

Doctoral Dissertation

**Value of Legislation Providing Support and
Protection to Vulnerable Adults:
Vulnerability Approach and Autonomy**

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TABLE OF CONTENTS

Abstract/Acronyms/Table & Figure/Notes/Key Terms	1-7
Introduction	8-26
1. Background of the Study	8
2. Framework of the Study	16
3. Composition of the Dissertation	24
1 Legal Advocacy and Challenges in Japan	27-122
1.1 Research Framework of the Dissertation	27
1.1.1 Theoretical Review	27
1.1.2 Function-based Review	52
1.1.3 Research Framework	57
1.2 Overview of the Legal Advocacy and Relevant Policy	59
1.2.1 Adult Guardianship System and the Promotion Act	59
1.2.2 Supported Decision-Making (SDM)	94
1.2.3 Elder Abuse Prevention Law and Relevant Policy	108
1.3 Summary: Legal Advocacy to Meet People's Multiple Needs	120
2 Vulnerability Approach and Autonomy	123-162
2.1 Introduction	123
2.2 Vulnerable Adults	124
2.2.1 The Ageing of Population	124
2.2.2 The Elderly and Vulnerable Adults	128
2.3 Vulnerability and Safeguarding	135
2.3.1 Vulnerability	135
2.3.2 Vulnerability Approach	139
2.3.3 Safeguarding Laws for Adult at Risk	143
2.4 Adult Support and Protection	147
2.4.1 Capability Approach and Autonomy	147
2.4.2 Notion of Adult Support and Protection	159
2.5 Summary: A Good Balance of Vulnerability and Autonomy	161
3 Adult Support and Protection in the International Context	163-200
3.1 Introduction	163
3.2 A Comparative Law Study in the International Context	164
3.3 Analysis of Adult Support and Protection Legislation	194
3.3.1 Difference	194
3.3.2 Commonality	196
3.4 Summary: Adult Support and Protection is Defined	200

4 Adult Support and Protection in the Australian Context	201-279
4.1 Introduction	201
4.2 Australian Guardianship Laws	203
4.2.1 Australian Laws and its Guardianship	203
4.2.2 Victorian State Act	209
4.2.3 NSW State Act: Summary	224
4.2.4 Number of Tribunal Orders in 2020-2021	225
4.3 Victoria and NSW State Acts Incorporating Supported Decision-Making	226
4.3.1 Amendments to Victorian State Act	226
4.3.2 Draft Amendments to NSW State Act	227
4.3.3 Comments on Amendments to Victoria and NSW State Acts	229
4.4 Legislation for Elder Abuse	240
4.4.1 Background of Elder Abuse Legislation	240
4.4.2 ALRC Report 131 and its Responses	243
4.4.3 Discussion on Elder Abuse Legislation	254
4.5 Australian Principal Values and the Implications	258
4.5.1 Discussion on Australian Adult Support and Protection	258
4.5.2 Implications from Australian Legislative Project	275
4.6 Summary: Implications from Australian Legislative Project are Clarified	278
5 The Idea of Adult Support and Protection in Japan	280-354
5.1 Introduction	280
5.2 Considerations for a Core Agency and Supported Decision-Making	282
5.2.1 Roles and Legal Status of a Core Agency for Community Support	282
5.2.2 Combined Models of Guardianship and Supported Decision-Making	298
5.2.3 A Preliminary Idea of Supported Decision-Making Legislation	313
5.3 The Idea of Adult Support and Protection in Japan	329
5.3.1 The Illustration of Adult Support and Protection Legislation and Mechanism	329
5.3.2 Function-based Review of Transactions in a Community	334
5.3.3 Values of Adult Support and Protection to Global Application	342
5.4 Summary: Japan's Adult Support and Protection Legislation Framework	352
Conclusion	355-361
1. Conclusion	355
2. Significance of the Study	358
3. Uniqueness of the Study	360
4. Remaining Issues	361
Bibliography	362-412
Acknowledgements/Reference Survey	413-414

ABSTRACT

The purpose of this dissertation is to research the possibility of the adult support and protection legislation becoming part of the complex law of the adult guardianship system, supported decision-making, and elder abuse against vulnerable adults, based on issues related to Japan's adult guardianship system. For this purpose, the concept of legal advocacy for vulnerable adults, covering the adult guardianship system, supported decision-making, elder abuse prevention, and relevant policies, is first clarified to establish the scope of the law and policy in question, where the legal domains of the civil law and the social security law intersect. The study then uses an analytical axis to examine the theoretical frameworks that constitute the vulnerability approach and autonomy in the common law jurisdictions, on the one hand, and the perspective of comparative law studies between Japan and Australia on legislation that supports and protects vulnerable adults, on the other hand.

