

## Enduring Guardianship

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### Introduction

As previously explained in this text, the ‘guardianship’<sup>1</sup> system is regulated by State or Territory-based legislation. As described earlier, there is a perception that the Commonwealth ‘covers the field’ in relation to age-related law and policy; however, this is certainly not the case.<sup>2</sup> Further, until the 2017 report *Elder Abuse – A National Legal Response*,<sup>3</sup> there had been a limited national response to the challenges of fragmented State and Territory-based legislation. The impact of the lack of an integrated response to aged care issues is more than theoretical, and requires the legal practitioner to be able to navigate social, health, aged care as well as legal sectors, as there are few ‘joined up’ or integrated services for clients (where health, legal and social needs are also addressed).<sup>4</sup>

Guardianship legislation has been traditionally focused on substitute decision-making for adults, to provide certainty in identifying the decision-maker, when it has been determined by a health professional (when a matter is not contested) or court or tribunal that the person no longer has capacity to make their own decisions. Taken to its extreme format, substitute decision-making can mean that the person who is subject to an order for guardianship or administration is not included in decision-making about them. This is, of course, overly restrictive and in breach of an older person’s human rights. This situation is the legal mischief (loss of legal capacity and therefore personhood) that much of the United Nations Convention on the Rights of People with Disabilities (CRPD) was designed to repudiate.<sup>5</sup>

Increasingly, and in accordance with the CRPD, and a less discriminatory and perhaps less ageist or increasingly human rights approach, more states are turning their attention to supported decision-making. This is occurring either through policy,

1 The term ‘guardianship’ is used here in a generic way to include substitute (usually) decision-makers for both personal and financial matters. See Chapter 1 for an overview.

2 W Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Right of Older Persons in Australia’ (2014) 36(1) *Sydney Law Review* 99, 101.

3 Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report 131 (June 2017).

4 MA Noone and K Digney, *It’s Hard to Open Up to Strangers – Improving Access to Justice – The Key Features of an Integrated Service Delivery Model* (La Trobe University, 2010).

5 G Quinn, ‘Personhood and Legal Capacity – Perspectives on the Paradigm Shift of Article 12 of the CRPD’ (Paper presented at the Conference on Disability and Legal Capacity under the CRPD, Harvard Law School, 2010).

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