**Human Rights and Legal Capacity – The Fiction of a Bright Line**

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**ABSTRACT**

Legal capacity is fundamental to the exercise of a range of human rights and freedoms by older people. In Australia however, the law relating to how an older person’s legal capacity is assessed is ad hoc. Under current law, decisions about legal capacity are made by doctors, lawyers, courts and tribunals, all of whom apply different tests and processes dependent on both the circumstances under which capacity has been called into question and the nature of the decision to which the capacity relates.

This paper demonstrates how ad hoc capacity assessments in Australia have resulted from a legal system that has not kept pace with the complexity of an ageing population.

In Australia, someone who is concerned about the decision making capacity of an older person can seek orders from a Tribunal to grant them Powers of Attorney. This substitute decision making power denies the autonomy of the older person and may serve to allow family, caregivers or professionals to override the wishes of an older person. In extreme cases, this can lead to situations of financial, psychological and even physical abuse.

Drawing on original empirical research in this area, the authors argue that a human rights approach to the assessment of legal capacity as advocated for in ARNLA’s draft Charter of Rights and Freedoms for Older Persons, may offer improved legal protections for older people. The authors link these arguments to philosophical understandings of autonomy and vulnerability to demonstrate how the human rights approach to capacity aligns with these values. This approach moves away from status based or outcomes based capacity assessments and replaces substitute decision making powers with supported decision making processes wherever possible.

Article 1 of the ARNLA Charter provides:
Older persons have the right to be treated with dignity and humanity and to be free to exercise personal self-determination. This includes the right to be presumed as having full decision-making capacity unless otherwise determined in accordance with law, the right to make decisions regarding their present and future circumstances and to be supported to make decisions if they have difficulty in doing so.

Whilst article 7 of the ARNLA Charter states:

Older persons have the right to recognition as a person before the law and to be treated equally before the law. ¹

¹ See Appendix for a complete copy of the ARNLA Charter
The story of Mike

At the age of 64 Mike was diagnosed with early onset dementia. Fearful of what lay ahead, he and his partner Jacqui consulted a solicitor, explained Mike’s diagnosis, made a Will for Mike naming Jacqui as the beneficiary of his estate and signed documents giving Jacqui powers as Mike’s Enduring Power of Attorney and Enduring Guardian in the event that he lost his decision making capacity. Two years later, the relationship between Mike and Jacqui had soured and they no longer lived together. Mike went back to the solicitor in the company of a friend, complaining that Jacqui now controlled all his money; that he was “under the thumb” and wanted to appoint his friend as a new Enduring Guardian. Mike’s friend Tom wanted to take Mike overseas for a spiritual retreat but Jacqui refused to sanction the trip. Mike and Tom had spent two of the best years of their life in an overseas monastery and Tom was sure that a return to Mike’s spiritual home would be therapeutic for his friend.

As Mike’s guardian however, Jacqui now controlled all of Mike’s finances and had absolute discretion to authorize any financial decisions. As Mike’s long term partner, she also had a financial interest in Mike’s estate as she was named as the primary beneficiary in Mike’s will. Mike owned a house that could have been sold to finance this pilgrimage and any future travel plans, however Jacqui did not want the house sold.

Jacqui was in possession of a medical opinion from a doctor stating that Tom did not have the capacity to make “complex decisions”. Jacqui had used this medical opinion to activate her powers of attorney and guardianship. There is no authority to supervise the exercise of these powers and whilst Jacqui is to be guided by the principles of the Guardianship Act, these principles are difficult to enforce. The principles state that Jacqui should give consideration to

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2 This case study is based on original research conducted by co-author Ms Lise Barry. In 2013, Ms Barry examined the complaint files of the NSW Office of Legal Services Commission (OLSC) as part of a Doctoral research project titled “The Capacity Conundrum”. The OLSC is an independent statutory authority established under the Legal Profession Act 1987 (NSW) to receive complaints about solicitors and barristers in New South Wales. Names and identifying details have been changed to protect the confidentiality of the information on the file.

3 In NSW an Enduring Power of Attorney can make legal and financial decisions for a person who has lost capacity to do so.

4 In NSW an Enduring Guardian can make health and lifestyle decisions for a person. These powers only come into effect when the donor of the powers lacks capacity.

5 Guardianship Act 1987 (NSW) s4.
the “welfare and interests” of Mike and should “consider” Mike’s views, restricting his freedom of action “as little as possible.”6 There is no absolute requirement for Jacqui to consult Mike about decisions she makes on his behalf.

Mike’s solicitor, concerned that under NSW law Mike may not have capacity to revoke Jacqui’s appointment, sought an opinion about Mike’s capacity. Mike furnished a report from a mental health worker who had apparently known Mike for ten years, stating that Mike was “of sound mind and cognitive ability to independently make competent decisions for himself …..” The solicitor himself felt that Mike “had some capacity, but may have had an inability to understand more complex transactions.” The solicitor was aware that he could not presume complete incapacity but knew that Mike’s ability was impaired because of his previous dealing with Mike and Jacqui. The solicitor requested documentation about the mental health care worker’s qualifications and furnished Mike’s friend with a bill for the work he had done to date. When the bill went unpaid, he sent it on to Jacqui as the person responsible for Mike’s finances and Jacqui complained about the actions of the lawyer to the OLSC.7

With no definitive professional assessment about Mike’s capacity for making decisions and no person willing to pay for his services, the lawyer took no further action on Mike’s behalf.