The dissertation explores the legal policy for adult support and protection, including supported decision-making. The main question addressed by this dissertation is ‘What is the framework and value of the adult support and protection legislation that respects the will and preferences of vulnerable adults with insufficient mental capacity, and how can this legislation be made effective for community support?’ To answer this question, five research questions are outlined in ‘Introduction’ and reviewed in the subsequent chapters. This study clarifies the basic framework of the adult support and protection legislation and policies in respect of the legal concept, legislative process, and operational mechanism in community support, through comparative law studies between Japan and Australia:

- (a) The first focus of the discussion is on finding a legal framework to support and protect vulnerable adults based on the aspect of vulnerability and autonomy in order to respect their will and preferences. An adult support and protection legislative system can be said to refer to a comprehensive package of laws for legal advocacy that aims to protect vulnerable adults through the least restrictive measures, as long as is necessary, by taking their will and preferences into consideration. In other words, an adult support and protection legislative system offers necessary support according to individual characteristics, minimizes restriction of a principal's rights, and takes less restrictive alternative measures.
- (b) The second focus is on the formulation of social norms that may encourage the use of supported decision-making, with adult guardianship to be used as a last resort. Review of supported decision-making guidelines based on practices and experiences is required to improve the unified definition of supported decision-making, standardize supported decision-making methods, and develop adequate safeguards against risks to principals. The path to Japan's legislation of supported decision-making and the main content of the legislation have been clarified by finding normative enforcement through the practices of the supported decision-making guidelines as a soft law, in order to transform them into a hard law through a step-by-step approach.

- (c) The third focus of the discussion is on establishing a community support system for vulnerable adults. The dissertation clarifies a concept of community support and its mechanism for vulnerable adults conducted by a core agency as a community center with a quasi-public character. It clarifies the role of community support in which relevant information on vulnerable adults is collected at the core agency through daily communication between the core agency and people in the community. The core agencies play a central role in community support, being cross-sectional with relevant agencies, including the family court and municipality. This study discusses how the core agencies can be merged with community-based general support centers or how they collaborate each other to ensure the support and protection of vulnerable adults.

This dissertation explores substantial aspects that related studies in Japan have not delved into. One significance of this study lies in its legal advocacy for a complex concept, called adult support and protection legislation, including its clarification of the definitions, scope, and roles of this legislation, which have been previously unclear. A second significance of this dissertation lies in its analysis of the process of legislation of the *Guardianship and Administration Act 2019 (Vic)* as an integrated law of guardianship and supported decision-making in the State of Victoria, Australia. In particular, the process of accumulating empirical research on supported decision-making, which has been conducted by universities and NPOs in various parts of Australia since around 2010, forms a social consensus and reaches legislation. The dissertation analyzes how Australian legislation demonstrates the necessity of Japan's supported decision-making legislation with a legislative strategy for the middle and long term. It then draws an outline for the supported decision-making legislation. A third significance of this study lies in its demonstration of the roles of community support as an operational framework of the adult support and protection legislation. The core agency responds to various requests for support from people in the community, and, when necessary, public agencies, which receive reports from the core agency, intervene for the protection of vulnerable adults. The dissertation clarifies how the role of community support is functionally demonstrated by the transactions between the core agency and people in the community.

One unique contribution of this study concerns how it shows the path to Japan's legislation of supported decision-making. The main task of the legislation is clarified by finding normative enforcement through the practices of the supported decision-making guidelines as a soft law, in order to transform them into a hard law through a step-by-step approach. This study establishes a legal design for the coexistence of supported decision-making and the adult guardianship system with supported decision-making prioritized and the adult guardianship system to be considered only as a last resort. This legal design also functions as legal safeguards against elder abuse.

This dissertation does not examine some legal issues related to supported decision-making, including its safeguards, and contemporary measures of the social security law in the legal advocacy that has been adopted in other developed countries. These issues will be the subject of a future study.

Key words: vulnerability, autonomy, guardianship, supported decision-making, elder abuse

ACRONYMS

ABA	American Bar Association
AGAC	Australian Guardianship and Administration Council
ALRC	Australian Law Reform Commission
CHS	Community Health Service
CRPD	Convention on the Rights of Persons with Disabilities
DPA	Durable Power of Attorney
EPA	Enduring Power of Attorney
EU	European Union
FINRA	Financial Industry Regulatory Authority
ILO	International Labour Organization
IMCA	Independent Mental Capacity Advocate
JAGA	Japan Adult Guardianship Law Corporate Association
LDP	Liberal Democratic Party
LPA	Lasting Power of Attorney
MCA	Mental Capacity Act
NGO	Non-Governmental Organization
NPO	Not-for-Profit Organization
NSW	New South Wales
OPA	Office of the Public Advocate
OPG	Office of the Public Guardian
PaCS	Pacte Civil de Solidarité
PoA	Power of Attorney
SAB	Safeguarding Adults Board
SIRS	Serious Incident Response Scheme
SDM	Supported Decision-Making
STL	State Trustees Limited
UAGPPJA	Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
UGCOPAA	Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act
ULC	Uniform Law Commission
UN	United Nations
UNOHCR	The United Nations Office of the High Commissioner for Human Rights
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission
WCAG	World Congress of Adult Guardianship
WHO	World Health Organization

