



Law Reform Agencies: contributions to discourse and the push for inclusion of supported decision-making in legal regimes

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Overview

- Why Law Reform Agencies?
- What are they recommending?
- Why are they making these recommendations?
- How is this relevant to ongoing discourse around supported decision-making?

Supported decision-making: the practice + legal recognition

Practical Process

Practical/informal support

Use different strategies to support

No need for legislation

Legal Recognition

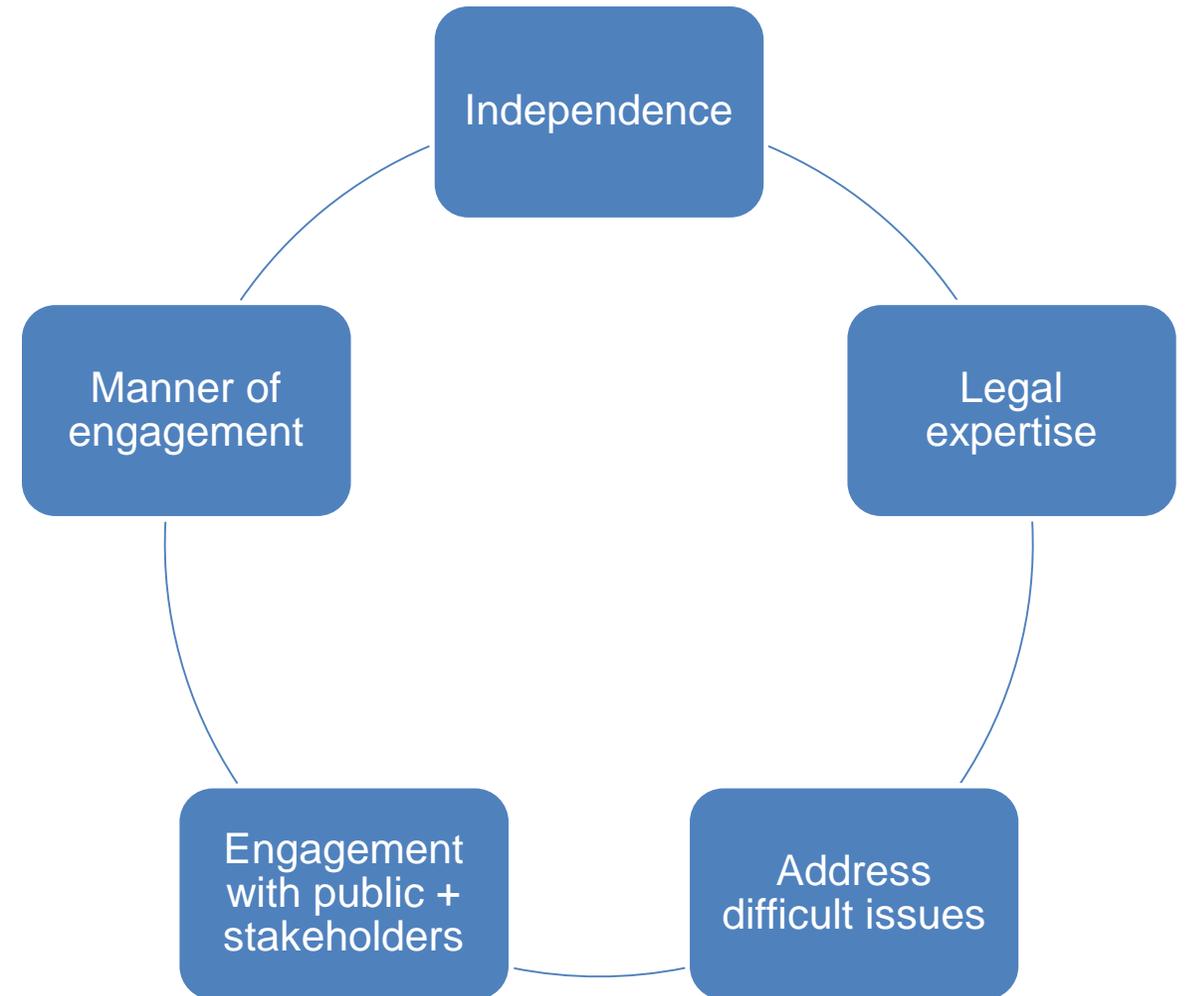
Requires legislation recognising concept

