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# The impact of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on Victorian guardianship practice

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## ABSTRACT

**Purpose:** Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) emphasises full and equal legal capacity of all citizens to participate in decisions. This paper examines whether the principles of Article 12, also reflected in other reform documents, were evident within 12 guardianship hearings conducted in Victoria, Australia from 2001 to 2016 involving adults with cognitive disability. The issues this study raises resonate loudly across the globe as multiple signatory nations to the CRPD grapple with the complexities of implementing Article 12.

**Methods:** Reports of VCAT decisions with written reasons of Guardianship List hearings from 2001 to 2016 were selected from the Australasian Legal Information Institute site and analysed thematically.

**Results:** Thematic analysis of proceedings revealed three consistent trends. Firstly, a presumption of incapacity based on disability excluded Proposed Represented Persons (PRP) from involvement in decision-making. Secondly, external perceptions of PRPs best interest were dominated by safeguarding concerns and conflict between supporters. Finally, in multiple cases, although a PRP's preference had been established, it was considered immaterial to the final decision.

**Conclusions:** The paper concludes with a promising discussion of the new Guardianship and Administration Act 2019 (Vic), which came into force on 1 March 2020, and recommendations for guardianship practice both locally and internationally.

## ARTICLE HISTORY

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## KEYWORDS

Guardianship; substituted decision-making; supported decision-making; United Nations Convention on the Rights of Persons with Disabilities; disability; cognitive disability; disability rights; disability law

## ► IMPLICATIONS FOR REHABILITATION



- Legal capacity should be recognised as inherent in all people, and therefore decision making incapacity should not be assumed based on a person's cognitive and/or communication disability;
- The supported decision making mechanisms, born from Article 12 of the CRPD, that facilitate acknowledgment, interpretation and acting upon a person's expression of will and preference need to be recognised and promoted within the context of Guardianship proceedings and by health professionals when assessing decision making capacity of people with cognitive disability;
- Significant knowledge and attitudinal changes are required within the Tribunal and incorporated into the practice of health professionals informing the Tribunal, in order to counter many conceptual underpinnings embedded within current guardianship legislation across the globe;
- Ascertaining the will and preference of the proposed represented person should be prioritised by Guardianship tribunal members' rather than the management of conflict between interested parties.

## Introduction

The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 13 December 2006. The CRPD was the first human rights treaty adopted in the twenty first century, and arguably, the most rapidly negotiated [1]. The CRPD embodies a paradigm shift away from a social welfare response to disability to one that is firmly entrenched in human rights. Article 12 of the Convention arguably provides the strongest example of this paradigm shift [2]. Article 12 requires signatory nations to recognise that legal capacity is a universal construct, and that people with disability enjoy legal capacity on an equal basis with others. Additionally, it

mandates signatory nations to develop appropriate mechanisms to support individuals to exercise this legal capacity. The Convention promotes supported decision-making (in lieu of substituted decision-making) as one such mechanism.

In Australia, as in most countries around the world, people with significant cognitive impairment are routinely subjected to substitute decision-making mechanisms. This is despite Australia's ratification of the Convention on the Rights of Persons with Disabilities, in particular Article 12 [3]. Engaging with this context, marked by several policy and legislation changes, this study sought to explore the effect of this discursive shift on the Victorian Civil and Administrative Tribunal (VCAT) between 2001 and 2016. In this paper, the authors outline this study's findings.

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Although coming from an Australian perspective, these findings contribute to a global conversation about the role of Article 12 of the CRPD in the lives of people with cognitive disability and in the administrative systems designed to support them.

### ***Guardianship, self-determination and article 12 of the CRPD***

Concepts relating to self-determination have played a prominent role in the discourse of human rights since 1948, when the Universal Declaration of Human Rights enshrined the concept into international human rights law [4]. The disability rights movement of the 1970s further developed the focus on self-determination for people with disability [5]. However, despite gains for those with physical and milder cognitive disability, opportunities for self-determination were, and continue to be, restricted for people with more severe cognitive disability [6]. The literature points to several reasons for this restriction, including a lack of opportunity for choice [7], a view that a person's ability to make and communicate decisions is solely dependent on cognitive functioning, [8], negative attitudes toward disability [9], and a lack of responsiveness to expressions of will and preference [10,11]. As a result, people with cognitive disability are often viewed as requiring the appointment of formal (State-appointed) or informal substitute decision-makers, usually in the form of family members or paid advocates. These substitute decision-makers are given the legislative power to act on behalf of the person concerned, generally using a best interest framework, where a determination is made through the application of an objective assessment of the "best interests" of the person concerned.