TABLES & FIGURES

- Table 1: List of Main Functions to Support and Protect the Principal (p. 56–57)
- Table 2: Statutory Guardianship System by Type (p. 60–61)
- Table 3: Main Points of the Basic Plan (p.84)
- Table 4: Measures for Updating the Adult Guardianship System in 2000–2022 (p.87–90)
- Table 5: Definitions of ‘Vulnerable Adults’ or ‘Adults at Risk’ by Country (p.144–145)
- Table 6: Relevant Legislation by Jurisdiction (p.204–205)
- Table 7: Guardianship and Trustee Agencies by Jurisdiction (p.205)
- Table 8: Victorian Act 1986 (p.223–224)
- Table 9: NSW State Act 1987 (p.224–225)
- Table 10: Comparisons between Amendments to Victoria and NSW State Acts (p. 229–230)
- Table 11: Comparisons of the Three Types of Models (p.312–313)
- Table 12: Step-by-Step Approach (p.328)
- Table 13: Legislation and Policy of Adult Support and Protection (p.330)
- Figure 1: Illustration of the Victorian Adult Support and Protection Framework (p.262)
- Figure 2: The Multi-Dimensional Model of Elder Law (p.271)
- Figure 3: Illustration of the Japan’s Adult Support and Protection Framework (p.331)
- Figure 4: The Modified Multi-Dimensional Model of Elder Law (p.343)

Notes

Referencing Style

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<<http://www.japaneselawtranslation.go.jp/?re=02>>

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KEY TERMS

Will and Preferences: The ‘best interests’ principle is not a safeguard which complies with Article 12 (CRPD) in relation to adults. The ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others (General Comment No.1 by UN Committee on CRPD, ‘GC1’).

Informal Arrangements: Usually involving family members, friends, or other supporters (Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Final Report*, ‘ALRC Report 124’).

Dementia: A syndrome in which there is deterioration in memory, thinking, behavior, and the ability to perform everyday activities (WHO).

Elder Abuse: 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. It can be of various forms: physical, psychological/emotional, sexual, financial, or simply reflect intentional or unintentional neglect (WHO).

Legal Capacity: The ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency) (GC1).

Mental Capacity: The decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors (GC1).

Persons with Disabilities: Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (Article 1 of CRPD).

Support: A broad term that encompasses both informal and formal support arrangements, of varying types and intensity (GC1).

Supported Decision-Making: Supported decision-making emphasizes the ability of a person to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. It focuses on what the person wants. (The terms the ALRC recommends are ‘supporter’ and ‘representative’ contained in the Commonwealth decision-making model set out in this Report) (ALRC Report 124).

Undue Influence: Undue influence is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception, or manipulation (GC1), Undue influence is defined as an ‘excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity’ (California Welfare and Institutions Code section 15610.70).

Introduction

1. Background of the Study

(1) Issues in Japan

The Civil Code of Japan (hereinafter referred to as ‘Civil Code’) covers adults¹ who can demonstrate mental capacity² and autonomy.³ This is based on an understanding behind the Civil Code that humans should have capacity and autonomy and behave as rationally as possible. In this sense, humans without full capacity and autonomy are regarded as an exception, such as people with impaired intellectual or mental capacity, dementia,⁴ and higher brain dysfunction. Those who fall short of mental capacity must be placed under the supervision of others, such as guardians, by law, according to the relevant mental capacity. The Japan’s adult guardianship system was implemented on April 1, 2000 with the aim to uphold such values as respect for self-determination, utilization of the remaining

Remarks: The title of the Japanese publication is translated into English by the author in case of missing English title, with the mark ‘’ placed after the title. All website accesses in this dissertation were confirmed by March 2, 2022.*

¹ The term ‘adults’ are people having reached the age of sixteen, eighteen, or twenty, according to how relevant local law defines an adult, and living without any cognitive disability.

² The term ‘mental capacity’ is used in the dissertation, which refers to ‘the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors’ (General Comment No.1 by the United Nations Committee on Convention on the Rights of Persons with Disabilities). The term ‘legal capacity’ refers to ‘the ability to hold rights and duties (legal standing) and the ability to exercise these rights and duties (legal agency)’(Ibid); See Lanny Vincent, ‘Differentiating Competence, Capability and Capacity’ (2008) 16(3) *Innovating Perspectives* 1-2.