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7 The complaint was mediated by the OLSC and the fee for legal services was waived. The solicitor reports that Mike’s friend did not respond to requests for further information about Mike’s capacity.
Capacity in law and the older person

Legal capacity comprises legal standing (to be recognized as a holder of rights and duties) and legal agency (the right to exercise these rights and duties). A person who is declared to lack capacity is prohibited from making a variety of important life decisions. For instance, a person in Australia who is lacking capacity cannot: enter into a binding contract, dispose of their property by way of a will or as a gift, marry, vote, engage in consensual sexual intercourse, consent to medical treatment, become a member of parliament, or carry out certain occupations. Legal capacity is essential for the exercise of economic and social rights yet it has historically has been denied to populations including older persons, who may experience decision making disabilities.

Older people are frequently the subject of capacity assessments, either because of ageist assumptions that they lack capacity based on their status as elderly people, or because they have been diagnosed with a decision making disability such as dementia. Dementia is the leading cause of disability in Australians aged 65 and over. Impaired decision making ability in the elderly may also be the result of other conditions such as temporary illness, fever or delirium, brain damage due to stroke, diseases other than dementia, and intellectual disability. Capacity can fluctuate – a person may have capacity for a certain decision one day, but lack that capacity the next day due for instance to fatigue or illness.

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8 Blomley v Ryan (1954) 99 CLR 362.
9 Banks v Goodfellow (1870) LR5 QB, 549.
10 Marriage Act 1961 (Cth) s238(1)(d).
11 Commonwealth Electoral Act 1918 (Cth) s93(8).
12 Crimes Act 1900 (NSW) s61HA(4)(a)
13 Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (1992) 175 CLR 218 (‘Marion’s Case’).
14 Only those people eligible to vote can become a member of parliament
In Australian law, the required standard of capacity is prescribed by the High Court in *Gibbons v Wright*:¹⁸

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.

This functional approach to capacity acknowledges that capacity is decision specific – the more complicated and multi-faceted the decision, the more the required capacity.¹⁹ The legal test for the range of decisions has developed over time without a coordinated standard as to the extent to which the person with diminished capacity is able to participate on the same terms as a person presumed to have full decision making capacity. The resultant ad hoc approach to capacity assessments has the potential to open the door to elder abuse because the law as it stands in Australia does not do enough to promote the autonomy of older persons with diminished decision making abilities, or to protect them from abuse. An examination of the laws of guardianship and powers of attorney demonstrate some of the practical effects of a bright line approach to legal capacity in the elder law context and highlights how a human rights approach could go some way toward remedying the deficiencies in the system.

**The bright line approach to the loss of capacity**

Australian law does not currently recognize or accommodate an older person’s need to gain staged or varying types of decision-making support to address fluctuating capacity while still maintaining the ability to make their own legally valid decisions about their life. Under Australian law a person may only fall on one of two sides of a ‘bright line’, that is they either have full decision making capacity at law or they do not have any capacity to make lawful decisions at all. If they are deemed to have legal capacity, they may continue to make their own

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¹⁸(1954) 91 CLR 423.
¹⁹ see Guardianship Final Report 24. (2012), ch7 for an outline of varying legal tests for capacity applied in Australia.
decisions and if they are deemed not to have capacity, the consequence is that someone else, a
substituted decision-maker must then make all decisions on their behalf. It is an all or nothing
approach that favours certainty of the legal validity of the decisions being made over the rights
of the person seeking to make it.

In addition to theoretical concerns, there are two practical difficulties with the concept that
there is a bright line to separate those with and those without capacity. Firstly and most
obviously, it does not reflect the reality of most people experiencing a loss of cognitive function
that may reduce their legal capacity due to age, illness or disability. With the exception of the
seriously injured or acutely ill, most people do not experience loss of legal capacity and the way
this impacts on their ability to make their own decisions as a point in time event or a particular
moment where a line is crossed. Laws relying on such a fiction that does not reflect the lived
experience of diminishing capacity renders it unhelpful to the people it is designed to assist.

The second practical difficulty with the bright line model is that it transfers or affords far too
much importance, weight and power into the actual capacity assessment itself. Capacity
assessments are the various tests conducted by professionals to ascertain whether a person has
lost their legal capacity or not. These tests are known however to be unreliable indicators of
the entirety of a persons’ real decision making capacity. Under this model the capacity
assessment necessarily becomes the blunt arbiter of which side of the bright line a person with
diminished capacity is to fall, with significant consequences for that person’s rights and wishes
if they fall on the “wrong” side. Practical concerns about the bright line view of legal capacity
have led to widespread recognition in Australia that the law is outdated and in urgent need of
reform.