However, both substitute decision-making and its attendant "best interest" process are challenged by Article 12 of the United Nations' Convention on the Rights of Persons with Disabilities [2]. The United Nations' General Assembly adopted the CRPD in December 2006 and it was entered into force in May 2008. Article 12 requires signatory nations to rethink domestic laws, offering new ways of thinking about capacity, recognising that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" [2]. From this premise, Article 12 stipulates the universal right of all humans to receive appropriate support to make decisions. This support, referred to as "supported decision-making" has emerged as an alternative paradigm, support practice and, in some jurisdictions, legal structure (e.g., Peru), to be implemented instead of substitute decision-making. This is consistent with signatory nations' obligations under Article 12 of the CRPD [12,13].

Article 12 presents a clear challenge to existing systems of guardianship for people with cognitive disability. Multiple jurisdictions, amongst them, Australia<sup>1</sup>, Canada, Egypt, Estonia, Georgia, Kuwait, Netherlands, Norway, and the Arab Republic of Syria, have responded to this challenge by retaining interpretative declarations and reservations relating to Article 12. The wording of these declarations and reservations are relatively consistent across these jurisdictions and, as pointed out by Cavaino [14], appear to demonstrate that the States holding them believe that their domestic laws are incompatible with Article 12. Cavaino's assertion is reflected in Estonia's declaration, which states:

The Republic of Estonia interprets article 12 of the Convention as it does not forbid to restrict a person's active legal capacity, when such need arises from the person's ability to understand and direct his or her actions. In restricting the rights of the persons with restricted active legal capacity the Republic of Estonia acts according to its domestic laws [15].

Such an interpretative declaration enables the nation declaring it, to retain laws that use substituted decision-making where a person is deemed by the State to have limited decision-making capacity. Referring to such declarations, McSherry [16] claims that while a nation does not recognise the universality of Article 12 (that is, that it applies to all people regardless of level or type of disability), it is not acting within the spirit of the Convention. Reinforcing this view, in its review of Australia's progress in 2013, the United Nations monitoring body for the CRPD, the Committee on the Rights of Persons with Disabilities, articulated that it was:

...concerned about the possibility that the regime of substitute decision-making will be maintained and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity. The Committee recommends that the State party [Australia] effectively use the current inquiry [by the Australian Law Reform Commission] to take immediate steps to replace substitute decision-making with supported decision-making and that it provide a wide range of measures which respect a person's autonomy, will and preferences and are in full conformity with article 12 of the Convention ... [17]

The UN Committee on the Rights of Persons with Disabilities has reiterated its concerns in its recent consideration of the combined second and third periodic reports of Australia at its 499th and 500th meetings, held on 12 and 13 September 2019 [18]. The Committee stated specific concerns around "... the lack of progress to review and withdraw the interpretive declarations on articles 12, 17 and 18 [and recommends Australia] Review and withdraw the Interpretative Declarations on articles 12, 17 and 18 of the Convention" [18]. The Committee's concerns relating to declarations and reservations relating to Article 12 are not only focused on Australia, but all jurisdictions that have similar declarations and reservations in place. This concern is not only exemplified in the Committee's recent response to Australia but in the explicit commendation it gave to Great Britain and Northern Ireland for that State's withdrawal of its reservation to article 12 (4) of the Convention in 2017 [19].

### ***The evolution of guardianship practice in Victoria***

Victoria is a one of six states and two territories that comprise the Australian federated system. Each State and Territory has the authority to determine its own legislation in relation to legal capacity and decision-making. Although Victoria has been adopted as the focus for this study, the findings have clear application to signatory nations to the CRPD, that continue to implement substitute decision-making for people with cognitive disability through mechanisms such as guardianship.

The Parliament of Victoria enacted the Guardianship and Administration Act 1986 (Vic) in 1986 [20]. This legislation considered ground breaking for the time, was introduced to allow for the appointment of a substitute decision-maker to make personal, medical, and financial decisions for people deemed to have impaired decision-making capacity [20]. The introduction of this law occurred against a backdrop of increasing deinstitutionalisation for people with intellectual disability, as well as a growing international movement towards recognising human rights for people with disability.

