

# Australian Adult Support and Protection for Vulnerable Adults:

## Through Law Reforms of Guardianship and Elder Abuse Legislation (Part II)

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### 3. Australian National Elder Abuse Legislation

#### 3-1 Background of National Elder Abuse Legislation

In Australia, as in other developed countries, elder abuse occurs frequently. Elder abuse only came to the fore in the late 1980s. Since then, it has gradually become more prevalent after a number of publications and research projects on elder abuse.<sup>1)</sup> But there is no comprehensive legislation to combat elder abuse in Australia.<sup>2)</sup> Instead, the *Aged Care Amendment (Security and Protection) Act 2007* was enacted to amend the *Aged Care Act 1997*, a national law, to insert an additional Article 63-1AA. This Article states 'responsibilities relating to alleged and suspected assaults' to require mandatory reporting of incidents of elder abuse occurring in institutional aged care settings.<sup>3)</sup> The object of the *Aged Care Act 1997* (Article 2-1) is 'to provide funding of aged care services and to promote a high quality of care and accommodation for the recipients of aged care services'. Therefore, the adult protection against elder abuse is not central but is regarded as a matter associated with aged care activity, and the definition of elder abuse is not included in the Act.

Elder abuse has become more visible than before after some media and research reports of last few years. Elder abuse is one of the major social problems in Australia. Elder abuse often goes unreported because perpetrators of elder abuse are frequently the adult children of the victims; this may contribute to the reluctance of the elderly to seek help.<sup>4)</sup> It is assumed that elder abuse is a complex, multifaceted and often hidden form of abuse.<sup>5)</sup> The current problem of elder abuse is left to the treatment in each state and special territory in Australia, but states and special territories cannot fully tackle elder abuse problems. In fact, the number of calls to the non-profit organization (NPO), Seniors Rights Victoria's advice call service related to elder abuse from the period July 2012 to July 2019 increased, with 6.12 per cent increase in financial abuse and 4.21 per cent increase in social abuse.<sup>6)</sup> The research in the state of Victoria indicates that elder abuse prevalence rates among the principals in guardianship were estimated to be 13 per cent in 2013-14 and 21 per cent in 2016-17.<sup>7)</sup> It also shows an upward trend of the elder abuse prevalence rate among the principals in the guardianship.

Considering the lack of legislation and public policy that prevents and responds measures to elder abuse

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*Remarks: The titles of the Japanese publications are translated into English by the author in case of missing English title. The mark '\*' is put after these titles. All website accesses were reconfirmed by September 26, 2020.*

1) Susan Kurrle and Gerard Naughtin, 'An Overview of Elder Abuse and Neglect in Australia' (2008) 20 (2) *Journal of Elder Abuse & Neglect* 108, 125.

2) R. Kaspiew, Carson, R. and Rhoades, H. *Elder abuse: Understanding Issues, Frameworks and Responses* (Research Report No. 35, Australian Institute of Family Studies, 2016, Correction (2 November 2018)) 22.

3) Krista James, *Legal Definitions of Elder Abuse and Neglect—Australia* (Department of Justice Canada, 2019) 57-62.

4) Briony Dow, Gahan, L., Gaffy, E. and et al, 'Barriers to Disclosing Elder Abuse and Taking Action in Australia' (Online 2019) *Journal of Family Violence* 1, 9. <<https://doi.org/10.1007/s10896-019-00084-w>>.

5) Ibid 5. Between 2 per cents and 14 per cents of older Australians experience elder abuse in any given year, and the prevalence of neglect may be higher.

6) Melanie Joosten, Freda Vratsidis and Briony Dow, *Understanding Elder Abuse: A Scoping Study* (National Ageing Research Institute, Melbourne Social Equity Institute, 2017) 35.

7) Women experienced elder abuse at a higher rate than men and the elderly with dementia or intellectual disability were more likely to have experienced elder abuse than those with other disabilities in the state of Victoria. Lois Bedson, John Chesterman, and Michael Woods, 'The Prevalence of Elder Abuse Among Adult Guardianship Clients' (2018) 18 *Macquarie Law Journal* 15-34, 25.

in each state and special territory, there was a view that a collaborative national strategy, incorporating a rights-based approach to the review and reform of state and special territory laws is essential.<sup>8)</sup> For this reason, the responsible entity in question was upgraded from the state and special territory to the federation. Officially, the Federal Attorney-General announced an inquiry into the Australia Law Reform Commission (hereinafter referred to as 'ALRC') on 'Protecting the Rights of Older Australians from Abuse' on February 23, 2016.<sup>9)</sup> A new national legislation has been discussed. After debates by experts over a few years, amendments through public comments review were devised. Then the report *Elder Abuse—A National Legal Response* (ALRC Report No. 131, 2017, hereinafter referred to as 'ALRC Report 131')<sup>10)</sup> was tabled on the Federal Parliament on June 14, 2017. This report was released at a symposium on elder abuse held in Melbourne on the World Elder Abuse Awareness Day (June 15) in 2017.

### 3-2 ALRC Report 131 and the Responses

#### (1) ALRC Report 131

The ALRC Report 131 clarifies the Australian national policy to combat elder abuse as much as possible. The Report considers elder abuse a serious social problem in Australia. Elder abuse is defined as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person (WHO 2002)'.<sup>11)</sup> Five types of abuse are stated in the Report: psychological/emotional abuse, monetary/material abuse, financial/ material abuse, sexual abuse, and neglect.

The ALRC Report 131 is based on two key framing principles, namely *dignity and autonomy* and *protection and safeguarding*. These key principles are summarized in the Term of References of the Report. *Dignity and autonomy* refers to 'the principle that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse'.<sup>12)</sup> *Protection and safeguarding* is 'the principle that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimizing interference with the rights and preferences of the person'.<sup>13)</sup> The ALRC Report 131 also take into consideration 'relevant international obligations relating to the rights of older people under United Nations human rights conventions to which Australia is a party'.<sup>14)</sup> The United Nations (UN) Principles for Older Persons was adopted by the General Assembly resolution 46/91 of December 16, 1991.<sup>15)</sup> This resolution recommended the UN member countries/areas to incorporate the following five principles into their national programs, i.e., *Independence, Participation, Care, Self-fulfillment,*

8) Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 130.

9) ALRC, *Terms of Reference: Protecting the Rights of Older Australians from Abuse* (Web Page, February 23, 2016) <<https://www.alrc.gov.au/inquiry/elder-abuse-2/terms-of-reference-19/>>.

10) Australian Law Reform Commission (ALRC), *Elder Abuse—A National Legal Response Final Report* (ALRC Report No. 131, 2017).

11) Ibid 41–42.

12) Ibid 50.

13) Ibid.

14) ALRC Report 131, 5.