20 Discussed further below
21 See for instance Paul Applebaum & Thomas Grisso, Assessing Patient’s Capacities to Consent to Treatment, 319
NEW ENGLAND JOURNAL OF MEDICINE (1988); Natalie Banner, Can Procedural and Substantive Elements of Decision-
Making be Reconciled in Assessments of Mental Capacity, 9 INTERNATIONAL JOURNAL OF LAW IN CONTEXT (2013);
Penelope Brown, et al., Assessments of Mental Capacity in Psychiatric Inpatients: A Retrospective Cohort Study
BMC Psychiatry at http://www.biomedcentral.com/1471-244X/13/115..
**Guardianship and Powers of Attorney in Australia**

Legislation in Australia that either relates to or requires the use of capacity assessments all avoid setting out a uniform standard or test for capacity. In relation to older people, the key legislative frameworks that impact on decision making are the safeguards provided by state-based statutes in the areas of Guardianship and Administration and more recently advanced care directives. Unfortunately, the legal tests for capacity required to invoke these laws in each of the jurisdictions remain inconsistent or unclear. They do however introduce the oversight of a statutory decision-maker, such as a Tribunal member, to make decisions regarding capacity, particularly where the cognitive ability of the person is in dispute. Overall however, while the tests may vary, they all use the bright line approach to capacity. None of the statutory standards are currently able to recognize any variations in a persons’ capacity itself, that is, it is still an ‘all or nothing’ proposition.

**Capacity standards in Guardianship legislation**

Guardianship laws in Australia have come under particular strain in recent years due to their increasing use in responding to difficulties relating to decision-making and diminishing capacity in the aging population. While the common law in Australia presumes that adults have the capacity to make decisions unless there is evidence to the contrary, this presumption is not set out in Guardianship legislation other than in Queensland and Western Australia.

In addition, due to the historical development of guardianship laws from the disability sector, in all Australian states and territories except Queensland, current legislation states that a person’s lack of capacity must be due to a disability. For example, Guardianship laws in Victoria, Tasmania, Western Australia and the Northern Territory are able to be invoked when a person

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22 See Borthwick v Carruthers (1787) 99 ER 1300; Re Cumming (1852) 42 ER 660 at 668

23 Guardianship and Administration Act 2000 (Qld) sch 1 pt 1 cl 1; Guardianship and Administration Act 1990 (WA) s 4(3). Bucknall v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd R 402.[21–6], [43].

24 Guardianship and Administration Act 1986 (Vic) s 3 (definition of ‘disability’); Guardianship and Management of Property Act 1991 (ACT) s 5; Guardianship Act 1987 (NSW) s 3 (definition of ‘person in need of a guardian’ Guardianship and Administration Act 1993(SA) s 3 (definition of ‘mental incapacity’); Guardianship and Administration Act 1990 (WA) s 3 (definition of ‘mental disability’); Guardianship and Administration Act 1995 (Tas) s 3 (definition of ‘disability’); Adult Guardianship Act (NT) s 3(1) (definition of ‘intellectual disability’).
is ‘unable to make reasonable judgments’ about their affairs because of a disability. In the ageing context, this suggests there must be a defined or catalyst medical event to invoke the provisions, rather than a supported or staged decline in cognitive ability.

Queensland’s guardianship legislation contains the most detailed capacity standard of the Australian statutes. In the Queensland Act, a person is deemed to have capacity where the person is capable of understanding the nature and effect of decisions about a particular matter, of freely and voluntarily making decisions about the matter and of communicating their decisions in some way. A further additional provision then recognizes that the capacity of an adult may also differ according to the nature and extent of the impairment, the type of decision to be made, including, for example, its complexity and the support available from members of the person’s existing support network. While comprehensive in recognizing that loss of capacity may be transient, this provision is still for use in determining which side of the bright line a person is deemed to fall, rather than creating a broader definition of supported decision-making for diminished capacity.

Another detailed statutory provision in relation to capacity standards is found in the Australian Capital Territory (ACT) Guardianship Act. In this Act it is specified that a person cannot be found to have impaired decision-making capacity only because the person is eccentric; or expresses a particular political or religious opinion, sexual orientation or preference, or has engaged in illegal or immoral conduct or taken drugs, including alcohol (but any effects of a drug may be taken into account). While this may prove a useful provision for an older person seeking to ensure they preserve their ability to make their own lifestyle choice where a change in these choices may call their capacity into question, the provision does not alter the bright line test. Should an older person in Australia wish to plan for their future by appointing a person to make decisions for them if they lack capacity, then they will generally rely on the appointment of an

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25 Guardianship and Administration Act 1995 (Tas) ss 20 (1)(b), 51(1)(b); Guardianship and Administration Act 1990 (WA) ss 43(1)(b)(ii), Adult Guardianship Act (NT) s 3(1)
26 Guardianship and Administration Act 1986 (Vic) ss 3 (definition of ‘disability’), 22(1)(a)–(b), 46(1)(a)(i)–(ii); Guardianship and Management
27 Guardianship and Administration Act 2000 (Qld) s 5(c).
28 Guardianship and Management of Property Act 1991 (ACT) s 6A.
enduring guardian or enduring attorney. In order to validly appoint a person with substitute decision making powers, the older person must be able to demonstrate that they have the capacity to understand and make a valid appointment.