Since its promulgation, a number of amendments have been made to the Guardianship and Administration Act 1986 [20]. These included an amendment to Section 22 in 2006 to include a requirement to consider the wishes of the proposed represented person, as far as they could be ascertained, when determining if a guardian was needed [21]. It is not clear if this amendment was made in response to the development of human rights

instruments such as the CRPD, however, it does reflect an attempt to include the proposed represented person (PRP) in the guardianship process to a greater extent.

In 2012, the Victorian Law Reform Commission (VLRC) released its final report of its review of Victoria's guardianship laws along with its recommendations for new laws that reflected "contemporary thinking about people with impaired decision-making ability and which are designed for the many different groups of people who now use these laws" [22]. The report recommended that, "A new single statute should be created to provide for supported decision-making and substitute decision-making for people with impaired decision-making ability" [22]. In 2014, the Australian Law Reform Commission (ALRC) released its report: Equality, Capacity and Disability in Commonwealth Laws [23]. In this report, the ALRC introduced the idea of positions of "supporter" and "representative" to assist people who need decision-making support.

Recommendations from both the VLRC [22] and ALRC [23] reports are reflected in the recent Guardianship and Administration Act 2019 (Vic) [24], which came into effect 1 March 2020. Replacing the 1986 Act, the new Act introduces a new category of guardianship whereby the VCAT member can appoint a supportive guardian for personal matters or supportive administrator for financial matters.

## Materials and methods

This paper describes a research project situated within the Australian jurisdiction of Victoria. This project was designed to examine if, and if so how, the discourses and considerations expressed in guardianship reform and policy are reflected within guardianship hearings of VCAT over a 15-year period, 2001–2016. This time period was chosen as it covered the multiple legislative and policy changes in guardianship practice within Victoria over the past 20 years.

The research was guided by the following research questions:

1. What are the key drivers to decisions made by VCAT regarding guardianship for people with severe cognitive disability between 2001 and 2016?
2. How have the key drivers to decisions made by VCAT evolved over this period?
3. To what extent is a person's will and preference responded to (acknowledged, interpreted and acted on) in the process of guardianship hearings over this period?

## Sample

Reports of VCAT decisions with written reasons of Guardianship List hearings from 2001 to 2016 are publicly available through the Australasian Legal Information Institute site [25]. It is important to note that while all parties to Guardianship cases at VCAT are provided with reasons for final decisions, not all decisions are published in writing. The second author read all of the published proceedings from 2001 to 2016 to identify guardianship proceedings that fit the selection criteria.

Cases were selected if they were heard between 2001 and 2016 (inclusive) and involved people with severe cognitive disability. For the purpose of this study, a person with severe cognitive disability was defined as someone with significant cognitive impairment as a result of a lifelong intellectual impairment or an acquired cognitive impairment such as dementia or traumatic brain injury. A person with severe cognitive disability is likely to

have difficulty using and understanding formal or symbolic language (synonymous with "informal communicators") and is frequently considered to have limited decision-making capacity [26]. Twelve cases were identified, five prior to the amendments to the Guardianship and Administration Act in 2006 and the drafting of the Victorian Charter of Human Rights and Responsibilities Act (2006) in the same year. In all but one case<sup>2</sup> the proposed represented persons (PRPs) were given unique identifiers by VCAT to protect their identities. Demographic information about the PRPs, including whether their disability was lifelong or acquired can be found in Table 1. The hearings were related to both new applications for guardianship and the continuation of current guardianship arrangements.

## Analysis

Consistent with an interpretative research methodology, the transcripts of the proceedings of the selected Guardianship List cases were treated as "texts". These are meaningful phenomena that, because they are coherent, communicative and cohesive, enable analysis of their inherent themes to reveal social practice [33]. Transcripts were imported into NVivo before being coded and thematically analysed. Authors 1 and 2 independently coded emerging themes from the data before comparing and developing a coding framework. Authors 1 and 2 then independently applied this coding framework to the data set. They then collaboratively reviewed and organised these codes into basic themes

Table 1. Demographic information from VCAT cases.

