



**OFFICE OF THE
PUBLIC ADVOCATE**

Supported Decision-Making Forum

24 February 2010

Summary Report

Contact:

John Chesterman

Manager, Policy and Education

Email: john.chesterman@justice.vic.gov.au

Prepared by:

Magdalena McGuire

Legal Policy and Research Officer

Contents

1. Introduction	3
2. What is Supported Decision-Making?.....	4
3. Hopes	4
4. Capacity.....	5
5. Risks	5
6. Support Networks	6
7. Relationship to Current Laws.....	6
8. Legislative Changes	6
9. Resources	7
10. OPA	7
11. VCAT.....	7
12. Outcomes.....	8

1. Introduction

Supported decision-making has been the subject of considerable focus following Australia's ratification of the Disability Convention in July 2009.¹ According to the Convention, people with disabilities are entitled to enjoy legal capacity on an equal basis with all others. The Convention also recognises that some people with disabilities require assistance in exercising this capacity, and that States must do what they can to support this process.² The Convention has generated renewed interest in decision-making processes for people with disabilities. It has also been a key factor in prompting the review of Victoria's guardianship legislation. This legislation sets out a framework for making decisions on behalf of people with disabilities who are considered unable to make decisions independently.³ The guardianship review therefore provides an opportune time to consider how Victorian law might recognise and facilitate supported decision-making.⁴

On 24 February 2010, the Office of the Public Advocate (OPA) held a forum to discuss supported decision-making with members of the Victorian disability, legal, academic and advocacy sectors. Participants included representatives from: Victoria Law Reform Commission, Australian Federation of Disability Organisations, Mental Health Legal Centre, STAR Victoria, VALID, SARU, SCOPE, Monash University, Villamanta Disability Rights Legal Service, ARBIAS, ADEC, REINFORCE, DARU, Law Institute Victoria, La Trobe University, Council on the Aging, Victorian Equal Opportunity and Human Rights Commission, Victorian Aboriginal Legal Service, RMIT, VMIAC, Yooralla, Summer Foundation and Alzheimer's Australia. The purpose of the forum was to share ideas about what a Victorian model of supported decision-making might look like. Participants were not asked to decide on a position regarding supported decision-making. Rather, the forum gave participants the opportunity to share their insights and experiences, and to learn from other people.

The forum commenced with a presentation from Barbara Carter, who gave an overview of her background and discussion paper on supported decision-making.⁵ John Chesterman then discussed possible options for legislative recognition of supported decision-making.⁶ Participants then broke up into small groups to discuss a range of questions about supported decision-making. The forum concluded with a plenary session in which the small groups reported back to the group as a whole.

¹ United Nations *Convention on the Rights of Persons with Disabilities*.

² Article 12, *Convention on the Rights of Persons with Disabilities*.

³ *Guardianship and Administration Act 1986*

⁴ Chesterman, John 2010 *Supported Decision-Making: Options for Legislative Recognition*, p 3 available at http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/Supported%20Decision-Making_%20Options%20for%20Legislative%20Recognition%202010.pdf.

⁵ Carter, Barbara 2009 *Supported Decision-Making: Background and Discussion Paper* available at http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2009/0909_Supported_Decision_Making.pdf.

⁶ Chesterman, John *Supported Decision-Making: Options for Legislative Recognition*.

This report sets out to capture the flavour of the discussions in the plenary session. The overall view of the plenary session was that, while legal recognition of supported decision-making could mark a step in the right direction, it is not a panacea. Sufficient resources, education, and adequate safeguards are required to enable supported decision-making to create meaningful opportunities for people with disabilities to participate in decisions affecting their lives. Furthermore, any changes to the law must be driven by a genuine commitment to advancing the rights and dignity of people with disabilities.

2. What is Supported Decision-Making?

What does ‘supported decision-making’ mean and to what extent does it happen already? (Is it different to informal support?)

Participants agreed it was difficult to pin down a definition of supported decision-making. This was due to what they described as the “fluid” and “contextual” nature of supported decision-making processes. Therefore, rather than deciding on a definition, participants described some of the key elements of a good supported decision-making model. These included listening to the wishes of the person with a disability, providing them with informed advice, and acting on their instructions as far as possible. Ideas about the “best interests” of the person with a disability were considered to be inappropriate within a supported decision-making context.

Several participants noted that supported decision-making already occurs informally within the community. Participants said that when families, carers and advocates assist a person with a disability with their decision-making process, they are engaged in supported decision-making. However, some participants warned that if this process is not collaborative, or involves a significant power imbalance or conflict of interest, it cannot be regarded as supported decision-making. In this sense ‘supported decision-making’ was viewed as being potentially different to ‘informal support’. As one participant put it: “Do you work at enabling the person with a disability to make a decision, or are you supporting them to make the decision *you* want them to make?”. It was noted that, while both these processes are commonly referred to as ‘support’, only the first could be regarded as ‘supported decision-making’.

3. Hopes

What hopes do you have for supported decision-making? (What problems will supported decision-making address?)