**Capacity Decision-makers in Guardianship legislation**

Under all the Australian Guardianship Acts, capacity assessments in relation to appointing an enduring guardian are most often undertaken by individual lawyers, acting on the advice of a person responsible and sometimes informed by medical opinion. In other circumstances, where the appointment of a guardian or administrator is required or where a person seeks to activate an enduring guarding or enduring attorney where the capacity of the person is in dispute, the decision-maker will be an administrative tribunal member. In all Australian jurisdictions, capacity assessments undertaken by statutory decision-makers are not judicial decisions, which would allow for some discretionary interpretation of the law, but are considered to be findings of fact, or the application of the statute to the circumstances. In Australian administrative law, Tribunal members are authorized by legislation to make findings of fact under many statutory provisions. In most other administrative decisions under an enactment however, the evidentiary standards and procedural guidelines for the tests to be applied in fact-finding are also set out in the relevant statute to guide the decision-maker. In the case of guardianship, no current legislation provides for such procedure or prescribes an approach to determining whether a person is incapable of ‘managing their affairs’ or ‘exercising reasonable judgements’.

Most administrative tribunal members making decisions under guardianship law require some medical evidence or opinion of a person’s cognitive functioning, usually via a standard form as supplied by the Tribunal that may be completed by a general practitioner, specialist doctor or a neuropsychologist. The law does require that the Tribunal member must make its own finding of fact however and it is not possible for the Tribunal decision-maker to simply defer or delegate the task of assessing capacity to a health professional by relying upon medical opinion alone.\(^\text{29}\) As a result, many Tribunal members generally also seek out other opinions from lay persons who can attest to how the person is functioning in daily life, such as family, friends and

\(^{29}\text{XYZ v State Trustees Ltd [2006] VSC 444 (22 November 2006) [54]-[59]}\)
supportive community members. Given the risk of this other lay opinion to be subjective or self-interested, the medical evidence is generally considered more highly probative however and given a greater weight.

The practical problem with the fluidity of these processes at law however, in this and the other common law areas is that unless the question is brought before a court, who decides on this standard and which test do they use? As a legal construct in most cases it will be an individual lawyer who decides on both the standard and the test, perhaps acting with information supplied by a doctor. This is problematic because research suggests that it is difficult even for doctors who are skilled in capacity assessment from a clinical perspective to make a definitive finding as to a person’s decision making capacity.

**Professionals and bright line capacity assessments.**

It has been observed that most Doctors have very little training in capacity assessment, particularly outside of the realm of informed consent.\(^{30}\) The tests for capacity are many and varied,\(^ {31}\) and medical practitioners can face challenges that may lead them to both underestimate and overestimate the capacity of a patient.\(^ {32}\) Whether tests are administered by trained medical staff, rely on self-reporting by an older person, reports of family and carers or a combination of these, no test is foolproof.\(^ {33}\) Further, clinical tests of capacity aren’t always accurate in assessing how older people will operate in the real world. For instance tests that question patients about how they would resolve a hypothetical problem are not effective in

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assessing how a patient will solve their actual problems.\textsuperscript{34} It is also possible that medical staff may be reticent in some cases to provide an honest opinion of an older person’s decision making disabilities for fear that the information might prove to be anti-therapeutic for some patients.\textsuperscript{35}

Capacity assessments in the clinical setting are also influenced the normative judgements of the staff administering them.\textsuperscript{36} Worryingly from a human rights perspective, capacity assessments tend to be undertaken more frequently when patients disagree with a clinical opinion. A recent study of capacity assessments within two United Kingdom hospitals found that if junior staff disapproved of the outcome of a decision by an elderly person then it was more likely that they would assess that person to be lacking decision making capacity and that whilst health professionals were aware of the broad legal standards to be applied to capacity assessment, they did not routinely apply the standards.\textsuperscript{37} This study highlighted that ‘risk averse’ junior staff, were more likely to take an outcomes based approach to capacity assessment rather than the functional approach prescribed by legislation and the application of human rights principles.\textsuperscript{38}

In the medical realm, some studies of capacity assessment are openly cynical about the approach of professionals and have pointed to the possibility of “collusion”, suggesting for instance that psychiatrists may play a role in coercing patients into treatments they don’t consent to by assessing that the patient lacks capacity to make their own decisions.\textsuperscript{39} Concerns about the triggers for capacity assessment are a common theme in the literature that provides grounds for caution in the application of any bright line capacity test.

\textsuperscript{35} Kapp, \textit{WILLIAM MITCHELL LAW REVIEW}, (2011), 105.
\textsuperscript{38} Id. at., 77.
Lawyers become involved in capacity assessments because they are required by professional ethics and conduct rules to follow their client’s lawful, competent instructions.\textsuperscript{40} The practical implications of this rule are that lawyers need to ensure that their elderly clients have the capacity to instruct them, however, even more so than with the medical profession, it is a role that lawyers are not well trained for. In Australia, a lawyer could be successfully sued in negligence if they accept instructions from a client who lacked the capacity to give them, however they have little guidance in how to go about carrying out such an assessment.\textsuperscript{41} The professional bodies representing lawyers in some states have prepared toolkits for lawyers involved in capacity assessments\textsuperscript{42} and whilst the Australian Solicitor Rules recommend that lawyers should consult these guidelines, they are not mandated.\textsuperscript{43}

The danger is that in the absence of a human rights framework for supported decision making models bright line capacity assessments will screen out more and more elderly people from exercising their legal capacity. This is particularly so in Australia, where “old age” is cited in the commentary to the legal professional rules as grounds to displace the presumption of capacity.