VCAT Case no.	Year	Sex	Age group	Disability type
VCAT 12 [27]	2002	F	50–59	Lifelong cognitive disability
VCAT 121 [25]	2003	F	60–69	Acquired cognitive disability
VCAT 1880 [28]	2004	M	40–49	Acquired cognitive disability
VCAT 779 [24]	2005	F	50–59	Acquired cognitive disability
VCAT 1300 [29]	2007	M	80–89	Acquired cognitive disability
VCAT 2219 [30]	2009	F	80–89	Acquired cognitive disability
VCAT 2430 [23]	2009	F	20–29	Lifelong cognitive disability
VCAT 2442 [31]	2011	M	80–89	Acquired cognitive disability
VCAT 1232 [32]	2012	F	40–49	Lifelong cognitive disability
VCAT 958 [33]	2015	M	Not stated	Lifelong cognitive disability
VCAT 1150 [26]	2016	M	20–29	Lifelong cognitive disability
VCAT 1259 [34]	2016	M	40–49	Lifelong cognitive disability



Figure 1. Organising themes and sub-themes.

using thematic network analysis [33]. Thematic network analysis is a tool that involves the creation of web-like illustrations that serve to summarize and present the main themes in a data set. [Figure 1](#) is an example of an illustration generated through thematic network analysis for this study. It illustrates how codes for the original organisation of the data were assembled in basic themes, which were then arranged into three organising themes.

## Results

The main organising themes identified were: (1) perceived incapacity of the PRP, (2) best interests of the PRP and (3) consideration of will and preference of the PRP. A number of sub-themes were identified within these three organising themes. The themes and sub-themes are represented in [Figure 1](#).

### ***Organising theme: perceived incapacity of the proposed represented person***

This theme, constructed from the two sub themes of disability and communication, relates to judgements about the capacity of the PRP to participate in the Guardianship hearing process and to make decisions about his or her life more broadly.

#### ***Disability***

During the study period (2001–2016) in Victoria, a Guardian could be appointed if a proposed represented person had a disability and “[was] unable by reason of that disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances” [20]. The Guardianship and Administration Act 1986 does not offer any criteria by which to assess the presence of disability in a PRP. In all 12 cases included in this study, the presiding Tribunal member was satisfied that the PRP had a disability. The nature and extent of disability was largely determined from advice from medical practitioners as illustrated by a tribunal member, who stated:

Dr [name omitted] notes that there have been many assessments over the years. Dr [name omitted]’s diagnosis is that YWR has advanced severe intellectual disability, is non-verbal, unable to follow simple instructions, and has no insight. The Tribunal accepts this evidence and finds that YWR has a disability [35]. Not only was the determination of “disability” made by a third party such as a medical practitioner, the determination was largely made without consultation with the PRP. In the 12 cases included in this study, VCAT members met three of the PRPs in person and, of these, only one was present at their Guardianship hearing. In all other cases, Tribunal members relied entirely on reports from medical professionals for confirmation of the presence of disability. The three cases in which members sort consultation from the PRP occurred across the time period of cases examined, both pre and post the 2006 amendment to the Guardianship and Administration Act (1986) and Australia’s signing and ratification of the UNCRPD in 2008. Both these instruments explicitly require a focus on and engagement with the PRP. This indicates that VCAT members’ decisions to engage or not to engage with PRP is unlikely to have been influenced by these key legislative changes.

#### ***Communication***

In several of the cases included in this study, the perceived inability to make decisions was supported by assessments regarding communication capacity, which were mainly determined by third parties, predominantly medical practitioners, often in the absence

of the person themselves. The absence of, particularly verbal, communication was an attribute clearly associated with members’ perception that a person was unable “to make reasonable judgements”. Tribunal members in eight out of twelve cases analysed for this study commented on this absence, attributing it to limited decision making capacity, as illustrated in a member’s concluding comment:

In summary, the report stated that the represented person has cerebral palsy and some associated conditions which result in the represented person being unable to make reasonable decisions about his health care, his general living circumstances or his financial and legal affairs. Importantly, he has no means of verbal or digital communication [35]. The four cases in which VCAT members did not tribute limited decision-making capacity to a PRP’s communication difficulties occurred across the time period of cases examined for this study. Therefore, such judgements did not appear to be influenced by any key legislative and policy milestones such as the 2006 amendment to the Guardianship and Administration Act (1986), the 2012 VLRC or 2014 ALRC reports or Australia’s signing and ratification of the UNCRPD.