15) United Nations, Human Rights Office of the High Commissioner, United Nations Principles for Older Persons (Web Page) <<https://www.ohchr.org/en/professionalinterest/pages/olderpersons.aspx>>.

and *Dignity*. Paragraph 1.18 of the ALRC Report 131 refers to the resolution of the UN Principles for Older Persons regarding dignity and autonomy of the elderly.<sup>16)</sup>

In the Terminology of the ALRC Report 131, a number of key terms are summarized such as 'supported and substitute decision-making', 'supporters and representatives', 'will, preferences and rights standard', 'national decision-making principles', and 'legal capacity'.<sup>17)</sup> It can be understood by these terminologies that the ALRC Report 131 for elder abuse was based on the *Equality, Capacity and Disability in Commonwealth Laws Final Report* (ALRC Report No. 124, 2014, hereinafter referred to as 'ALRC Report 124').<sup>18)</sup> The ALRC Report 124 is the guardianship and administration law reform report. In other words, the policy to combat elder abuse and the reforms of the guardianship and administration law are positioned back to back. This close relationship between the two ALRC Reports 124 and 131 is addressed in the Term of Reference<sup>19)</sup> and is also advocated by Rosalind F. Croucher.<sup>20)</sup>

The ALRC Report 131 offers twelve countermeasures to cope with elder abuse, Namely: 1) a national plan to combat elder abuse, 2) aged care, 3) enduring appointment, 4) family agreements, 5) superannuation, 6) wills, 7) banking, 8) guardianship and administration, 9) health and national disability insurance scheme (NDIS), 10) social security, 11) criminal justice responses, and 12) safeguarding adults at risk.<sup>21)</sup> The scope of the countermeasures against elder abuse is broader and comprehensive. In addition, it includes incorporating elder abuse programs in school and community education and conducting academic research on elder abuse in a scientific way to elucidate the actual situation. The policy also stresses that the *dignity and autonomy* of the elderly, in addition to their *protection and safeguarding*, should be considered in a balanced manner.<sup>22)</sup>

Captioned 'Safeguarding Adults at Risk', Chapter 14 of the ALRC Report 131 proposes establishing the first adult safeguarding law in Australia.<sup>23)</sup> It quotes Jonathan Herring's remark: 'older people have a fundamental human right to protection from abuse. That obliges the state to put in place legal and social structures to combat elder abuse'.<sup>24)</sup> This acknowledgement in part comes from a vulnerability approach, where a general view is derived that

16) ALRC Report 131, 20.

17) Ibid 53–58.

18) Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws Final Report* (ALRC Report No. 124, 2014).

19) ALRC Report 131, 5.

20) Rosalind F. Croucher was the President of the ALRC members who published the ALRC Reports 124 and 131. Croucher has highlighted how deeply ALRC members debated on the elder abuse based on the guardianship and administration reform report. Rosalind F. Croucher, 'Modelling Supported Decision Making in Commonwealth Laws—The ALRC's 2014 Report and Making it Work' (Conference Paper, AGAC 2016 Conference in Sydney, October 18, 2016) 11–20.

21) The ALRC Report 131 provides an overview on 'laws and legal frameworks across Commonwealth, state and territory laws—aimed at achieving a nationally consistent response to elder abuse'. (ALRC Report 131, 21).

22) ALRC Report 131, 50–51.

23) Refers to the research paper focusing on adult safeguards in the common law jurisdictions. John Chesterman, *Responding to Violence, Abuse, Exploitation and Neglect: Improving our Protection of at-Risk Adults* (Report for Winston Churchill Memorial Trust of Australia, 2012).

24) ALRC Report 131, 377. Jonathan Herring, 'Elder Abuse: A Human Rights Agenda for the Future' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer Science and Business Media, 2012) 175.

vulnerable adults at risk of harm must be protected by the law and public policy.<sup>25)</sup> A review of the current state-based measures to reduce elder abuse shows that considerable gaps exist between the elder abuse measures required by law and those practically provided by public agencies.<sup>26)</sup> It may be assumed that the gaps exist among public agencies in part because Australia adopts a three-tier administrative system, such as national, state and special territory, and local government. Recognizing that elder abuse occurs within the gaps in the current administrative system, a national elder abuse legislation framework or the like is needed to fill the gaps. Paragraph 14.37 of the ALRC Report 131 states that 'the ALRC agrees with this assessment and recommends the introduction of adult safeguarding laws throughout Australia as an important measure toward filling the gap.'<sup>27)</sup> This will provide a uniform standard throughout Australia. Daily responses to elder abuse will be provided by local governments, which can enact laws in each state and special territory under the uniform national legislation or the like.<sup>28)</sup> The ALRC Report 131 acknowledges the lack of statutory role of safeguarding and supporting adults at risk of harm and thus proposes necessary institutional steps to improve this challenge.

In the ALRC's view, the support and protection should be provided by state and special territory adult safeguarding agencies.<sup>29)</sup> Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an at-risk adult.<sup>30)</sup> The first step of an inquiry should be to contact the at-risk adult.<sup>31)</sup> If a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult, the agency may take necessary actions with the adult's consent.<sup>32)</sup> Responding effectively to elder abuse may often require the cooperation and expertise of people from multi disciplines and multi agencies.<sup>33)</sup> Adult safeguarding agencies should lead and coordinate this work. The ALRC Report 131 recommends that

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25) Vulnerability has been analyzed and explored by Martha Albertson Fineman. Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) *Yale Journal of Law and Feminism*, 1, 23.; Martha Albertson Fineman, "'Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71,112.

26) Paragraph 14.36 of the ALRC Report 131 refers to *Closing the Gaps* report co-author Wendy Lacey's remarks: 'State-based frameworks presently contain a number of significant flaws: there is no dedicated agency with statutorily mandated responsibility to investigate cases of elder abuse, coordinate interagency responses and seek intervention orders where necessary; referral services between agencies can provide partial solutions in cases of elder abuse, but do not encourage a multi-disciplinary and multi-agency response in complex cases.' Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' 105.

27) ALRC Report 131, 383.

28) There is an article asking 'if the reforms are implemented, what will be the implications for lawyers in philosophical and practical terms?'. Margaret Castles, 'A Critical Commentary on the 2017 ALRC Elder Abuse Report: Looking for an Ethical Baseline for Lawyers' (2018) 18 *Macquarie Law Journal* 115, 130.

29) ALRC Report 131, 384.

30) Ibid 387. At-risk adult is defined as people aged 18 or over who: (a) have care and support needs; (b) are being abused or neglected, or are at-risk of abuse or neglect; and (c) are unable to protect themselves from abuse or neglect because of their care and support needs.

31) Ibid.

32) Ibid 402–403. The actions by a safeguarding agency include: (a) coordinate legal, medical and other services for the adult; (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult; (c) report the abuse to the police; (d) apply for a court order; or (e) decide to take no further action.