The Australian rules and commentary on client capacity are exemplary of a system based on competing understandings of capacity and the functional approach. The commentary to rule eight reads:

\textit{It is a presumption at common law that every adult person is competent to make their own decisions. Characteristics which may displace the presumption include old age, incapacity, mental infirmity, suspicion of undue influence or of fraud, or where the client is unable to communicate. Accordingly, while a presumption of legal capacity lies at the heart of the solicitor-client relationship, solicitors must be reasonably satisfied that their client has the mental capacity to give instructions,}

\textsuperscript{40}Rule 8, \textit{Australian Solicitors’ Conduct Rules} (2011).
\textsuperscript{41}\textit{Goddard Elliott v Fritsch} [2012] VSC 87 (Vic ed., 2012).
\textsuperscript{43}Law Council of Australia, \textit{Australian Solicitors’ Conduct Rules 2011 and Commentary}, (2013), r8.
and if not so satisfied, must not act for or represent the client. A failure to be alert to
issues of incapacity has the potential to generate liability in negligence.
Complex issues can arise when a solicitor has reason to doubt a client’s capacity to
give competent instructions. A number of Law Societies have issued guidance on the
ethical responsibilities of practitioners when faced with such questions. Where a
solicitor is unsure about the appropriate response in a situation where the client’s
capacity is in doubt, the solicitor can, pursuant to Rule 9.2.3, seek confidential advice
on his or her legal or ethical obligations.44

There are clear contradictions inherent in this commentary. On the one hand, the commentary
promotes a status based approach to capacity in arguing “Characteristics which may displace
the presumption include old age…” This statement is contrary to a human rights approach to
legal capacity and harks back to ageist assumptions about a person’s decision making ability.

On the other hand, the commentary to the rules promotes the use of state based capacity
toolkits. These tool kits are explicit in promoting a functional approach to capacity assessment.
For instance the NSW Toolkit contains six “Capacity Assessment Principles”, the first of which is
“Always presume a person has capacity”.45 Principle three of the same toolkit is “Don’t Assume
a person lacks capacity based on appearances” and is followed by the sage advice that “It is
wrong to assume a person lacks capacity because of their age, appearance, disability,
behaviour, language skills or any other condition or characteristic.” Likewise the South
Australian guidelines state: “Doubt as to incapacity is not to be expected or assumed. This is a
caveat of the first importance.”46

Unfortunately, as demonstrated by the ad hoc approach to professionals’ assessments of
capacity, the law as it currently stands in Australia does not promote the adoption of a human
rights approach to the decision making rights of older persons.

44Id. at., commentary to rule 8, 7.
45Law Society of New South Wales, above n19, 27.
46Client Capacity Guidelines South Australia. (2012), 11.
The Human Rights Framework – The Australian position

Equality before the law is fundamental to the exercise of our core human rights and is guaranteed to all persons by the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Whilst everyone is presumed to have legal personality as of right,\textsuperscript{47} legal capacity is fundamental to exercising that right.\textsuperscript{48}

The primary international human rights instrument relating to the right of people to exercise their decision making capacity is the *Convention on the Rights of Persons with Disabilities* (CRPD).\textsuperscript{49} Whilst Australia is a signatory to the CRPD, they have made an interpretive declaration in relation to Article 12.

*Australia declares its 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.*\textsuperscript{50}

When Australia appeared before the 10\textsuperscript{th} session of the CRPD in 2013, the Committee recommended that the Interpretive Declarations of Australia be reviewed and withdrawn.\textsuperscript{51}

The Australian Research Network on Law and Ageing (ARNLA) has developed a draft Charter on the Rights and Freedoms of Older Persons, to encourage and inform debate within Australia.\textsuperscript{52}

The Draft Charter draws upon Australia’s existing international obligations under the core human rights conventions and upon existing state based legislation. Two articles of the Draft

\textsuperscript{47} Article 16 of the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) provides: "Everyone shall have the right to recognition everywhere as a person before the law."
\textsuperscript{48} In some jurisdictions the term competence is used instead of capacity, however in Australia the two terms are usually synonymous
\textsuperscript{51} Office of the High Commissioner for Human Rights, 10\textsuperscript{th} Session of the Committee on the Rights of Persons with Disabilities (12 November 2013) <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session10Old.aspx>
\textsuperscript{52} A complete copy of the Draft Charter has been inserted as an appendix to this article.
Charter are particularly relevant to any discussion of legal capacity and substitute decision making:

Article 1 of the ARNLA Charter provides:

Older persons have the right to be treated with dignity and humanity and to be free to exercise personal self-determination.\(^{53}\) This includes the right to be presumed as having full decision-making capacity unless otherwise determined in accordance with law, the right to make decisions regarding their present and future circumstances and to be supported to make decisions if they have difficulty in doing so.\(^{54}\)

*Article 1 of the ARNLA Charter is designed to promote the autonomy of older people whilst providing protections for the most vulnerable. A further purpose is to give weight to calls for the development of supported decision making models and to promote the legal recognition of advanced health care directives and other forward looking decisions.*

Article 7 of the ARNLA Charter states:

Older persons have the right to recognition as a person before the law and to be treated equally before the law.\(^{55}\)

This approach moves away from status based or outcomes based capacity assessments and would replace substitute decision making powers with processes that provide for supported decision making wherever possible. This affirms the approach to the exercise of legal capacity for people with decision making disabilities (DMD) in the CRPD, Art 12. Under the CRPD, The question to be asked is not, “Does this person have the capability to exercise their legal capacity?” The question becomes instead: “What types of supports are required for this person

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\(^{53}\) Articles 1 & 10, International Covenant on Civil and Political Rights (ICCPR); Article 1, International Covenant on Economic, Social and Cultural Rights (ICESCR); Principles 3, 14, 15, UN Principles for Older Persons; Articles 3 & 12 Convention on the Rights of Persons with Disabilities (CRPD).