³ Refers to ‘2.4.1 Capability Approach and Autonomy.’ Autonomy is close to right to self-determination. Some psychologists state that the notion of autonomy is ‘regulation by the self.’

⁴ The term ‘dementia’ is used in this dissertation, which is a syndrome characterized by deterioration in memory, thinking, behavior, and the ability to perform everyday activities (WHO); The term ‘dementia’ is the umbrella term of a number of neurological conditions of which the major symptom is the decline in brain function and is categorized as a ‘Neurocognitive Disorder’ (NCD) in the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition (DSM-5) published by the American Psychiatric Association (APA) in 2013. Dementia Australia, *Diagnostic Criteria for Dementia* (Web Page, n/a) <<https://www.dementia.org.au/information/for-health-professionals/clinical-resources/diagnostic-criteria-for-dementia>>.

capacity of the principal,⁵ and normalization⁶ while the support⁷ and protection⁸ of the principal must be carried out as far as it is necessary.⁹ The duties of adult guardians are limited to legal acts such as the principal's property management and contracts, and adult guardians are supervised by the family courts through annual reports to the family courts about their work.¹⁰ The adult guardianship system may uniformly restrict the principal's ability to act in exchange for the adult guardian's substitute decision-making,¹¹ the right to revoke the contract, or the right to consent the event. These are protective measures applicable due to the capacity doctrine in the Civil Code, according to the relevant mental capacity of the principal.¹² This doctrine, *the principal of restricted legal agency*,¹³ is

⁵ The term 'the principal' in this dissertation refers to 'the represented person' or 'the person who is supported by others.'

⁶ The term 'normalization' is not used any longer because it may hint a discrimination towards people with disabilities. This term is used in this dissertation to show the historical background of the adult guardianship system in Japan. Wolf Wolfensberger, 'A Contribution to the History of Normalization, with Primary Emphasis on the Establishment of Normalization in North America between 1967-1975' in Robert John Flynn and Raymond A. Lemay (eds), *A Quarter-century of Normalization and Social Role Valorization: Evolution and Impact* (University of Ottawa Press, 1999) 3-69.

⁷ 'Support' is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity (General Comment No.1 by UN Committee on CRPD).

⁸ 'Protections' are laws and other official measures intended to protect people's rights and freedoms. Collins, *Protection* (Web Page, n/a) <<https://www.collinsdictionary.com/dictionary/english/legal-protection>>.

⁹ Refers to the Ministry of Justice of Japan, Civil Affairs Bureau Counselor's Office, *Commentary on Proposal Overview for Revision of Adult Guardianship System* (Kinzai Institute for Financial Affairs, INC., 1998) Appendix 1. (in Japanese)

¹⁰ Refers to the Ministry of Justice of Japan website: Ministry of Justice of Japan, *Adult Guardianship System and Adult Guardianship Registration System* (Web Page, October 15, 2020) <<http://www.moj.go.jp/MINJI/minji95.html>> (in Japanese) and <<http://www.moj.go.jp/EN/MINJI/minji17.html#a1>> (in English).

¹¹ 'Substituted decision-making' enables a proxy to make decisions on behalf of a person with insufficient mental capacity.

¹² In Japan, the guardianship system adopts the capacity doctrine in the Civil Code while the supported decision-making guidelines for adult guardians (October 2020) include the term 'decision-making capacity' and suggest that the adult guardians should adopt supported decision-making in decision-making process of principals and apply substituted decision-making as a last resort (refers to '1.3.2 (2) b. Seven Principles).

¹³ Those who are protected by law include persons with guardianship, conservatorship, and assistance, in addition to minors. These persons are determined by the family courts in Japan (Articles 8, 12, and 16 of the Civil Code).

originated in Roman law¹⁴ and has been used for a long time to contribute to the protection of the principal's interests. Such a paternalistic¹⁵ aspect of the adult guardianship system is now criticized by human rights institutions, including the United Nations Committee on the Rights of Persons with Disabilities (hereinafter referred to as 'UN Committee') and international non-governmental organizations (hereinafter referred to as 'NGOs'). In addition, the adult guardianship system is losing credibility among the users because of misconducts by adult guardians, such as fraudulent acts against the principal or seizure of the principal's property.¹⁶

The number of the adult guardianship users in Japan was some 239,933 cases as of December 2021.¹⁷ This can be estimated to approximately two to three per cent of the potential users of the adult guardianship system.¹⁸ In most cases, relatives or nursing-home managers of the principal provide support for the principal. This is called 'informal arrangement.'¹⁹ Japanese adults with insufficient

¹⁴ Charles P. Sherman, 'The Debt of the Modern Law of Guardianship to Roman Law' (1913) 12(2) *Michigan Law Review* 124, 131.

