] ...'
- A representative can also consent to the placement of the adult in some care facilities (section 7(2)).

The presumption in the Act (section 3) is that a person has capacity to enter a representation agreement, and a representation agreement continues to be in force even though a person subsequently loses the capacity necessary to enter a representation agreement (section 9.1). On that score, section 8 specifies that:

'An adult may make a representation agreement ... even though the adult is incapable of

- (a) making a contract, or
- (b) managing his or her health care, personal care, legal matters, financial affairs, business or assets.'

The decision on competence is made after weighing up several factors, including (section 8(2)):

- ‘(a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others ...
- (d) whether the adult has a relationship with the representative that is characterized by trust.’

Thus one difference between this particular form of representation agreement and an enduring power of attorney is that the capacity test is more easily met for the representation agreement. While the test for most enduring powers of attorney (and other forms of representation agreements and authorizations) is that the person understands the nature and effect of the document, the British Columbia representation agreement does not require this level of knowledge. On this point, OPA would want to register its concerns about legislation that permitted a person to enter an agreement that they might not understand. This would present obvious opportunities for abuse and would require extensive monitoring.

A higher order of powers is also able to be included in a British Columbia representation agreement (section 9), including the power to:

- ‘(a) physically restrain, move or manage the adult ... when necessary and despite the objections of the adult;
- (b) give consent, in the circumstances specified in the agreement, to specified kinds of health care, even though the adult is refusing to give consent at the time the health care is provided;
- (c) refuse consent to specified kinds of health care, including life-supporting care or treatment ...’

The coverage of these higher order powers in a representation agreement requires (section 9(2)) the person to have consulted a lawyer or a member of ‘a prescribed class of persons’ who must complete a ‘consultation certificate’. Finally, the legislation makes use of ‘monitors’ (section 12) as one of its ways of guarding against abuse.

The representation agreements in this section are comparable to powers of attorney, in that they allow for substitute decision-making. The Yukon’s representation agreements do not endure beyond their makers’ loss of capacity, and as such resemble general powers of attorney. The British Columbia version of the representation agreement does endure beyond its maker’s loss of capacity, and therefore resembles an enduring power of attorney. In addition to its lower capacity threshold, the key difference between a British Columbia representation agreement and Victoria’s Enduring Power of Attorney (Medical Treatment) and Enduring Power of Guardianship, is that these enduring powers of attorney presently only operate when the person in question lacks capacity, while the representation agreement is operative prior to a loss of capacity. However, if Victoria’s enduring power of attorney laws are amended as OPA has suggested, then this difference will no longer exist.

Observation 1. The case for legislating in Victoria to recognise representation agreements is not yet convincing. This observation is made in view of the existence of general powers of attorney and three kinds of enduring powers of attorney in Victoria, and the various calls that have been made in the current review of them for these instruments to allow greater scope for supported decision-making.

4. Co-Decision Making

One final possibility, which would have the authority of a guardianship order but which is not entirely an instance of substitute decision-making, is a co-decision-making order.

Alberta's *Adult Guardianship and Trusteeship Act 2008* enables a 'co-decision-making order' to be made where:

- An 'adult's capacity to make decisions about the personal matters that are to be referred to in the order is significantly impaired', and 'the adult would have the capacity to make decisions about the personal matters that are to be referred to in the order if the adult were provided with appropriate guidance and support' (section 13 (4)(a)).
- The adult must agree with the order (section 13(4)(c)).
- A 'capacity assessment' must be lodged before an order can be made (section 13(2)).
- The co-decision-making orders can only be made in relation to 'personal matters' (section 12) and the order can specify the particular matters to be covered, such as accommodation, access to persons and so on (section 17).
- Where co-decision-makers cannot agree, it is implied that the assisted person's view holds sway. Co-decision-making orders can end with the simple filing of a 'withdrawal of consent' (section 17(8)-(9)).
- Any 'withdrawal of consent' must be lodged with the Public Guardian (who then has a role to determine whether follow-up action is needed) (section 17(8)-(12)).
- Co-decision-makers are exempted from liability where they act 'in good faith' (section 23).
- The Public Guardian and the Public Trustee are specifically prevented (section 15) from being co-decision-makers.

The key challenge from a legislative point of view would be to define the level of capacity needed before a person could be the subject of a co-decision-making order. At present, while capacity assessments are notoriously difficult to make in some circumstances, Victoria's laws in relation to guardianship and enduring powers of attorney allow little flexibility so far as capacity is concerned. Either a person has capacity or they do not. The creation of a co-decision-making order would involve a re-working of this paradigm. Barbara Carter has referred to this in her paper (p.18) as placing emphasis on 'competent decision making' rather than on the competence of the decision maker. There is much to be said for this development. There are many situations where a person is able and willing, for instance, to express preferences, but where the existence of a disability curtails the person's ability to weigh up the range of consequences that the decision might bring about, or inhibits their ability to

communicate or carry out their decision. The creation of a co-decision-making order would in effect enable a supporter to act as an assistant and safety mechanism without subjecting the person to the substituted judgement of another.

In attempting to draft the criteria for a co-decision-making order, the Alberta example above is quite vague. A co-decision-making order can only be made where there is significant impairment in the person's decision-making, and where 'the adult would have the capacity to make decisions about the personal matters that are to be referred to in the order if the adult were provided with appropriate guidance and support'. This suggests the person's capacity would be increased by the provision of support.

OPA believes a better way might be to state 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.

Observation 2. New guardianship legislation could enable the Victorian Civil and Administrative Tribunal (VCAT) to make a Co-Decision-Making Order where:

1. A person meets the criteria for guardianship; and
2. VCAT determines that the person has sufficient capabilities to be able to contribute significantly to any guardianship decisions that need to be made.

Both co-decision-makers would need to agree in making any decisions under the order. Failure to agree would provide grounds for the revocation of the order.

Conclusion

This paper is an attempt to facilitate and focus discussion on how Victorian legislation might better incorporate important developments in supported decision-making. Any comments or suggestions are welcome to be made to John Chesterman at the contact points mentioned on the front of this paper.