33) Ibid 403. R. Kaspiew, Carson, R. and Rhoades, H. *Elder abuse: Understanding Issues, Frameworks and Responses* 43–44.

adult safeguarding agencies would provide a clear point of accountability within the government.<sup>34)</sup>

The ALRC Report 131 concludes that the consent of an adult at risk must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult.<sup>35)</sup> This is due to the need to respect the autonomy of an adult at risk. An adult safeguarding agency sometimes may seek court orders to prevent someone suspected of abuse from contacting an at-risk adult and in particularly serious cases, the safety of the at-risk adult may need to be secured, even against their wishes.<sup>36)</sup> The ALRC Report 131 suggests that although a person's wishes should always be respected, in some limited cases, it may be appropriate to act without their consent.<sup>37)</sup> This may apply to only those who need care and support and cannot protect themselves.<sup>38)</sup>

## (2) Responses

In response to the ALRC Report 131, the Federal Attorney-General Charles Christian Porter, at the 5th Elder Abuse Conference held in Sydney on February 20, 2018,<sup>39)</sup> identified the following five items as a national plan for elder abuse:

- promote the autonomy and agency of older people
- address ageism and promote community understanding of elder abuse
- achieve national consistency
- safeguard at-risk older people and improve responses
- build the evidence basis

Later, Age Discrimination Commissioner Dr. Kay Patterson made a keynote speech titled 'Elder Abuse is Everybody's Business' at the Aged Rights Advocacy Service World Elder Abuse Awareness Day Conference held in Adelaide on June 15, 2018.<sup>40)</sup> She stressed that '[t]he multidimensional nature of elder abuse, and the expectations of individuals affected by elder abuse, require multi-disciplinary responses. We need more collaborations and partnerships to make the most of everyone's expertise and plug the gaps in services and supports'. This speech clarifies the main points of the measures to reduce elder abuse.

Furthermore, considering Australians' growing concerns with elder abuse, the Royal Commission into Aged Care Quality and Safety (hereinafter referred to as 'Royal Commission') was established on October 8, 2018 by the Governor-General of the Commonwealth of Australia.<sup>41)</sup> The Royal Commission organized a

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34) Ibid 405.

35) Ibid 392.

36) Rosalind Croucher and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' (2018) 18 *Macquarie Law Journal* 5–14, 14.

37) ALRC Report 131, 397. This is reflected in the 'will, preferences and rights guidelines' in the ALRC Report 124 in relation to the 'Representative decision-making'. (ALRC Report 124, 77).

38) Ibid 392. The ALRC Report states that consent should not be required: (a) in serious cases of physical abuse, sexual abuse, or neglect; (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or (c) if the adult lacks legal capacity to give consent, in the circumstances.

39) Federal Attorney-General Charles Christian Porter, 'National Plan to Address Elder Abuse' (Speech delivered at the 5th Elder Abuse Conference in Sydney, February 20, 2018).

40) The Australian Human Rights Commission's Age Discrimination Commissioner Dr. Kay Patterson, 'Elder Abuse is Everybody's Business' (Speech delivered at the Aged Rights Advocacy Service World Elder Abuse Awareness Day Conference in Adelaide, June 15, 2018).

41) As the Prime Minister of Australia Scot Morrison announced on September 18, 2018, the Royal Commission into Aged Care Quality and Safety was established by the Letters Patent December 6, 2018. Royal Commission into

national campaign at which they held hearings and accepted submissions regarding elder abuse in Australia. The Royal Commission has received a total of 10,102 submissions and 6,729 telephone calls by July 31, 2020.<sup>42)</sup> It is scheduled for the Royal Commission to publish a final report by February 26, 2021, in addition to the Interim Report, which was issued on October 31, 2019.<sup>43)</sup>

With regard to the national budget and policy, the federal government had an annual budget of approximately AS\$15 million related to the elder abuse policy measures since the 2016 fiscal year. This budget was then increased to AS\$ 22 million in the 2018–19 fiscal year. On March 19, 2019, the Federal Attorney-General launched the ‘National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–23’.<sup>44)</sup> Developed in collaboration with state and special territory governments, the National Plan provides an overview of the issues that all local governments need to act on as a priority.<sup>45)</sup> In particular, financial exploitation is a common serious problem in developed countries, including Australia. Attention should be paid in the future to the movements of the federal government in coping with financial exploitation.

There has been a remarkable progress in elder abuse legislation in the state of South Australia. The 2011 Wendy Lacey report *Closing the Gaps* was presented to the state of South Australia Parliament,<sup>46)</sup> and legislation of an Act on adult safeguarding was considered to combat elderly abuse. Consequently, the *Office of the Ageing (Adult Safeguarding) Amendment Act 2018* was enacted in November 2018 and was planned to be implemented step by step over three years.<sup>47)</sup> At the first stage, the elderly aged 65 and over and indigenous elderly people aged 50 and over became subject to the law in 2019.<sup>48)</sup> The target of the Act was expected to expand gradually for three years. In the South Australian state elder abuse legislation, all political parties supported the Bill, but a debate took place between the Ruling and Opposition parties on the public agency

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Aged Care Quality and Safety, *Letters Patent—6 December 2018* (Web Page, December 6, 2018) <<https://agedcare.royalcommission.gov.au/publications/letters-patent-6-december-2018>>.

42) The author submitted an adult support and protection legislation article to the Royal Commission. Royal Commission, *Royal Commission into Aged Care Quality and Safety* (Web Page, 2020) <<https://agedcare.royalcommission.gov.au/Pages/default.aspx>>.

43) Royal Commission, *Interim Report* (Web Page, October 31, 2019) <<https://agedcare.royalcommission.gov.au/publications/interim-report>>.

44) Australian Government, Attorney-General's Department, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–23* (Web Page, March 2019) <<https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Documents/National-plan-to-respond-to-the-abuse-of-older-australians-elder.pdf>>.

45) Regarding Australian elder abuse policy in general, Australian Government, Attorney-General's Department, *Protecting the Rights of Older Australians* (Web Page) <<https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Pages/default.aspx>>.

46) Office of the Public Advocate in the state of South Australia, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (Office of the Public Advocate in collaboration with University of South Australia, 2011).

47) The Act provides legislative framework as follows. Role of the Adult Safeguarding Unit; Definition of vulnerable adults; Basic principles of protection; Reporting system; Role of the Director; In principle, the consent of the principal is required for protection, but an emergency rescue without consent is also assumed; Granting investigation authority; Protection orders of and appeals to the court; and Information exchange and sharing.