¹⁵ The term 'paternalistic' expresses the character of paternalism, which is 'the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm.' Gerald Dworkin, 'Paternalism' (Online, September 9, 2020) in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy Archive Fall 2020 Edition* <<https://plato.stanford.edu/archives/fall2020/entries/paternalism/>>; English law principle, *parens patriae*, is important. Erica Wood, 'History of Guardianship' in Mary Joy Quinn (ed), *Guardianship of Adults: Achieving Justice, Autonomy and Safety* (Springer Publishing Company, 2005) 17, 48.

¹⁶ Refers to '1.2.1 (1) Adult Guardianship System in Japan-*Issues of Adult Guardianship System*.'

¹⁷ Refers to the Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022) (in Japanese) * <https://www.courts.go.jp/toukei_siryu/siryo/kouken/index.html>.

¹⁸ One research project estimated approximately two per cent based on the 0.22 million adult guardianship users vs. 8.70 million potential users of the adult guardianship in 2018. The Regional Guardianship Promotion Project (joint research between the Division of Lifelong Learning Infrastructure Management, Graduate School of Education, the University of Tokyo and the Regional Guardianship Promotion Center), *The Gist of the Adult Guardianship System* (Web Page, n/a) (in Japanese) * <<https://kouken-pj.org/about/>>.

¹⁹ Refers to '1.1.1 (1) e. The CRPD and the Adult Guardianship System.' In Japan, it is sometimes called 'de facto adult guardianship.' The term 'informal arrangement' is used in Australia, involving family members, friends, and other supporters (ALRC Report 124).

mental capacity tend to prefer to have an informal arrangement, particularly family reliance, rather than a law and policy approach. Principals in informal arrangement however do not receive legal protections provided by the adult guardianship system, where the risk of abuse may exist. Due to low growth in the use of the adult guardianship system over the years, the *Act on Promotion of the Adult Guardianship System 2016* (Act No. 29 of 2016, hereinafter referred to as ‘Promotion Act’) was enacted on April 15, 2016. Based on the Promotion Act, the Basic Plan for Promoting the Adult Guardianship System (hereinafter referred to as ‘Basic Plan’) was approved by the Cabinet of Japan on March 24, 2017.²⁰ It was renewed as the second term Basic Plan on March 25, 2022 to cover until March 2027.²¹ The Basic Plan was intended to provide legal protections through the adult guardianship system to adults with insufficient mental capacity.²² The Basic Plan aims to establish a regional collaboration network nationwide.²³ For this purpose, core agencies²⁴ within communities

²⁰ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Basic Plan for Promoting the Adult Guardianship System* (Web Page, March 24, 2017) (in Japanese) * <<https://www.mhlw.go.jp/file/06-Seisakujouhou-12000000-Shakaiengokyoku-Shakai/keikaku1.pdf>>.

²¹ Refers to the Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System* (Web Page, 2022) (in Japanese) <https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html>.

²² This dissertation uses the term ‘adults with insufficient mental capacity,’ referring to the term used on the Ministry of Justice of Japan website. Ministry of Justice of Japan, *Adult Guardianship System and Adult Guardianship Registration System* (Web Page, October 15, 2020).

²³ The term ‘regional collaboration network’ is a community system, involving relevant agencies and practitioners, which finds people who need support and properly advocate them to the necessary support measures, including the adult guardianship system, in addition to establishing a consultation desk in a community. Ministry of Health, Labour, and Welfare of Japan, ‘Guidance for Formulating a Basic Plan for Promoting the Adult Guardianship System in Municipalities’ (Web Page, March 2019) 3 (in Japanese) <<https://www.mhlw.go.jp/content/000503082.pdf>>.

²⁴ Refers to ‘5.2.1 Roles and Legal Status of a Core Agency for Community Support.’ In this dissertation, a ‘core agency’ is positioned as a multi-functional agency to work for legal advocacy in community support, in addition to the role that is stipulated in the Basic Plan to promote the adult guardianship system.

have been/will be set up to provide community people with easy access to the family courts²⁵ where they can lodge the adult guardianship petition with the core agency's assistance. Core agencies are focal points in communities that play central role for advocacy²⁶ in line with the Basic Plan. Operational improvement programs of the system are also being implemented. An idea of reform of the Civil Code and relevant laws related to the adult guardianship system was not included in the Basic Plan, but its possibility is included in the second term Basic Plan.