Participants hoped that a Victorian supported decision-making model would be person-centred, and would create genuine opportunities for the empowerment and social inclusion of people with disabilities. It was hoped that supported decision-making would be a way for people with

disabilities to gain more control over decisions affecting their lives. However, as several participants pointed out, the law is not a panacea. One participant stressed the importance of recognising that “a lot of good supported decision-making already goes on” in the Victorian community, particularly within Indigenous and culturally and linguistically diverse communities. This participant cautioned that any changes to the law should “do no harm” to these informal support networks. Along similar lines, another participant noted that, “once you give legal recognition to supported decision-making, you change the nature of the decision-making process”. The message, therefore, was to proceed with care.

4. Capacity

Can anyone, no matter how profound their disability, take part in supported decision-making? (Should there be capacity criteria?)

The notion of ‘capacity’ was perhaps one of the most complex topics raised at the forum. Several participants strongly felt that all people with disabilities have the capacity to take part in supported decision-making. One participant suggested that, even if a person was severely disabled and unable to communicate at all, it was still possible to gain an idea of their wishes based on factors such as their interests, family circumstances and historical context. These factors were described as being “part of the process of determining what enhances a person’s quality of life”. Other participants were unsure whether this process could be called ‘supported decision-making’, or whether, in fact, it was a form of substitute decision-making.

Some participants offered the view that a test for capacity should be decision-specific, rather than based on a person’s disability. This could mean that, while a person could utilise supported decision-making for some areas of their life, other decisions may require a substitute decision-maker. Some participants noted that, in this sense, supported and substitute decision-making should be understood as existing on a continuum of decision-making processes. However, other participants were reluctant to discuss a capacity criteria for supported decision-making, as they felt this was premature.

5. Risks

Does supported decision-making involve any dangers of abuse or exploitation?

Participants felt that legal recognition of supported decision-making required adequate safeguards and accountability mechanisms to protect the rights of the person with a disability. They recognised the potential for a conflict of interests to occur between the person with a disability and their support person, and said that these risks needed to be addressed by any legislative change. Other participants pointed out that risk was “a part of everyday life” and that there was an element of risk in all decision-making processes.

6. Support Networks

What is the role of families, and what is the role of advocates and advocacy organisations in encouraging supported decision-making?

Participants felt that families and advocates should continue to play a key role in supported decision-making. However, the nature and extent of this role should be determined by the needs and wishes of the person with a disability. One participant noted that, “particularly for people with mental health issues, there can be a great power imbalance with other people who, for all best intentions, are involved in their support network”. The key consideration for this participant was that the person with a disability was actually being supported to make a decision, rather than having other people determine what was in their “best interests”. To this end, the role of independent advocates was seen as crucial to ensuring that the wishes and instructions of the person with a disability were carried out.

7. Relationship to Current Laws

What kind of supported decision-making is possible under current laws (such as the Mental Health Act, the Disability Act, the Aged Care Act and the Guardianship and Administration Act)?

The resounding view of participants was that current laws did not adequately facilitate supported decision-making. The Mental Health Act was viewed by some as being far “too clinical” in its approach to issues of capacity and disability. Some participants felt that, while the Disability Act did set out a framework within which supported decision-making should occur, in practice this did not seem to happen. Some participants also felt that the Guardianship and Administration Act did not sufficiently enable supported decision-making to occur. This was regarded as an anomaly given that the Guardianship and Administration Act requires “less restrictive” options to be considered before a guardianship or administration order is made.

8. Legislative Changes

What kinds of changes to the law do we need in order to enable supported decision-making to occur more than it does at the moment?

One participant suggested that guardianship legislation could be amended so as to enable a new type of supported decision-making agreement to be made between people with disabilities and their support networks. It was suggested that such an agreement could be similar to a Power of Attorney.

9. Resources

What resources are needed to make supported decision-making work? (If money wasn't a problem, what would supported decision-making look like? What would it look like with few resources devoted to it?)

Education, training and advice for people with disabilities and their support networks were viewed as essential resources for a good supported decision-making model. Furthermore, one participant pointed out that the key 'resource' was the support people themselves. This participant noted that, while many people with disabilities had "terrific" support networks, others did not have people they could trust and depend on. Therefore a key issue for supported decision-making networks was "who is going to be in them?". This participant observed that "we struggle now to find people who will support people with disabilities. Where are these people going to magically come from in the context of supported decision-making?".

10. OPA

Should a statutory office like OPA have a role to play in the oversight and implementation of supported decision-making?

Some participants felt that there was a role for OPA in supported decision-making, but felt that this role was a very broad one. For example, some participants believed that OPA could provide education, training and advice to families about supported decision-making. However these participants also said they preferred to see the oversight of supported decision-making located in the community sector, as they regarded this as a less intimidating and more accessible environment.

11. VCAT

What should the role of the Victorian Civil and Administrative Tribunal (VCAT) be in relation to supported decision-making?

It was felt that there was a potential role for VCAT in overseeing supported decision-making orders. However, participants emphasised that VCAT must reflect the values and principles of supported decision-making. These values and principles were said to include person-centred planning and a willingness to listen to the preferences and choices of people with disabilities.

12. Outcomes

The forum enabled participants to flesh-out some of the key concepts and ideas relevant to supported decision-making in Victoria. OPA considers it essential that these discussions take place in the context of the review of Victoria's guardianship legislation. Ideally, the forum should act as a springboard for further, more in-depth discussions about supported decision-making. OPA therefore encourages all forum participants and other interested people to continue engaging with these important questions.