### ***Organising theme: best interests of the proposed represented person***

Best interests were explicitly mentioned in eight of the twelve cases as a justification for the appointment of a guardian or administrator. This is unsurprising as, in contrast to Victoria’s new Guardianship and Administration Act (2019), Section 22(3) of the Guardianship and Administration Act 1986 (Vic) states that the Tribunal cannot make a Guardianship order “unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made” [20]. It is worth noting that in one case (in 2009), an application for an administration order was declined, as it was not judged necessary as the PRP’s best interests were being met informally [36]. In all the cases included in the study, VCAT members needed to consider a multitude of factors when deciding what constituted the best interests of PRP. Within this organising theme, two sub-themes were identified – safeguarding and conflict.

#### ***Safeguarding***

The perception that the person currently making decisions on behalf of the PRP was not meeting his or her best interests was found in a number of cases. For example, in one case, conflict between the current guardian and service providers led to allegations that the PRP’s best interests were not being met.

There was evidence from various parties present that YWR was unable to have access to appropriate services due to issues at home between USP and service providers. There was also evidence that YWR’s funds were not being managed in a manner that promoted his best interests [35].

In several cases, Tribunal members were required to make decisions about guardianship where there was a possibility that an appointed guardian might make decisions regarding the withdrawal of medical treatment or life support on behalf of a PRP. In one such case, submissions were made opposing current guardianship orders on the grounds that the best interests of the PRP would not be safeguarded if they were to continue.

His [current] guardian wishes that his medication be withdrawn and he be sent home to his [name withheld] facility to let nature take its course. His sisters, father (Administrator) and [name withheld] carers disagree but the medical staff say that they are bound by the guardian’s wishes [37].

### **Conflict**

Conflict played a prominent role in all 12 cases included in the study. Conflict frequently occurred between family members and other parties over living arrangements, lifestyle decisions, finances, medical treatment, and choice of Guardian and Administrator. The theme of conflict, especially relating to financial matters and living arrangements, appeared to be more prominent in cases where the PRP had an acquired disability, although a number of families of people with lifelong disability experienced conflict regarding medical treatment and the choice of guardian. This theme of conflict is captured in a Tribunal member's statement:

Numerous allegations have been levied by each against the other with AA in one camp and BB and CC in the other. The Tribunal files record large amounts of correspondence and other documentation referring to or illustrative of the acrimony between them from many people including the represented person's children, other family members, 3 different administrators, guardians from the Office of the Public Advocate, and service providers [38].

### **Organising theme: consideration of will and preference of the proposed represented person**

The will and preference of the PRP was considered (but not necessarily given priority) in nine of the 12 cases included in this study, and this varied across disability types. That is, the will and preference of a PRP was more likely to be considered if that person had an acquired, rather than lifelong disability. In all six cases involving people with lifelong disability, the wishes of family members (even if they were deceased) were sought during proceedings and given priority over those of the PRP.

### **Prioritising other peoples' wishes**

Changes to the Guardianship and Administration Act (1986) in 2006 required consideration of (a) the wishes of the proposed represented person, as far as they can be ascertained; and (b) the wishes of any nearest relatives or other family members of the proposed represented person [S.22(2), 21]. This evolution of the Act in terms of the need to prioritise the PRP's wishes is reflected in a Tribunal member's comment post 2006. "It is clear that the Tribunal must, if possible, give effect to A's [PRP] wishes" [39]. However, in most of the cases examined in this study, the wishes of family members were generally prioritised, and less consideration given to the wishes of the PRP. This is exemplified in the above-mentioned Tribunal member's proceeding comment:

During the hearing, I observed the close relationship between A and B. I am satisfied that it is the wish of A that B manage her affairs. To consider A's wishes as required by s47(2)(a), however, it is not necessary to adopt or follow them [39].

In the cases where a PRP's expressed preference was acknowledged, there was no record of in-depth exploration of these preferences, and those wishes were not afforded any particular weight in the proceedings. A Tribunal member highlights this, stating: "The Tribunal accepts that DKN [PRP] has a role to play in the decision-making process but he is not, and cannot be the 'driver' or initiator of it" [40].

### **Acquired vs lifelong disability**

The PRP's wishes were mentioned in all but three of the cases included in this study. In these three cases, the PRP was reported to have severe lifelong, rather than acquired, disability. In cases where a PRP had an acquired disability, the prior wishes and preferences of the person before they acquired their disability were explored to some degree, as documented below:

It was impossible to ascertain the applicant's wife's views about it for she had lost the ability to communicate, but in conversations with the applicant and other family members which took place years prior to the onset of her illness she had said that she would not want her life prolonged in circumstances like these [41].