Legislation provides for formal appointment of supporters

Articulates duties and powers of supporters

The role of Law Reform Agencies (LRA)

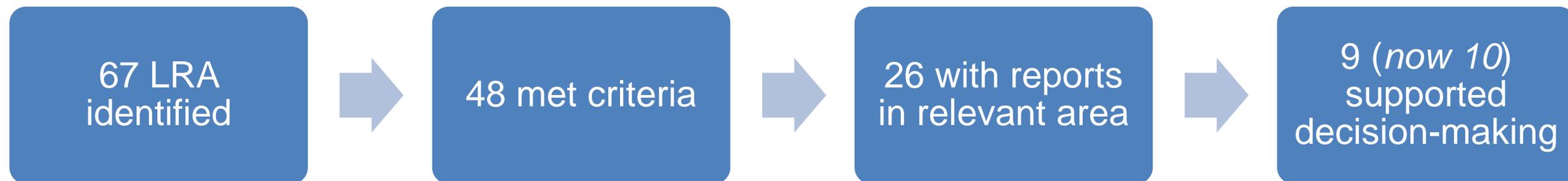
- LRAs unique organisations contributing to the discourse around legal recognition of supported decision-making.
- Building a case for why we should have supported decision-making recognised in legislation.
- **Why are they important?**



Are many Law Reform Agencies considering supported decision-making?

Method:

- Examined all LRA **final reports** which contained recommendations published in English between **January 2007 – August 2018** that considered whether **supported decision-making** should be recognised in legislation
- Needed to be accessible online in August 2018



What are the LRA recommending?

Different models proposed

- 1. Limited Recognition (QLRC, LRCNS)**
 - Recognition in principles only
 - Recognition in relation to narrow category of decisions
- 2. Partial Legal Implementation (NCCUSL, LCEW)**
 - Require supported decision-making to be considered within a legal framework.
- 3. Complete Legal Scheme (all other LRAs)**

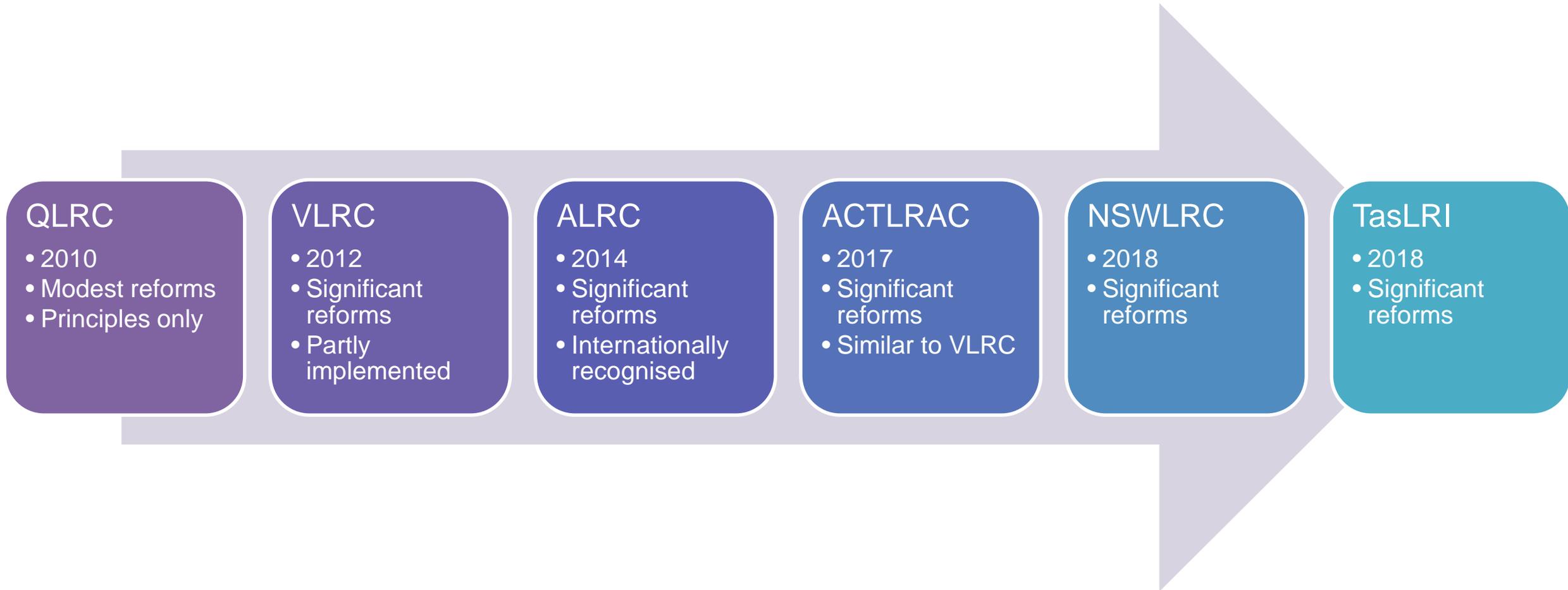
Relevant LRAs
Australian Law Reform Commission
ACT Law Reform Advisory Council
Law Commission of Ontario
Law Reform Commission of Nova Scotia
Law Commission of England and Wales
NSW Law Reform Commission
National Conference of Commissioner on Uniform State Laws (USA)
Qld Law Reform Commission
Victorian Law Reform Commission
Tasmanian Law Reform Institute