48) This is due to the shorter lifetime of indigenous people in average.



that should be responsible for elder abuse.<sup>49)</sup> The Office of the Public Advocate in charge of guardianship and administration was a candidate for the agency responsible for elder abuse. It was then concluded that the adoption of this proposal should be dropped. If elder abuse duties were added to the Office of the Public Advocate's existing duties, it was understood that the governance of the Office would have become difficult presumably due to a conflict of interest within the agency.<sup>50)</sup> Therefore, the responsibility was given to a new agency, the Adult Safeguarding Unit. This decision corresponds to ALRC Report 131 recommendation<sup>51)</sup> and one scholar's view that 'new agencies could be created if particular jurisdictions took the view that such an initiative would provide better responses'.<sup>52)</sup>

Similarly in the state of New South Wales (NSW), a NSW Ageing and Disability Commissioner<sup>53)</sup> was newly established in July 2019 by the *NSW Ageing and Disability Commissioner Act 2019* to better protect vulnerable adults.<sup>54)</sup> The activities of the Adult Safeguarding Unit in the state of South Australia and those of the NSW Ageing and Disability Commissioner in the state of NSW have begun, and the results can be expected to affect future national legislation on elder abuse and also legislation in the other states and special territories.<sup>55)</sup>

### 3-3 Comments on National Elder Abuse Legislation

It is particularly interesting to see the ALRC Report 131 that (3) enduring appointment, (8) guardianship and administration, and (12) safeguarding adults at risk are listed as the instruments of safeguards to combat elder abuse as the instruments of safeguards. Legal devices for adult guardianship and administration, supported decision-making, and safeguards for elder abuse are interrelated. Amendments to the adult guardianship system in state Acts and the national legislation of elderly abuse are ongoing in parallel and are expected to provide a unique Australian adult support and protection legislative system.

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49) SA Parliamentary Debates (Legislative Council), October 23, 2018, p. 1723–24 in HANSARD-10-24770.

50) The ALRC Report 131 states a similar view on this point (ALRC Report 131, 385).

51) Ibid 386.

52) John Chesterman, 'The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives' (2019b) 73 (3) *Australian Social Work* 381–389, 386.

53) 'The New South Wales Government established the Ageing and Disability Commissioner on 1 July 2019. This implements in part the NSW Law Reform Commission's recommendation in its Report No. 145: Review of the Guardianship Act 1987 for an independent statutory position to have powers to investigate suspected abuse and neglect of people in need of decision-making assistance'. Parliament of New South Wales, 1659—*NSW Law Reform Commission Guardianship Recommendations* (Web Page, November 2019) <[https://www.parliament.nsw.gov.au/la/papers/Pages/qaprofiles/nsw-law-reform-commission-guardianship-r\\_243663.aspx](https://www.parliament.nsw.gov.au/la/papers/Pages/qaprofiles/nsw-law-reform-commission-guardianship-r_243663.aspx)>; NSW state government, *NSW Ageing and Disability Commission* (Web Page) <<https://www.ageingdisabilitycommission.nsw.gov.au/>>; Lenny Roth, 'Adult Safeguarding Laws: Reviewing the Proposal for NSW Ageing and Disability Commissioner' *NSW Parliamentary Research Service e-brief Issue 3/2019* (Web Page, March 2019) <<https://www.parliament.nsw.gov.au/researchpapers/Documents/Adult%20safeguarding%20laws.pdf>>.

54) People recognize 'an urgent need for an effective, integrated framework and independent lead agency for responding to the abuse and neglect of all vulnerable adults in NSW'. New South Wales Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW—the Need for Action* (NSW Ombudsman, 2018) 21.

55) John Chesterman, 'The Future of Adult Safeguarding in Australia' (2019a) 54(4) *Australian Journal of Social Sciences* 360–370, 367.



The Australian elder abuse legislation mainly draw from England's elder abuse safeguard measures, as can be seen in the ALRC Report 131, to take care of the elderly from the viewpoint of human rights protection.<sup>56)</sup> In England, the *Care Act 2014* was enacted, which regulates 'safeguarding adults at risk of abuse or neglect' (section 42 to section 47 of the Act).<sup>57)</sup> The central public agencies engaged in adult safeguarding for abuse are the Office of Public Guardian (hereinafter referred to as 'OPG') and the Court of Protection. The OPG is a public agency established under the Ministry of Justice in 2007, a year before the enforcement of the *Mental Capacity Act 2005* (hereinafter referred to as 'MCA'). The OPG, originally in charge of adult guardianship, finds suspected abuse of adults at risk of harm based on the authority of the public guardian as a public body with legal power, in cooperation with other public agencies.

The purpose of the OPG is to protect adults at risk of harm by receiving investigative reports, recognizing abuse, and managing the findings. The OPG supervises people, reports to other public agencies such as the police and the Forced Marriage Unit,<sup>58)</sup> and shares information when it is necessary. 'The *Care Act 2014* replaces the term "vulnerable adults" with "adults at risk" to underscore that the emphasis should be on the circumstances adults find themselves, rather than on an individual's impairment, in which may or may not in itself make them vulnerable'.<sup>59)</sup> Section 43(1) of the Act states that, 'each local authority must establish a Safeguarding Adults Board (an "SAB") for its area'. An "SAB" comprises local authority, National Health Service (NHS), police, and so on, who which may play an important role in adults safeguarding activities in the community. According to the UK government, adults at risk of harm can be abused by a wide range of people, including family members, practitioners, paid care workers, other adults at risk, volunteers, other service users, neighbours, friends and associates, people who deliberately take advantage of vulnerable people, strangers, and people who see an opportunity to abuse.<sup>60)</sup>

It is presumed that England's elder abuse legislation has a background with a purpose intended for broad and social correspondence, including school and community education. This may correspond to the focus on 'the circumstances adults find themselves'. This seems to emphasize a 'preventive model' rather than a 'reactive model'.<sup>61)</sup> A preventive model is presumably based on a method aimed at diminishing possible root causes of the problem by taking proactive measures, including social, legal, and systemic ones. This preventive method

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56) From the interview of OPA Victoria and the Senior Rights Melbourne on March 2-3, 2017 by the author.

57) This guide (1<sup>st</sup> ed.) was published in 2000 before the legislation of the *Care Act 2014*. Department of Health of UK, *No Secrets: Guidance on Developing and Implementing Multi-agency Policies and Procedures to Protect Vulnerable Adults from Abuse* (Department of Health of UK, 2<sup>nd</sup> ed. 2015).

58) A forced marriage is recognized in the UK as a form of domestic or child abuse and a serious abuse of human rights. The Forced Marriage Unit (FMU) is a joint Foreign and Commonwealth Office and Home Office unit that enforces the government's forced marriage policy and undertakes outreach, and casework. GOV. UK, *Forced Marriage* (Web Page, May 24, 2019) <<https://www.gov.uk/guidance/forced-marriage>>.

59) Sarah Donnelly, O'Brien, Marita, Walsh, Judy, McNerney, Joanne, Campbell, Jim and Kodate, Naonori, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Health Service Executive, 2017) 25.

60) GOV. UK, *Policy Paper SD8: Office of the Public Guardian Safeguarding Policy* (Web Page, July 4, 2017) <<https://www.gov.uk/government/publications/safeguarding-policy-protecting-vulnerable-adults/sd8-opgs-safeguarding-policy>>.