I infer that a reasonable person in his current position could conclude that certain medical treatment should be refused. When I take into account the evidence given by CFS about RCS' [PRP with acquired disability] [previous] statements and values, this inference is reinforced [41].

### **Discussion**

The overarching aim of this research was to discover the conceptual drivers that underpin VCAT members' decision-making for this cohort of cases and whether, and if so how, these drivers had changed between 2001 and 2016. By so doing, the authors aim to contribute to the growing body of global literature relating to the implementation of Article 12 within jurisdictions that continue to implement guardianship [9,12,34,42].

Throughout the examined 15-year period there appears to be minimal change in the conceptual drivers underpinning guardianship practice in Victoria. This is likely to be due to the absence of substantive change in Victorian Guardianship and Administration law during this period. That is, whether or not someone is appointed a substitute decision maker or not were the only options available as supported decision-making was not provided as a legal option. However, it would appear to also reflect minimal change in VCAT members' thinking in relation to the reform discourses, embodied in the CRPD in 2006, the VLRC report in 2012 and clearly articulated in the principles at the centre of the previously mentioned ALRC report in 2014 [23]. These principles include a right to decision-making, recognition of will and preference, and the requirement for decision-making support. The VCAT decisions analysed as part of this research largely do not reflect these principles as discussed below.

### **Assumptions of decision-making incapacity trump right to decision-making**

Decision-making incapacity was assumed on the basis of significant cognitive and/or communication disability in all 12 cases analysed in this study. This assumption was evidenced in members' statements such as:

Dr [name omitted] is of the view that YWR is suffering a disability which leaves him unable to make judgements about his person or circumstances... YWR has advanced severe intellectual disability, is non-verbal, unable to follow simple instructions, and has no insight [35].

And

I did not require the represented person to attend the hearing and I did not visit him at the facility where he lives. Due to the severity of his cognitive impairment I was satisfied that his wishes could not be ascertained [43].

Overall, the prevailing and defining driver of Tribunal decisions to appoint guardianship appeared to be the expected incapacity of the person based on the diagnosis of cognitive impairment, particularly where also associated with non-verbal communication. This driver did not change over time. Members saw the diagnosis of a person with significant cognitive disability, confirmed by a medical practitioner, who may or may not know the person well, as sufficient evidence of decision-making incapacity. This evidence

appeared to override the necessity of the member to engage with PRP directly.

Automatic linking of decision-making incapacity to significant cognitive and/or communication disability is not only evident within guardianship hearings, but also exists within non-legal contexts. Evidence from other settings suggests that this linking of disability and decision-making incapacity is a driver of behaviour of many practitioner groups engaged with people with disability, despite wider discourses such as the CRPD. Watson found that there are assumptions amongst everyday supporters of people with severe cognitive disability that those they support are unable to participate in decisions, due to their cognitive and communication disabilities [11,26]. Such assumptions exist despite a body of empirical evidence that people with severe cognitive disability who communicate informally can, and are supported to, make decisions in many aspects of their lives through supported decision-making mechanisms [11,26,44].

Watson [11] found that supporter responsiveness to a person's will and preference was most likely when supporters had a positive view of the decision-making capacity of those they supported. This emphasis on the importance of positive assumptions of decision-making and communicative capacity for people with significant cognitive impairment is increasingly reinforced within the research literature [30,45]. This body of literature not only emphasises the importance of a universal assumption of legal capacity but also raises important questions, and offers solutions, relating to how best to support all citizens to exercise legal capacity on an equal basis through supported decision-making approaches [30,32,42].

Despite this evidence, in none of the 12 cases analysed for this study was consideration given to the ways PRPs were or could be supported to either communicate their preferences or participate in decision-making, and this did not change across the time period examined.

### ***The imperative to manage conflict***

The case files of those examined suggest that a major driver of VCAT member decisions was the management of conflict. In all cases analysed for this study there was some element of conflict between members of (informal) circles of support, contributing to difficulties within the decision-making process. In the analysed cases, conflict frequently occurred between family members and other parties over living arrangements, lifestyle decisions, finances, medical treatment, and choice of Guardian and Administrator. Although this theme of conflict was prominent across all cases, the conflict relating to financial matters and living arrangements was most evident in cases where the PRP had an acquired, as opposed to a lifelong, disability. This is likely to be the result of a person with an acquired disability having had the opportunity to accumulate wealth before the onset of their disability. For people with lifelong disability, conflict was most likely to be around decisions relating to medical treatment and the choice of guardian, rather than their finances.