\(^{54}\) Sections 10(c) and (d), *Advance Care Directives Act 2013* (SA).

\(^{55}\) Articles 16 & 26, ICCPR; Principle 12, UN Principles for Older Persons, Article 12 CRPD.
to exercise his or her legal capacity?” Supported decision making is consistent with a human rights approach to older people’s decisions because it promotes autonomy whilst offering protections against the abuse.

**Autonomy and vulnerability**

Philosophically, to take human rights seriously is to reconsider what it means to be a person.56 Because autonomy is at the heart of personhood and thus at the heart of legal capacity, then it is imperative to have a clear understanding of the constituent components of autonomy and also to appreciate the intersection of autonomy and vulnerability. The state of autonomy is generally understood as involving three conditions: freedom, competence and authenticity.57 These elements of autonomy can only be identified when we have a holistic view of a person. A lawyer who wants to understand and support the autonomy of the elder client needs to know that the older person’s decision is being made freely: free of undue influence from someone who might benefit from that decision; That it is being made competently – that is, on a proper understanding of what the decision will mean for their life in the future; And that it is authentic – meaning it is consistent with the expressed values of the older person. Authenticity requires that a decision illustrates a diachronic coherence (coherent over time), not just synchronic coherence (coherent in the moment).58 This necessitates a deep understanding of the older client and an enquiry that extends beyond a superficial legal interview or administration of a psychological test.

A discussion that respects autonomy is also likely to uncover certain vulnerabilities, including decision making disabilities, and also to reveal the possible existence of entrenched conflict within the older person’s sphere of influence. Any discussion of ‘vulnerability’ could benefit from a philosophical understanding of that term. It should be emphasised that vulnerability can be understood as a component part of autonomy rather than a threat to the exercise of legal capacity. As Margaret Hall writes: “... vulnerability is not so much the absence of (relational

autonomy) but its constant shadow which may be expected to wax and wane over an individual’s life course.”

Vulnerability is something that we all experience, so to say that an older person is vulnerable is not to say that they require a substitute decision maker. This much is made clear in the CRPD and the ARNLA charter and must inform a Convention on the Rights of the Older Person. To recognize a person’s vulnerability is to recognize that this person, at this point in time, is experiencing a strain on their autonomy that needs to be appreciated and addressed in order to support the person, not to diminish their autonomy. Recognizing vulnerability does not mean responding to vulnerability the same way in all circumstances, but to confine the “protective embrace [of supported decision making] … within its proper sphere.”

A human rights perspective on capacity incorporating an understanding of autonomy and vulnerability should be applied not just to the law on substitute decision making, but in all aspects of assessment.

**Suggested reform to legislative capacity assessment principles**

A number of law reform bodies throughout Australia have recently considered the capacity assessment principles in guardianship and powers of attorney legislation. In the absence of a uniform test and prescribed procedures for assessing capacity it has been recognized that tribunal decision-makers may make inappropriate assumptions or inadequately weigh the evidence before them when determining capacity. Fact-finding errors relating to misinterpretations concerning fluctuating or diminishing capacity or the cognitive effects of ageing are particularly problematic for older people experiencing memory loss. For example the Victorian Law Reform Commission (VLRC) made the following recommendation that legislation must explicitly address certain key false assumptions about the nature of capacity made by Tribunal decision-makers;

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60 Quinn, Personhood and Legal Capacity, Perspectives on the Paradigm Shift of Article 12 CRPD. 2010.58, 11.

Capacity Assessment Principles

27. New Guardianship legislation should contain the following capacity assessment principles:

(a) A person’s capacity is specific to the decision to be made.
(b) Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.
(c) An adult’s incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.
(d) A person should not be considered to lack the capacity to make a decision merely because they make a decision that other consider to be unwise.
(e) A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.
(f) When assessing a person’s capacity every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.62

The VLRC was in fact so concerned about the potential deficiencies in Tribunal decision-making process in relation to capacity assessments and guardianship, they also recommended the Victorian government consider a new qualified capacity assessors scheme. Such a scheme would allow only trained and certified professionals to make capacity determinations as part of a new legislative approach to guardianship.63

While the notion of specialist capacity assessors has not yet taken hold in any of the Australian jurisdictions to date, the new South Australian Advance Care Directives Act due to commence in July 2014 does provide for a new and unique process for statutory capacity assessment.

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63 Ibid, Recommendation 29,123. Based on the model in Ontario and Alberta
Towards decision-specific capacity assessment?

The *Advance Care Directives Act 2013 (SA)* is the first Australian State’s response to the National Framework for Advance Care Directives\(^6^4\) and incorporates advance care directive provisions previously contained in two different South Australian Acts. The Act provides a mechanism where a person may validly appoint a substitute decision-maker to commence their role when the person’s capacity becomes impaired in the area of healthcare, residential and accommodation arrangements, and personal affairs.