61) Two approaches addressing elder abuse are comparatively discussed, i.e., a reactive approach (the U.S.) and a preventive approach (Japan). Bryan A. Liang and Fusako Seki, 'Protecting the Elderly: Policy Lessons from an Analysis of Japan and USA Approaches' (2009) 18 (2) *Yokohama Law Review* 1-37, 25.

is different from the U.S. elder abuse method of adult protection services. In the U.S., most of the elder abuse programs take place at the state level. People or agencies that notice suspicious behavior related to elder abuse inform the police and deal with strict application of law/regulations.<sup>62)</sup> It can be said that Australian elder abuse policy is consistent with the character of Australian's multicultural society and draws more from England's elder abuse legislation than the U.S. method.<sup>63)</sup>

The activities of the Adult Safeguarding Unit in the state of South Australia and those of the NSW Ageing and Disability Commissioner in the state of NSW have begun by the state initiatives.<sup>64)</sup> For these reforms to constitute long-term improvements to the prevention of and response to elder abuse, extensive community education and adequate funding are essential, so that the relevant policy and legislative system could be continued and scaled up.<sup>65)</sup>

According to the legal system of Australia, the procedure on legal reforms of each state and special territory is first informally negotiated between the federal government and the state and special territory government.<sup>66)</sup> Second, the federal and the state and special territory parliaments will deliberate on the bills. For this reason, it is expected that a considerable amount of time will be required for these legislations to be completed.<sup>67)</sup> A strong and national initiative is vital if the legislations are to address the scourge of elder abuse.<sup>68)</sup>

#### 4. Australian Principal Values and the Implications

##### 4-1 Discussion

##### (1) Australian Project and Adult Support and Protection Legislation

The policy objectives of the amendments to the state law on the guardianship and administration system and the national legislation on elder abuse can be summarized as follows: First, the framework of the guardianship and administration system established over 30 years ago was changed or would be changed. And supported decision-making was or would be incorporated into the legislation as recommended by the UN in the *Convention on the Rights of People with Disabilities* (CRPD).<sup>69)</sup> Second, personal protection, autonomy and the right to self-determination were clarified and prioritized, even if they may somewhat change the

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62) The three main federal statutes are 'Title VII (Vulnerable Elder Rights Protection Activities) of the *Older Americans Act* (OAA), the *Violence against Women Act*, and the *Elder Justice Act* (EJA) portion of the *Affordable Care Act* (ACA)'. Marshall B. Kapp, 'Future Directions in Public Policy Relating to Elder Abuse' in Dong X. (eds) *Elder Abuse* (Springer, 2017) 695.

63) From the interview of OPA Victoria and the Senior Rights Melbourne on March 2-3, 2017 by the author.

64) The ALRC Report 131 leaves state and territory laws and agencies with ongoing adult safeguarding responsibilities. John Chesterman, 'The Future of Adult Safeguarding in Australia' 362.

65) John Chesterman, 'The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives' 387.

66) The institutional mechanism to adjust interests between federal and state/territory is reported. Jun Ashida, 'Australian Intergovernmental Council: Method of Federal and State Government Coordination' (2018) 277 *Foreign Legislation* 77, 91. (in Japanese) \*

67) From the interview of OPA Victoria on March 2-3, 2017 by the author.

68) Dow Briony, Vratsidis F., O'Brien M., Joosten M. and Gahan L., 'Elder Abuse in Australia' in Shankardass M. (eds) *International Handbook of Elder Abuse and Mistreatment* (Springer, 2020) 559, 574.

69) Reviewing 67 international Law Reform Reports on guardianship, 9 Reports were found to have recommendations to enact supported decision-making, including 5 Reports in Australia, 2 Reports in Canada, 1 Report

balance of protection and autonomy.<sup>70)</sup> Third, informal arrangements by relatives and close kin are kept as they are without forcing any changes unless problems arise. And fourth, to propose personal protection measures in a broader area. These measures include a policy to formulate treatment and safeguards through regulations of commercial banks and other financial institutions as well as school and community education. It is crucial to grasp the actual situation of damage related to financial exploitation and to inform the public of the necessity of protecting vulnerable adults particularly the elderly with dementia.<sup>71)</sup>

In the two Australian states of Victoria and NSW as representing Australia, the guardianship and administration system and the supported decision-making are incorporated into the state legislation. Legal devices for adult guardianship and administration, supported decision-making, and safeguards for elder abuse are interrelated. Amendments to the adult guardianship and administration system in state Acts and the national legislation of elderly abuse are ongoing in parallel and are expected to provide a unique Australian legislative system. The adult support and protection system is referred to an offer of necessary sustenance, according to individual characteristics, that minimizes restriction on a principal's rights. This system is considered to replace other less restrictive alternative measures available. A person-centered approach is emphasized, unlike traditional guardianship and administration system that uniformly restrict rights, according to the relevant mental capacity of the principal. If the adult support and protection system is considered as a comprehensive legal system, amendments to the state laws and national legislation covered in this article are an example of legislation of the adult support and protection. The values enshrined in the CRPD, international human rights legislation, and rising human rights awareness make up the background of the adult support and protection system.<sup>72)</sup> This Australian project has been under discussion at the Law Reform Commission of each state and federal government in response to rising human rights laws and awareness. This movement is a positive response to an ageing society and will be of relevance to other countries, including Japan.

In the meantime, there is some unique institutional design that supports the Australian adult support and protection system need to be understood. First, Australia has a Public Advocate or Public Guardian in each jurisdiction. This office, a part of the state Ministry of Justice, implements a legal support system and deals

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in UK, and 1 Uniform Law in the U.S. Shih-Ning Then, Terry Carney, Christine Bigby and Jacinta 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* 1, 12.

70) The ALRC Report 131 states on a balance of values of dignity, autonomy and safeguarding in the paragraph 1.19: 'Sometimes, protective measures may conflict with a person's autonomy, such as where an older person refuses to accept support, or to report abuse to police. Where possible, the ALRC has sought to recommend changes to the law that both uphold autonomy and provide protection from harm, but where this is not possible, greater weight is often given to the principle of autonomy. Older people, like most adults, prize their freedom and independence, and do not wish to be treated like children or sheltered from all risk. The autonomy of older people should not be afforded less respect than the autonomy of others. However, in limited cases, where there is particularly serious abuse of vulnerable people, protection should be given additional weight'.

71) Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies—It's Time to Face the Facts!' (2013) 7 *Elder Law Review* 1, 30.

72) 'Law reform initiatives must think beyond the limits of existing domestic laws to imagine different and interconnected legal, social, cultural and political responses to disability'. Fleur Beaupert, Linda Steele and Piers Gooding, 'Introduction to Disability, Rights and Law Reform in Australia: Pushing Beyond Legal Futures' 14.

with human rights policy issues at large. Second, Australia has a tribunal system. The tribunal is independent of the courts and is engaged in prompt and straightforward dispute resolution for tenancy, family, and human rights issues. Third, Australia has a state-run or public financial management institution, State Trustees Limited or Public Trustee. State Trustees limited or Public Trustee is appointed with fees when there is no person suitable to serve as an administrator for a principal with insufficient mental capacity or when more professional financial management skill is required. Fourth, Australia has many NPOs that operate in communities based on a charity, grants, or welfare funding system.