Conflict amongst supporters has been found to increase the complexities of decision-making support for people with cognitive disability outside of a legislative context [26,28,45]. In the presence of conflict, the preferences of the person being supported, tend to fade into the background, overshadowed by the conflict between those supporting them. Watson and colleagues identified two factors important for effective decision-making support for people with cognitive disability, collaboration between those supporting the decision maker as well as a lack of conflict

between these same supporters. Specifically, they found that support circles that were characterised by minimal conflict demonstrated greater levels of responsiveness to the will and preference of those they supported [26].

Navigating a path through the conflicting parties to establish effective and appropriate decision-making supports is a fraught task. Attending to the principles promoted by the ALRC, which focus on supporting the role of the PRP in expressing preference and being supported to participate in decisions, could offer a new criteria for the arbitration of these disputes: members could attend to the will and preference of the supported person and evaluate the level of attention to decision-making supports on the part of each disputing party. Without this, the PRP is likely to remain sidelined and silenced by the conflict around them, as occurred in the cases examined.

### ***Will and preference***

While it could be argued, given the prevalent sub-theme of conflict that the cases brought before the Tribunal are likely to be predominantly about conflict, some cases examined clearly articulated the presence of a functioning and benevolent support system that appeared to offer at least moments of supported preference expression or enactment of decisions based on the PRPs preferences. It is important to note that this support was most prominent for people with acquired as opposed to lifelong disability. In this context, support strategies included identifying that the PRP had a documented or established preference or decision, usually from a time prior to the onset of the significant cognitive disability. Tribunal members also commented either on the strategies they themselves had used to ascertain the PRP's preferences (such as visiting or conversing with the PRP), or the supports present in the person's environment such as family members or support staff who understood the will and preference of their family member. This acknowledgment is exemplified in a member's comment, "During the hearing, I observed the close relationship between A and B. I am satisfied that it is the wish of A that B manage her affairs..." [39]. Such examples offer evidence that it is possible to establish "the wishes of the represented person"<sup>3</sup>.

However, despite this and despite the advent of the CRPD and the overall reform agenda in relation to decision-making, will and preference of PRPs was not a driver of member decision making, and failed to be given primacy (or sometimes, even consideration) in the cases examined across the period of data analysis. Even where preferences of the PRP had been identified from prior to the onset of disability, these appeared to be given little weight and were largely laid aside or discredited. This is further illustrated by the above member's statement that while it was necessary to consider "... A's wishes as required by s47(2)(a), however, it is not necessary to adopt or follow them." [39]. In another case, a PRP's wishes were taken into account, but the member noted that they were not the primary driver of the decision regarding the choice of guardian: "The Tribunal accepts that DKN has a role to play in the decision-making process but he is not, and cannot be the 'driver' or initiator of it" [40]. In short, though a PRP's ability to express will and preference had been established in some cases, it was considered wholly or substantially immaterial to the decision to be made. Hence, despite explicit amendment to the Guardianship and Administration Act 1986 Section 22 in 2006, followed by further reinforcement of this principle in VLRC and ALRC documents, no change in behaviour occurred.

### Implications for guardianship practice

This analysis highlights the deeply held assumptions and understandings about the decision-making role, rights and capacity of people with significant cognitive disability within one Administrative Appeals jurisdiction in Australia. While new legislation has recently come into force, the new Act [24], in line with Australia's interpretive statement on Article 12, maintains the practice of capacity assessments along with the option of substitute decision-making and is therefore unlikely to change the approach to this for people with severe cognitive impairment who may be informal communicators. While the practice of capacity assessment is maintained, people with significant cognitive impairments are unlikely to qualify for the supportive guardianship and administration orders, as they are unlikely to have decision making capacity as defined in Section 5 of the new Act [24]. Without attending to the assumptions and practices identified in this paper, it is likely that the barrier of consent will be read by VCAT members through the existing cultural lens that has been shown to have continued unchanged on these dimensions between 2001 and 2016. It is important to note however, that this hypothesis is yet to be tested, as at the time of writing, there was no available data regarding how the new Act has impacted guardianship practice in Victoria.