People are less familiar with the family courts that operate on the adult guardianship system. It is unlikely that the adult guardianship system will be suddenly promoted by the Basic Plan, although the Basic Plan may provide some benefits to the users. It is expected that the growth in the number of the adult guardianship uses will increase more than in the past few years, and that cases of statutory curatorship and assistance types will increase more than cases of statutory guardianship type. In fact, no such results had been realized by December 2021.²⁷ This is in part because there are various individual situations for vulnerable adults, and the adult guardianship system does not cope with such diversity. Thus, a one-size-fits-all policy for the adult guardianship system cannot be assumed to be effective under the current situation.

²⁵ 'The family courts' are part of the Japanese court system. They are located at the same places as the district courts and their branches and have exclusive jurisdiction over cases involving juvenile delinquency and domestic relations, including the adult guardianship system. Courts in Japan, Judicial System in Japan (Web Page, n/a) <https://www.courts.go.jp/english/judicial_sys/index.html>.

²⁶ The term 'advocacy' refers to 'public support for an idea, plan, or way of doing something.' Cambridge Dictionary, *Advocacy* (Web Page, n/a) <<https://dictionary.cambridge.org/ja/dictionary/english/advocacy>>.

²⁷ There is no change in the structure in which the statutory guardianship type accounts for approximately 74 per cent of the total adult guardianship system in Japan. In December 2021, the number of adult guardian cases increased slightly to 239,933 (3.3 per cent increase from 2020), and the breakdown by type was guardianship 177,244 (73.9 per cent, 1.5 per cent increase from 2019) and 46,200 curatorship (19.2 per cent, 8.5 per cent increase from 2020), assistance 13,826 (5.8 per cent, 11.7 per cent increase from 2019), and voluntary guardianship 2,663 (1.1 per cent, 0.3 per cent increase from 2019). The Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022). (in Japanese)

Instead, multiple option for consumer choice²⁸ had better be provided to these people in community support.²⁹ Namely, community monitoring watch, support program for self-reliance in daily life, supported decision-making, the adult guardianship system, safeguards against elder abuse,³⁰ among others. It would be essential for public agencies to make these people aware of support options. A reasonable number of choices to be offered could be assumed to be the best.³¹ Then, these people may consider by themselves and choose appropriate legal or policy instrument, according to their individual needs. This relationship between people and public agencies is based on the value of autonomy and the participation of people into public policy, which may coincide with the contemporary the social security law system based on the contract.³² The second term Basic Plan to cover between April 2022 and March 2027 was decided by the Cabinet on March 25, 2022. The second term Basic Plan emphasizes on the concept of ‘advocacy support’³³ to promote multiple optional

²⁸ The term ‘consumer choice’ refers to ‘the range of competing products and services from which a consumer can choose.’ Collins, *Consumer Choice* (Web Page, n/a) <<https://www.collinsdictionary.com/jp/dictionary/english/consumer-choice>>.

²⁹ Refers to ‘5.2.1 (4) Contributions of Civil Society for Community Support.’

³⁰ The term ‘elder abuse’ refers to ‘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. It can be of various forms: physical, psychological/emotional, sexual, financial, or simply reflect intentional or unintentional neglect’ (WHO).

³¹ The theory on consumer behavior, an increase in choices does not always lead to his or her own interests, is known as ‘Jam study’ in the U.S. This implies that people tend to be more satisfied with reasonably less choice with greater satisfaction. Sheena Iyengar and Mark R. Lepper, ‘When Choice is Demotivating: Can One Desire Too Much of a Good Thing?’ (2000) 79(6) *Journal of Personality and Social Psychology* 995, 1006.

³² Refers to ‘1.1.1 (2) Previous Research in Social Security Law.’ ‘The social security law’ is a general term for legislation in Japan that regulates legal relationship, such as social insurance (pension, health care, and aged care), public assistance, health care and public health, and social welfare, which includes the social welfare law and legal advocacy.

³³ The term ‘advocacy support’ is defined as ‘support activities which have a common foundation for support and activities centered on the person, which are support for exercising their rights through supported decision-making and support for recovering from infringement of their rights in dealing with abuse and unfair property transactions, for adults with insufficient mental capacity to participate in the community and live independent lives.’ Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System* (Web Page, 2022) (in Japanese) <https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html>.

measures in community support, including the adult guardianship system. It can be said that the content of the adult guardianship promotion project has changed direction from just an adult guardianship promotion to a multiple optional measures' promotion through deliberations by experts for six years.

Another aspect to consider concerns how to establish adult protection law and policy to respond to adults with insufficient mental capacity who have no relatives or close friends to support them, have no financial asset or may be abused by their relatives or close friends. Such difficult cases become prevalent nationwide, and local governments and communities face challenges how to cope with these difficult cases.³⁴ An emergency rescue of the public agencies to these vulnerable adults are sometimes required and the preventive measures to avoid these difficult cases must be considered, including the adult guardianship system and abuse prevention policy. It can be understood that difficult cases need multiple measures, according to the characteristics of a specific case, involving in local human resources in the local government and communities.