What are the LRA recommending?

3. Complete legal schemes

- Majority of LRAs made bolder recommendations to establish more ‘complete’ legal schemes, including:
 - Adoption of general principles more consistent with supported decision-making
 - Acceptance that decisions remain that of the supported person (except co-dm)
 - Legal recognition of supporters with formal methods of appointment
 - Placing legislative duties on supporters
 - Granting explicit powers to supporters
 - Recognising the need for public education.

Australian context: proposals from LRAs (adult guardianship frameworks)



Why are LRAs making these recommendations?

- **Human Rights** as a driver for legal reform: UNCRPD + art 12
 - The right to make one’s own decisions is embedded in the *United Nations Convention on the Rights of Persons with Disability* (2006):
 - Persons with disabilities enjoy **legal capacity on an equal basis** with others in all aspects of life.
 - Signatory nations agree to develop “appropriate measures to provide access by persons with disabilities to the **support** they may require in **exercising their legal capacity.**”
- **Legal certainty and efficiency**
- **Increased benefit to individuals** and better reflection of what works in practice
- **Community sentiment** and **prior LRA reports**

Discussion and impact

- Legal recognition as an *adjunct* or less restrictive alternative to substitute decision-making - ***Not a system to replace substitute decision-making.***
- UNCRPD and article 12 – a significant influence on all LRAs
- The retention of ‘capacity’ or ‘decision-making ability’ as a legal threshold within these legal models. No radical moves away from the need for substitute decision-making in some cases as a last resort measure.
- Pragmatic approach; little community appetite for removal of substitute decision-making; recognition of lack of empirical evidence.
- Limited conversion into legislation as yet.

Conclusion

- Part of the developing discourse around supported decision-making and its place in legal frameworks is being driven by LRAs in Western countries.
- Evidence that some LRAs are recommending that aspects of supported decision-making be incorporated into legal frameworks – but only as an adjunct to existing guardianship schemes.
- Underlying rationale is clearly the human rights context and public support for supported decision-making.
- Incremental legal changes are happening – more changes likely in Australia in the future?

Presentation based on publication:

SN Then, T Carney, C Bigby, J Douglas, Supporting decision-making of adults with cognitive disabilities: The role of Law Reform Agencies – Recommendations, rationales and influence

(2018) 61 *International Journal of Law and Psychiatry* 64

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