This concept of institutional agencies mentioned above may enable the smooth implementation of the guardianship and administration in practice. But at the same time, it is a costly design. As far as Australia is concerned, the national population scale is relatively small, at approximately 25 million, and thus these institutional agencies can be run. The national productivity and the living standard are relatively high to pay for the financial burden. But it is unlikely that this institutional design will be applied in the exact same way to any other country, including Japan. This is because there will be financial challenges in maintaining the institutional agencies in any other country with a higher population scale, such as Japan.<sup>73)</sup> Therefore, when importing the concept of the Australian institutional agencies to another country, it is vital to revise its instrumental design to minimize the financial burden as much as possible.

There are some uncertainties as to what supported decision-making model is to be implemented. In the process of legislation, further consideration should be given to the supported decision-making model. For example, what supported decision-making model will be most effective to the elderly with dementia? Craig Sinclair et al proposed 'a spectrum model of supported decision-making which incorporates both a formal framework for "supporters" and recourse to a "representative" role as a last resort'.<sup>74)</sup> Based on the interviews and analysis of cases of dementia across three states in Australia, this model is considered to cope with the characteristics of dementia which is 'a condition resulting in gradual and progressive decline, but with unpredictable course'.<sup>75)</sup> In the process of implementation, it can be assumed necessary to accumulate practical issues associated with implementing supported decision-making, and to make systematic efforts to establish countermeasures and safeguards. Possible undue influence and a supporter's misconduct may be the problems.<sup>76)</sup> Undue influence may occur when a supporter uses its superior position to control a principal or to exercise improper persuasion.<sup>77)</sup> Under the principle of autonomy, a principal with insufficient mental capacity might be assisted through supported decision-making activity by a third-party in the principal's best interests. But, in fact, the principal might be forced to engage in action that serves the interests of a third-party by undue influence.

There is room for further research on supported decision-making, particularly in regard to the principal's

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73) From the interview by the author of a Japanese lawyer who belongs to the Japan Adult Guardianship Law Corporate Association (JAGA) at the World Congress of Adult Guardianship (WCAG) in Seoul, South Korea on October 25, 2018.

74) Craig Sinclair, Julie Bajic-Smith, Meredith Gresham, and Susan Kurrle, "A Real Bucket of Worms": Views of People Living with Dementia and Family Members on Supported Decision-Making' (2019) 16 *Journal of Bioethical Inquiry* 587–608, 605.

75) Ibid.

76) Fiona R. Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 (1) *UNSW Law Journal* 145, 185.

77) Mary Joy Quinn, 'Undue Influence and Elder Abuse' (2002) 23 (1) *Geriatric Nursing* 11–17, 15.

autonomy and self-determination. It is important for the state of NSW-proposed *Assisted Decision-Making Act* to respect the will and preferences of the principal when examining measures to properly determine them. These measures may include how to incorporate opinions of relatives and acquaintances surrounding the principal in the decision-making process. The guidelines, such as the code of practice for supported decision-making, would be essential. It is also important to train professionals to lead and coordinate supporters' activities. This professional human resource system may correspond to how to guide supported decision-making practices on site and how to solve any technical problems related to supported decision-making in communities. If such a professional is provisionally called a 'supported decision-making counselor', some consideration is needed specifically as to the qualification requirements and training course methods that this counselor should have.

In England and Wales, when the *Mental Capacity Act 2005* (MCA) was enacted, an independent mental capacity advocate (hereinafter referred to as 'IMCA') system based on the MCA was introduced.<sup>78)</sup> The main tasks of an IMCA are support for an important legal decision, such as selection of the residence of the principal, technical assistance, and medical assistance. An IMCA may perform as a supporter of the principal who has lost their mental capacity when there is no suitable supporter like a relative or an acquaintance. The Office of the Public Advocate (OPA) in states and special territories of Australia or a relevant public agency<sup>79)</sup> may support practical activities of supported decision-making on a daily basis. This will be a challenge in Japan, where there is no public agency or profession like the OPA or an IMCA who supports decision-making practices and helps to solve technical problems in communities.

Another aspect of supported decision-making that needs further research is support mechanisms and networks in community. As Bigby and Douglas have pointed out, supported decision-making schemes must incorporate 'mechanisms that proactively reach out to find, encourage and nurture supporters for the many people who do not have strong existing support networks'.<sup>80)</sup> It is supposed that the support mechanisms and networks in community would be part of the foundation where supporters can deal with people with various types of disabilities, including intellectual/mental disabilities, higher brain dysfunction, and dementia. It is required to specifically consider how to support people who do not have strong existing support mechanisms and networks in remote areas. A good idea would be a combined service of weekly patrol around the principals' residences and daily online communication by social workers. This subject will be a future task.<sup>81)</sup>

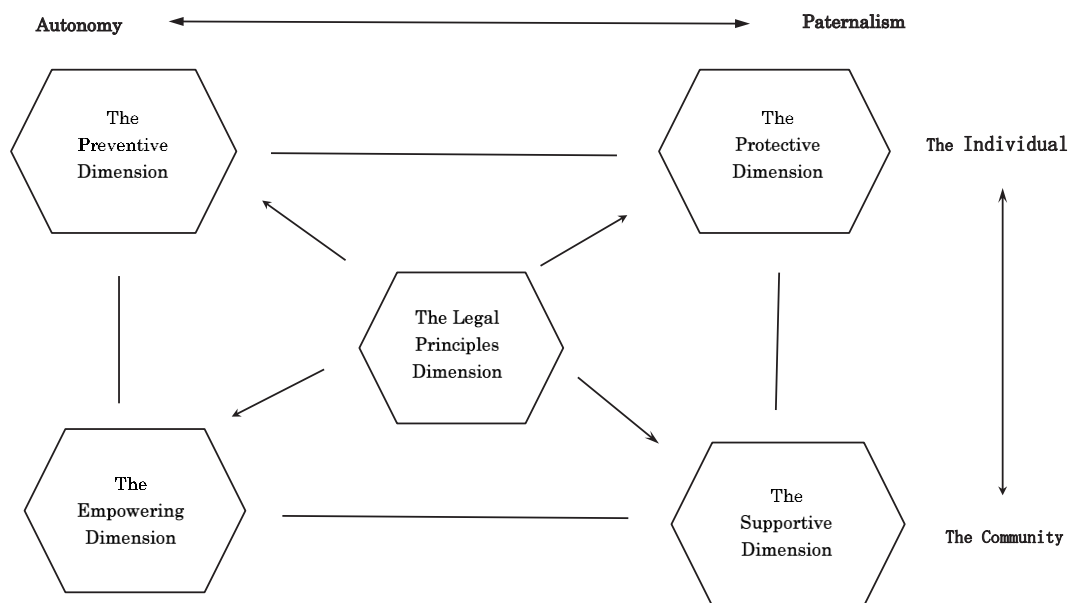
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78) Social Care Institute for Excellence (UK), *Independent Mental Capacity Advocate (IMCA)* (Web Page, January 2020) <<https://www.scie.org.uk/mca/imca>>.