(2) Adult Support and Protection Legislation

There is growing awareness of human rights as a universal value, and increased activity by international NGOs or not-for-profit organizations (hereinafter referred to as 'NPOs'). Particularly, the General Comment No.1, which was adopted on April 11, 2014, in Article 12 (equal recognition before the law) of the *Convention on the Rights of Persons with Disabilities* (hereinafter referred to as 'CRPD') in the UN recommends respect for the autonomy and self-determination of adults with insufficient mental capacity.³⁵ The General Comment No.1 recommends the abolishment of substituted decision-making and introduction of supported decision-making that respects the will and

³⁴ Difficult cases include five categories: financial problem, the need for living supports, family problems, service usage problems, and community and workplace problems, which are clarified by empirical studies. Individual support, parallel support, collaborative support, intermediation and formation support are implemented. Noriharu Unuma and Kaoru Sekine, 'A Study of Difficult Cases in Adult Guardianship: Analyses the Contents and Support Methods through Corporate Guardianship by the Council of Social Welfare' (2022) 12 *Kogakkan University of Japanese Studies* 1, 28. (in Japanese)

³⁵ Refers to '1.2.1 (2) The CRPD and the General Comment No.1.'

preferences of the principal. ‘Supported decision-making’ emphasizes the ability of a principal to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. It focuses on what the principal wants.³⁶

In some developed countries with a similar social environment to Japan, such as an ageing population and increasing number of the elderly with dementia, laws crafted by legislatures or amendments to the civil code or guardianship law provide support to and protect vulnerable adults.³⁷ This kind of legal system that supports and protects vulnerable adults is referred to as ‘adult support and protection legislation’ in this dissertation. This legislation focuses on the vulnerability³⁸ of the principal and provides the support and protection needed by an individual. This legislation may minimize the restrictions of a principal’s human rights and encourages the least restrictive alternative³⁹ measures that can be used to achieve the goal.

When a legislation or law reform to support and protect vulnerable adults is attempted in some developed countries, there is comprehensive of the autonomy of adults and respect for self-determination, the potential financial burden on the national and local governments, the views of professionals, such as lawyers in attorney, social workers, and medical practitioners, and collaboration with civil society. In common law jurisdictions, without clear evidence that a principal’s mental

³⁶ The ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others (General Comment No.1 by UN Committee on CRPD).

³⁷ This dissertation uses the term ‘the elderly’ or ‘elderly people,’ although the American Psychological Association (APA) recommends using the term ‘older adults.’ The term ‘the elderly’ is the same as ‘the aged.’

³⁸ Refers to ‘2.3.1 Vulnerability.’

³⁹ The ‘least restrictive alternative’ comes from the *Shelton v. Tucker* case in which the U.S. Supreme Court on December 12, 1960, ruled (5–4) that the Arkansas statute that required all public-school educators to disclose every institution to which they were affiliated over a five-year period, was unconstitutional. J. M. Johnston and Robert A. Sherman, ‘Applying the Least Restrictive Alternative Principle to Treatment Decisions: A Legal and Behavioral Analysis’ (1993) 16(1) *The Behavior Analyst* 103, 115.

capacity has been lost, the existence of the principal's decision-making capacity is presumed.⁴⁰ And it is understood that decisions by the principal can be made with the support of a third party. In this context, the adult guardianship is seen as a last resort and is rarely used. Instead, supported decision-making is encouraged to use as an alternative instrument, with the aim to respect the will and preferences of the principal. The laws and policies under consideration or adopted by some developed countries, including the values of the CRPD, will be reviewed in this dissertation. It can be assumed that some of the ideas may be of relevance to Japan.

2. Framework of the Study

(1) Purpose of the Study

The purpose of this dissertation is to research the possibility of the adult support and protection legislation becoming part of the complex law of the adult guardianship system, supported decision-making, and elder abuse against vulnerable adults, based on issues related to Japan's adult guardianship system. The main research subjects are the following three points.

(a) The first issue is the conceptual aspect of the adult support and protection legislation. This task defines the adult support protection legislation based on previous research and comparative law analysis and forms the theoretical basis of research.

(b) The second issue is the legislative aspect of the adult support and protection legislation. This task particularly explores the process of formation of supported decision-making in Japan through comparative law analysis.

(c) The third issue is the operational aspect of the adult support and protection legislation. This task examines the social resources of the community support in the operation of the legislation.

⁴⁰ A 'presumption of capacity' is established at common law. A principle 'the law requires satisfactory evidence of insanity' was mentioned in the 19th century of the U.K. Leonard Shelford, *A Practical Treatise of the Law concerning Lunatics, Idiots and Persons of Unsound Mind: with an appendix of the statutes of England, Ireland, and Scotland, relating to such persons; and forms of proceedings in lunacy* (London: S. Sweet, 2nd ed.1847) 37–39.