While the ability to appoint a substitute decision-maker is not new, the new legislation provides a statutory definition for impaired decision-making and standards as to capacity assessment to inform the appropriate time for the substitute decision-maker to commence their duties and safeguard the rights of the person with diminished capacity. In doing so, the Act also recognizes a decision-specific approach to capacity assessment in order to inform the need for substitute decision-making. Finally, in relation to capacity assessments, a statutory body, the Public Advocate,\(^6^5\) is empowered by the legislation to make declarations under the Act as to whether the person who gave the advance care directive has impaired decision-making in relation to a particular decision.\(^6^6\) This new role for the Public Advocate is, in effect, that of a specialist capacity assessor, at least in respect of Advance Care Directives legislation in South Australia. This Act has not yet commenced and it is yet to be seen how the new model of decision-specific capacity assessment will be implemented in practice.

**Case study re-visited**

What difference might a human rights approach make to the experience of Mike? Firstly as we have argued, a human rights approach to capacity must be decision specific. This would mean that Jacqui could not make decisions for Mike that he is capable of making for himself. Mike

\(^6^5\)Public Advocate is a Statutory Body role established by the Guardianship and Administration Act 1993 (SA) to provide public guardianship for adults with mental incapacity, undertake investigations for the Guardianship Tribunal and provide community education and advocacy. Under the new Advance Care Directives Act, the dispute resolution role includes that of providing preliminary assistance to resolve a matter, mediation, and to make declarations in respect of an advance care directive.
\(^6^6\)Advance Care Directives Act 2013 (SA)s45(5)
may not be able make decisions about how to invest the proceeds of the sale of his property, but might be able to make a decision to take an overseas trip. In any decision, Mike would be supported to participate in the decision making to the extent that he is able.

Secondly, bright line capacity assessments would be a thing of the past. Medical experts, allied health professionals and lawyers would not be drawn into making sweeping generalizations about a person’s capacity. Jacqui would not assume global substitute decision making authority on Mike’s behalf. Mike’s lawyer would be alert to the vulnerability of his client who appears to be caught in the cross-fire of allegiances to friends and family and competing claims on his future estate. At the same time, whatever actions Mike’s lawyer takes would be designed to promote Mike’s autonomous decision making to the extent possible.

Thirdly, in any situation where Mike is supported to make a decision or (and only as a last resort) has a decision made for him, then clear and enforceable principles would be in place that put the needs and preferences of the person who is subject to intervention at the forefront.

To apply a human rights approach to elder law means supporting a client’s autonomous decision making. In this model, the professional engages their client in a discussion not just of the law and the possible decisions for the client but also assists the client to identify their own values in relation to that decision. There is no place in this model for bright line capacity assessments. In defining autonomy in the context of the lawyer and client relationship, autonomy does not “imply isolation and disconnection for the client.”\(^{67}\) As Pepper writes, “To value autonomy in the political and legal context is not to assume or suggest that the self is either totally or naturally free... Rather, it is to appreciate that we ought to be very limited and careful in deciding by whom, when, and how the self is to be legally constrained.”\(^{68}\)

Older people in Australia who experience temporary or permanent decision making disabilities would benefit from the application of a more nuanced, human rights focus to the law of decision making.


\(^{68}\)Id. at., 944
The following rights and freedoms are drawn from the principal international instruments concerning older persons – the UDHR, ICCPR, ICESCR and the UN Principles for Older Persons. In this respect, the following rights are mere replications of existing rights contained in binding treaties or in declaratory instruments which further articulate the rights of older persons (such as the UN Principles). However, the following rights also include specific mention of rights not currently recognised in international treaties – the right to palliative care, a dignified death, lifelong learning, the freedom to choose the time of one’s retirement from work, the right to plan for retirement, loss of decision-making capacity and death, the right to choose one’s preferred place of residence, the right to access an appropriate level of humane and secure residential care. In these respects, the following rights partly represent a progressive development on the existing international human rights instruments which bind nations-states. However, these rights are already reflected in many non-binding international and regional instruments, can be linked to many existing rights already protected (such as the right to palliative care being one aspect of the right to adequate health care), and have been recognised by the United Nations Office of the High Commission for Human Rights as needing specific recognition and protection under international law.

In order to combat ageism and to adequately prepare for the needs of an ageing population, a rights based approach to aged care and ageing policy is necessary. Until such time as a new convention on the rights of older persons is adopted at the international level, we must work with the existing international human rights instruments, adopting a progressive approach to their interpretation in seeking to protect the rights and freedoms of older persons. The following Charter has been drafted with this objective in mind. Where there exist no legal or constitutional impediments to its implementation in domestic law or policy, governments, government agencies, advocacy groups, service providers and community organisations should promote its adoption and implementation.

Dignity and Self-Determination

1. Older persons have the right to be treated with dignity and humanity and to be free to exercise personal self-determination.\(^6^9\) This includes the right to plan for retirement, the loss of decision-making capacity and death.