79) Gerard Quinn proposed the 'Office of Public Support' as a moral agency of the person. Gerard Quinn, 'Reflecting Will and Preference in Decision Making' (Conference Paper, AGAC 2016 Conference in Sydney, October 17–18, 2016) 31.

80) Christine Bigby and Jacinta Mary Douglas, 'Supported Decision Making' in Stancliffe, R. J., Wehmeyer, M., Shogren, K., and Abery, B. H. (eds) *Choice, Preference, and Disability: Promoting Self-Determination Across the Lifespan* (Springer, 2020) 61.

81) Other types of support schemes for people with disabilities are available in the state of Victoria. i.e. a support attorney (*Powers of Attorney Act 2014*), a medical support person (*Medical Treatment Planning and Decisions Act 2016*), a plan nominee (*The National Disability Insurance Scheme Act 2013*), and a nominated person (*Mental Health Act 2014*). OPA Victoria, *Appointing A Person to Support You in Making Decisions* (Web Page) <<https://www.publicadvocate.vic.gov.au/power-of-attorney/supportive-attorney-appointments>>.



Source: Israel Doron, 'A Multi-Dimensional Model of Elder Law: An Israeli Example'

**Figure 1 The Multi-dimensional Model of Elder Law**

## (2) Theoretical Framework

A theoretical analysis of the guardianship and administration law reforms and national legislation of elder abuse in Australia is shown in accordance with a multi-dimensional model of elder law. The multi-dimensional model of elder law was advocated by Israel Doron in 2013 as 'an efficient comparison tool in international and comparative law'.<sup>82)</sup> The purpose of the model is to clarify elder law system through mapping, as shown in Figure 1, and to make a comparative law study in an international context.<sup>83)</sup> It is assumed that this model can be applied to the adult support and protection law, because the adult support and protection law is listed as part of elder law in the publication<sup>84)</sup> and both laws share the same values. With such an understanding, the Australian adult support and protection legislation system, comprising guardianship and administration state law reforms and national legislation of elder abuse, is reviewed in line with this model. Some comments on each dimension can be provided below.

### A. Legal Principles Dimension

The legal principles dimension comprises the values that are common in the adult support and protection law. The values that are common in two law reforms are referred to the four principles included in the 'National

82) Israel Doron, 'A Multi-Dimensional Model of Elder Law: An Israeli Example' (2003) 28(3) *Ageing International* 242–259, 256.

83) Ibid 255. Doron proposed that 'The model can be used to examine any legal system or to analyze its various laws by observing how these correspond to each of the model's suggested dimensions'.

84) Field, Sue et al, *Elder Law: A Guide to Working with Older Australians* (Federation Press, 2018).

Decision-Making Principles' addressed in the ALRC Report 124.<sup>85)</sup> It has been confirmed that the policy to combat elder abuse and the reforms of the guardianship and administration law are positioned back to back.<sup>86)</sup> Therefore, the Australian adult support and protection legislation system is commonly based on the 'National Decision-Making Principles' addressed in the ALRC Report 124. The Principles are principle 1, *the equal right to make decisions*; principle 2, *support*; principle 3, *will, preferences and rights*; and principle 4, *safeguards*. The ALRC Report 124 also states, the ALRC identified five Framing Principles for guiding the recommendations for reform: *dignity*; *equality*; *autonomy*; *inclusion and participation*; and *accountability*. There was wide support by stakeholders for these principles, which are reflected in the decision-making model that is developed in the ALRC Report 124.<sup>87)</sup> The said principles may correspond to the values of the CRPD as is mentioned before.<sup>88)</sup>

### **B. Protective Dimension**

By law, the adult guardianship and administration system provides, as a last resort, substituted decision-making as a protective measure to principals with insufficient mental capacity as a last resort. A public agency provides protective intervention to vulnerable adults at risk of harm from elder abuse. Both are legal instruments to protect vulnerable adults and are based on a vulnerability approach, bearing in mind that the least restrictive alternative measures should be taken. This is to avoid excessive paternalism, which may violate the human rights of the principal. Public agencies are involved in the activities and include the Office of the Public Advocate or the Public Guardian, tribunals, public trustee, and relevant agencies related to elder abuse.

### **C. Supportive Dimension**

Supported decision-making and relevant measures are offered through law, such as the Victoria Act 2019, to principals with insufficient mental capacity or to vulnerable adults. These supportive measures are implemented on an agreement basis, by a tribunal order, or even through informal arrangements if the principal is satisfied with the support. Public agencies are not always involved in supported decision-making activities. These agencies can include the Office of the Public Advocate or the Public Guardian, tribunals, public trustee, and relevant agencies related to elder abuse.

### **D. Preventive Dimension**

Supported decision-making and relevant measures, as well as an enduring power of attorney (EPA) and the adult guardianship and administration system, provide preventive measures for vulnerable adults at risk of harm. The harm includes, among others, financial exploitation. It is desirable for the adults to use these measures of their own accord. Public agencies—such as the Office of the Public Advocate or Public Guardian, tribunals, public trustee, and relevant agencies related to elder abuse—provide some preventive guidelines and pay careful attention to possible misconducts by supporters or relevant persons. These guidelines ensure that the autonomy and self-determination of the principals are respected.

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85) Refers to 2–3 (4) B. *What are the Common Values?* in Part I. From the interview by the author of OPA Victoria and Terry Carney on March 5 and 14, 2019 respectively.

86) Refers to 3–2 (1) ALRC Report 131.

87) ALRC Report 124, 12.

88) Refers to 2–3 (4) B. *What are the Common Values?*



### ***E. Empowering Dimension***

Vulnerable adults should be encouraged and empowered to use supported decision-making and relevant measures of their own accords, as well as an enduring power of attorney (EPA). The purpose is to respect their autonomy and self-determination. Even in dispute cases, the principals and relevant persons may use the alternative dispute resolution (ADR) provided by the tribunal outside the court. For example, in the state of Victoria, four measures are available through Victorian Civil and Administrative Tribunal (VCAT) as mentioned before.<sup>89)</sup> It is understood that people may choose the solution that best suits their circumstances.

The Australian adult support and protection system could be illustrated as a legal architecture in accordance with the multi-dimensional model. The model comprises four dimensions——i.e., *protective*, *supportive*, *preventive*, and *empowering*——and a *legal principles dimension* at the centre to connect with each of the four other dimensions. The value indicator matrix is set horizontally between autonomy and paternalism and vertically between the individual and the community. Legal instruments, such as guardianship and administration, EPA, supported decision-making, ADR, and elder abuse safeguarding, and the relevant public agencies are placed in mapping within the four dimensions. All these legal instruments and public agencies are based on the foundation of the National Decision-Making Principles, that is the legal principles dimension. It is noteworthy how the four dimensions are kept in a reasonable balance by the legal principles dimension. It can then be concluded through the model analysis that the Australian adult support and protection system is a comprehensive and well-designed legal architecture aimed to cover the possible needs of adults in various aspects. The importance in practice would be a balance of values between autonomy and paternalism to be assigned case by case.