In this context, significant knowledge and attitudinal changes are required within the Tribunal and within the practice of health professionals informing the Tribunal, in order to counter many of the embedded conceptual underpinnings of the 1986 Guardianship and Administration Act (Vic). This call for knowledge and attitudinal change is reflected in the literature focused on disability rights law, specifically relate to Article 12 of the UNCRPD [11–13,16,30,34,42,45–47]. Although this body of literature is substantial, the premise at its heart of a universal right to support with decision-making regardless of cognitive or communication disability, is yet to be applied widely across the globe. Costa Rica and Peru are notable exceptions. Both these jurisdictions have removed all forms of guardianship for people with disabilities from their legal landscapes. This means that in Peru and Costa Rica, legal capacity cannot be removed on the basis of intellectual, psychosocial or cognitive disability. Both reforms are recognised by international human rights bodies such as the United Nations and Human Rights Watch as good and promising practice in the implementation of Article 12 of the Convention. Despite this recognition, there has been little empirical exploration focused on this new legislation's implementation in Peru or Costa Rica in terms of practice change.

The research described in this paper has led to a range of specific policy and practice recommendations offered to ratifying jurisdictions' guardianship tribunals across the globe.

- Disassociating cognitive and severe disability from incapacity: For legal capacity to be recognised as inherent in all people, the link between the nature (cognitive) and severity of disability and decision-making incapacity will need to be broken.
- Recognising the breadth of communicative activity for all individuals and the options available to support and/or interpret communicative acts.
- Identifying existing and required decision-making supports and engaging these into the Tribunal processes.
- Managing conflict between parties and increasingly privileging the preferences of the represented person, along with those who show commitment to utilise strategies to support their understanding of these and build these into decisions.

Such a response would assist not only VCAT, but all jurisdictions that maintain guardianship, in efforts to move practice away from paternalistic approaches to decision-making support to current legislative frameworks such as the CRPD and the new Guardianship and Administration Act 2019 (Vic).

### Limitations

Although the study spans data from 15 years of operation, the final sample size is small due to the limited number of published cases that fit the criteria. Published cases also lack a consistency of description and often are concise in their detail. It is not possible to determine if the data set is representative as information about the criteria used to select cases for publication is not available. However, across the 12 cases included in this study, there is a consistent theme of the existence of an underlying set of embedded practices and understandings. Further research, in this and other jurisdictions, could shed light on the generalisability of these findings. Additionally, the researchers are of the view that attempts should be made to triangulate these findings through in-depth interviews with Tribunal members.

### Conclusion

In 1986 when Victoria's guardianship and administration legislation was written, supported decision-making as a theory or practice was non-existent. The 1986 Guardianship and Administration Act (Vic) has since provided the legal frame for these decisions across a period of more than thirty years. In this context, the advent of the CRPD and the later reports of the Victorian and Australian Law Reform Commissions represent recent weather changes that appear to have had little to no effect on the cultural bedrock of practice in the Victorian Civil and Administrative Tribunal. The new Guardianship and Administration Act 2019 (Vic), which came into force March 1, 2020, embeds elements of Article 12 and understandings of supported decision-making into legal reform particularly in relation to those with severe cognitive disability. Proponents of the CRPD warmly welcome this new Act. However, for the decision-making rights of people with severe cognitive disability to be upheld, support should be given to guardianship tribunal members, and those who inform them (e.g., health professionals) to increase their understanding of the complexities of Article 12 of the CRPD, particularly the practice of supported decision-making. In this way, consistent with the paradigm shift instigated by Article 12 of the CRPD, the human right to legal capacity of all signatory nations' citizens, including people with the most significant cognitive disability is likely to be seen as a priority.

This paper describes a local study which has global application. It is particularly relevant to signatories of the CRPD, who, through Article 12 of the Convention, have an obligation to promote universal legal capacity to all citizens, including those with severe cognitive disability.

### Notes

1. United Nations Treaty Collection. "Convention on the Rights of Persons with Disabilities: Declarations and Reservations." Available online: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4) (accessed on 13 September 2020).
2. In *Korp (Guardianship)* [2005] VCAT 779, retrieved from <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/>



2005/779.html, the proposed represented person was identified by her surname because of the extensive media coverage of the situation that led to the proceedings in the Guardianship List.

3. as stated in the *Guardianship and Administration Act 1986*, (Vic) S.22(2).

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