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?

Independence

Manner of engagement

Legal expertise

Engagement with public + stakeholders

Address difficult issues
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

67 LRA identified → 48 met criteria → 26 with reports in relevant area → 9 (now 10) supported decision-making
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)

<table>
<thead>
<tr>
<th>LRA</th>
<th>Year</th>
<th>Reforms</th>
<th>Status</th>
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<tbody>
<tr>
<td>QLRC</td>
<td>2010</td>
<td>Modest reforms</td>
<td>Principles only</td>
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<tr>
<td>VLRC</td>
<td>2012</td>
<td>Significant reforms</td>
<td>Partly implemented</td>
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<td>ALRC</td>
<td>2014</td>
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<td>2017</td>
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<td>Similar to VLRC</td>
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<td>NSWLRC</td>
<td>2018</td>
<td>Significant reforms</td>
<td></td>
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<tr>
<td>TasLRI</td>
<td>2018</td>
<td>Significant reforms</td>
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</tbody>
</table>
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?
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