### **4-2 Possible Implications from Australian Legislation**

Guardianship and administration state law reforms and national legislation of elder abuse in Australia suggest possible implications for Japan's public policy and legislation on the adult guardianship system, supported decision-making, and elder abuse safeguards. These implications can be summarized under the following five points:

- (a) The Australian law reforms and legislation may reflect the values of the CRPD in the legal system. In the background, there is a rise in international human rights law and human rights awareness. In Australia, it is assumed that people have a decision-making capacity unless there is relevant evidence to deny it, and the state and special territory governments are trying to reduce the use of adult guardianship as a last resort. In this regard, the stance of the Japanese government is different, which is to ensure that Japan's adult guardianship system does not conflict with the Article 12 (equal recognition before the law) of the CRPD.<sup>90)</sup> As the number of the elderly with dementia is increasing, the Japanese government has an

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89) Refers to 2-2 (1) D. Dispute Response Mechanism.

90) Anna Arstein-Kerslake, 'Legal Capacity and Supported Decision-Making: Respecting Rights and Empowering People' (University of Melbourne Legal Studies Research Paper No. 736, 2016) <<http://dx.doi.org/10.2139/ssrn.2818153>>; United Nations, Committee on the Rights of Persons with Disabilities, *Initial Report Submitted by Japan under Article 35 of the Convention, Due in 2016* (Web Page, June 30, 2017) 17–18. <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fJPN%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fJPN%2f1&Lang=en)>.

intention to promote the adult guardianship system to protect their interests. Therefore, the government supports implementing the Basic Plan decided by the Cabinet in March 2017 to promote the adult guardianship system in communities.<sup>91)</sup> It is therefore necessary to recognize that the stance of the Japanese government is largely inconsistent with the norms of other developed countries, including Australia.<sup>92)</sup>

- (b) The Australian guardianship and administration law reforms aim at legislation of supported decision-making to respect the will and preferences of the principal, while the Japanese government places supported decision-making outside the law framework and manages its operation by some guidelines. Management by guidelines depends on voluntary intentions of the decision-makers. Large ambiguity without enforcement remains. It can be assumed that the need for legislation of supported decision-making will be considered as safeguards against possible undue influence and financial exploitation.<sup>93)</sup> The Victorian legislation would be of relevance to Japan.
- (c) Australia has public agencies in states and special territories, including the Office of the Public Advocate or the Public Guardian. The function of this public agency will serve as a reference to the project to establish 'core agencies'<sup>94)</sup> in Japanese communities even though the legal entity is different. A Public Trustee is a unique public agency that contributes to communities by providing financial management services at a fee for persons with disabilities and the elderly. Commercial banks and other financial institutions might be unable to attain such services from a private company, because a private company typically pursues commercial profits. It is therefore understood that this agency's business model can be a useful reference for other countries, including Japan. Japan has large demands for property management by public agencies, particularly for the elderly with dementia.
- (d) A dispute response mechanism is important for the users. Four measures are available through VCAT in the state of Victoria according to the dimension of the dispute, namely complaint solving, mediation, Fast Track Mediation and Hearing (FTMH) service, and appeals to the Supreme Court, according to the dimension of the dispute.
- (e) Australia has many NPOs that operate in communities based on a charity, grants, or welfare funding system. They are engaged in community services related to adult guardianship, supported decision-making, and responses to elder abuse, while cooperating with local governments and the public agencies.

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91) Ministry of Health, Labour, and Welfare of Japan, *Promotion of the Adult Guardianship System* (Web Page) <<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622.html>>.

92) Japan's adult guardianship system may partly violate the CRPD both in legal system and practice. This view has been addressed by Japanese researchers, including Miaki Kuroda, 'The Compatibilities of the Japanese Adult Guardianship System with the Convention on the Rights of Persons with Disabilities' 100 *Meiji Gakuin Law Journal* (2016) 125, 146.

93) In Japan, there are some views to support the operational guidelines for supported decision-making because those guidelines may give advantages to the users and have an operational flexibility than the legislation. It can be assumed that the opinion may differ on whether those guidelines should be maintained either for the time being until its legislation or on a permanent basis, and the discussion is premature.

94) A Core agency is a focal point in Japanese community to promote the adult guardianship system, which is directed to establish over Japan in the Basic Plan.

## 5. Conclusion

In this article, the amendments to the guardianship and administration state laws of Victoria and NSW and the national legislation for elder abuse have been reviewed. In the two leading Australian states, Victoria and NSW, the guardianship and administration system and supported decision-making were or would be positioned in the legal safeguards to prevent possible elder abuse. Some unique institutional designs support the Australian adult support and protection system. These institutions are the three public agencies: the Office of the Public Advocate or the Guardian, the tribunal, and the State Trustees Limited or Public Trustee.

The adult support and protection system is referred to an offer of necessary sustenance, according to individual characteristics, that minimizes the restriction of a principal's rights. If the adult support and protection legislative system is considered as a comprehensive legal system, the Australian amendments to the state laws and national legislation cited in this article reflect an example of legislation of the adult support and protection. This move is a positive response in an ageing society and will be of relevance to other countries, including Japan.

Law reform in states and special territories and national legislative processes are being carried out in Australia to improve the domestic legislation in compliance with the values of the CRPD. These actions are on-going, with the recognition that the current Australian law may be partially in conflict with the CRPD. As a result, these amendments will position substituted decision-making as a last resort, and instead encourage supported decision-making. Supported decision-making is positioned or will be positioned as a legal system that respects the will and preferences of the principal. In the background, the positive attitude towards international human rights laws and awareness by the Australian government is confirmed.<sup>95)</sup> The Australian legislative policy on Article 12 (equal recognition before the law) of the CRPD was accepted by the UN CRPD Committee in October 2019.<sup>96)</sup>

The Australian amendments to the guardianship and administration state law and national legislation for elder abuse covered in this article are currently being deliberated. Deliberations are at a stage where it cannot fully be understood what kind of practice will be applied to the community after the legislation. It is thus necessary to continually monitor Australia's project developments until the legislation and practices are established. But this will take more time. Detailed analysis of the developments and practices are essential, but such research will be for a future studies.

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95) Shih-Ning Then, Terry Carney, Christine Bigby and Jacinta Douglas, 'Supporting Decision-making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies—Recommendations, Rationales and Influence' 72.

96) A positive response was addressed to the government of Australia by the UN CRPD Committee. The Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia* (Web Page, October 15, 2019) 6 <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f2-3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f2-3&Lang=en)>.

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