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\(^6^9\) Articles 1 & 10, International Covenant on Civil and Political Rights (ICCPR); Article 1, International Covenant on Economic, Social and Cultural Rights (ICESCR); Principles 3, 14, 15, UN Principles for Older Persons.
2. Older persons have the right to freedom of movement and to choose their preferred place of residence. These rights shall only be restricted in accordance with law, where such restriction is necessary to protect public health, public order or morals, and the rights and freedoms of others.\textsuperscript{70}

#### Liberty and Security of the Person & Property

3. Older persons have the right to be free from torture or other forms of cruel, inhuman or degrading treatment.\textsuperscript{71}

4. Older persons have the right to liberty and security of the person and to be free from exploitation and physical, social, psychological and sexual abuse. No person shall be deprived of their liberty, including by forced or involuntary institutionalisation, except in accordance with procedures established by law.\textsuperscript{72}

5. Older persons have the right to own property, the right to exercise self-determination with respect to that property, and the right not be arbitrarily or unlawfully deprived of their property.\textsuperscript{73}

#### Equality and Non-Discrimination

6. Older persons have the right to exercise their rights free from all forms of discrimination, whether on the basis of age, sex, colour, sexual orientation, religion, political opinion, educational qualification, national origin or ethnicity.\textsuperscript{74}

7. Older have the right to recognition as a person before the law and to be treated equally before the law.\textsuperscript{75} Older persons are entitled to access and seek remedies for breaches of their rights, including in institutional settings.\textsuperscript{76}

\textsuperscript{70} Article 12, ICCPR; Principle 6, UN Principles for Older Persons.

\textsuperscript{71} Article 7, ICCPR; CAT; Principle 17, UN Principles for Older Persons.

\textsuperscript{72} Article 9, ICCPR; Article 12, ICESCR; Principle 17, UN Principles for Older Persons.

\textsuperscript{73} Article 17, Universal Declaration of Human Rights; Articles 1, ICCPR and ICESCR.

\textsuperscript{74} Article 2, ICCPR; Article 2, ICESCR; Principle 18, UN Principles for Older Persons.

\textsuperscript{75} Articles 16 & 26, ICCPR; Principle 12, UN Principles for Older Persons.

\textsuperscript{76} Articles 2 & 14, ICCPR; Article 2, ICESCR; Principle 12, UN Principles for Older Persons.
Minimum Standards of Living and Care

8. Older persons have the right to life, to adequate food, clothing and shelter and to enjoy the highest attainable standards of physical and mental health.\(^{77}\) This includes the right to palliative care in order to preserve the best possible quality of life until death,\(^ {78} \) and the right to a dignified death.\(^ {79} \)

9. All older persons have the right to social security\(^ {80} \) and to access an appropriate level of humane and secure residential care, where the fundamental rights and freedoms of residents are recognised and protected.\(^ {81} \)

Privacy and Family

10. Older persons have the right to be free from arbitrary or unlawful interferences with his/her privacy, family, home or correspondence,\(^ {82} \) and respect for a person’s privacy must be maintained in institutional settings.

11. Older persons have the right to a family life, to marry and to have their family unit respected by others, including government agencies and officials.\(^ {83} \)

Social, Economic & Political Participation

12. Older persons have the right to freely associate with others and to participate fully in the social and cultural life of their community.\(^ {84} \) This may include participation in voluntary work both before and following retirement, as well as the formation of, and engagement in, movements or associations of older persons.\(^ {85} \)

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\(^{77}\) Article 6, ICCPR; Articles 11 & 12, ICESCR; Principles 1, 10-13, UN Principles for Older Persons.


\(^{80}\) Article 9, ICESCR;

\(^{81}\) Principles 13 & 14, UN Principles for Older Persons.

\(^{82}\) Article 17, ICCPR; Principles 5, 10, 17, UN Principles for Older Persons.

\(^{83}\) Article 23, ICCPR; Article 10, ICESCR; Principles 10, 5, UN Principles for Older Persons.

\(^{84}\) Article 25, ICCPR; Article 15, ICESCR; Principles 7, 8, & 9, UN Principles for Older Persons.

\(^{85}\) Principle 9, UN Principles for Older Persons.
13. Older persons have the right to engage in work until such time as they choose to leave the workforce, to receive fair wages and equal remuneration for equal work and to work in safe and healthy working conditions.  

14. Older persons have the right to lifelong learning, to access and participate in education and training programs and to access the scientific, cultural, educational and spiritual resources of the community.  

15. Older persons have the right to take part in the conduct of public affairs, to vote, to stand for election and to be elected to parliament, and to have access, on equal terms, to public service.  

16. Older persons have the right to exercise freedom of thought, conscience and religion.  

17. Older persons have the right to freedom of opinion and expression and to seek, receive and impart information and ideas, particularly in respect of policies which affect their wellbeing or interests. Older persons should also be encouraged, and provided with opportunities, to share their knowledge and skills with younger generations. Adult persons also have the right to seek, and be provided with, personal information about him/herself held by government agencies of officials.

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86 Articles 6 & 7, ICESCR; Principles 2 & 3, UN Principles for Older Persons.
87 Articles 13 & 15, ICESCR; Principles, 4, 15 & 16, UN Principles for Older Persons.
88 Article 25, ICCPR.
89 Article 18, ICCPR.
90 Article 19, ICCPR; Principles 4, 15, 16, UN Principles for Older Persons. This right is also supported by Freedom of Information legislation throughout Australia.
Banks v Goodfellow (1870) LR5 QB, 549.
Commonwealth Electoral Act 1918 (Cth) s93(8).
Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (1992) 175 CLR 218 ('Marion’s Case').
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Edward Zalta, Stanford Encyclopedia of Philosophy (Stanford University 2008).