(2) Methodology

The concept of legal advocacy⁴¹ for vulnerable adults, covering the adult guardianship system, supported decision-making, elder abuse prevention, and relevant policies, is first clarified to establish the scope of the law and policy in question, where the legal domains of the civil law and the social security law intersect. The study then uses an analytical axis to examine the theoretical frameworks that constitute the vulnerability approach and autonomy in the common law jurisdictions, on the one hand, and the perspective of comparative law studies between Japan and Australia on legislation that supports and protects vulnerable adults, on the other hand.

A Japanese systematic review of the adult guardianship system and relevant laws/policies, the theories of the civil law related to the adult guardianship system, the theories of the social security law on advocacy, and the main functions that are needed to support and protect vulnerable adults are to be done in Chapter 1.⁴² The author's stance in regard to the civil law and the social security law theories is clarified. Through this arrangement, the scope of the legal and policy system and the main functions of supporting and protecting adults with insufficient mental capacity are clarified. Based on this systematic review, the research framework of this dissertation is stated below.

First, the subject of this dissertation is basically specified for legal acts involving the principal, and interdisciplinary legal studies based on the civil law and the social security law are applied. Legal affairs after the death of the principal are outside the scope of this dissertation. Focusing on an international trend regarding legislation for support and protection of adults with insufficient mental

⁴¹ The term 'advocacy' includes multi-functional meanings, such as self-advocacy, legal advocacy, social advocacy, and systemic advocacy. Karen Williams and Sue Field, 'Advocacy and the Rights of the Vulnerable Older Person' (2021) 12 *Journal of Aging Law & Policy* 1, 37.

⁴² 'The concept of diminished competence varies depending on the professional disciplinary domain.' This dissertation focuses on the concept of diminished competence from a legal perspective (i.e., law and policy) and from a social perspective (i.e., function-based review). Terry Carney, 'Guardianship, "Social" Citizenship and Theorising Substitute Decision-Making Law' (2012) in Israel Doron and Ann M. Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer Science & Business Media, 2012) 1-17, 3.

capacity, particularly the revision of the laws in Australia, we will develop a legislative theory on the support and protection of vulnerable adults in Japan based on comparative law analysis.⁴³

Second, the subject of legal and policy systems, such as the adult guardianship system, supported decision-making, elder abuse prevention law, and relevant policies (i.e., the ‘support program for self-reliance in daily life’ and ‘community-based integrated care system’⁴⁴), is included in this dissertation. We call the subject of these legal and policy systems as ‘legal advocacy,’ which is part of advocacy, that mainly deal with legal acts of the principal to protect his/her interests. Elder abuse prevention law is legally interlinked with the adult guardianship system and is listed in Table 1 (List of the Main Functions to Support and Protect Vulnerable Adults) to show a functionally close relation. This is the reason elder abuse prevention law is placed as the subject of legal advocacy. In contrast, the consumer contract law, trust law, and medical law are excluded from the scope of this dissertation because they indirectly support vulnerable adults and require a separate systematic examination.

Third, we will proceed with the discussion with the assumption that the civil and relevant laws concerning the adult guardianship system will stay status quo. Focusing on supported decision-making, which respects the will and preferences of the principal, supported decision-making will become an independent legal system, and we envision a legislation on supported decision-making to coexist with the adult guardianship system. Supported decision-making is based on existing guidelines set by the Ministry of Health, Labour, and Welfare of Japan, which do not include supported decision-making in healthcare and terminal care.⁴⁵

⁴³ Refers to ‘5.1 Introduction.’

⁴⁴ Refers to ‘1.2.3 (2) Relevant Policy in Community Support.’ The ‘support program for self-reliance in daily life’ is a social welfare system that supports people with insufficient mental capacity to use simple welfare services and manage their finance arrangement for daily use. A structure called ‘the community-based integrated care system’ is to comprehensively ensure the provision of health care, nursing care, prevention, housing, and livelihood support in a community. Ministry of Health, Labour, and Welfare of Japan, *Establishing the Community-Based Integrated Care System* (Web Page, n/a) <https://www.mhlw.go.jp/english/policy/care-welfare/care-welfare-elderly/dl/establish_e.pdf>.

⁴⁵ Supported decision-making in healthcare and terminal care is discussed in the medical law or bioethics in Japan.

Fourth, although the new coronavirus (COVID-19) infection has had a wide range of effects on social life, it cannot be said that the full picture of the effects has been accurately grasped and that academic analysis of these effects has been sufficiently conducted. Discussions on the effects of the new coronavirus infections are beyond the scope of this dissertation.

The adult support and protection is a serious social issue domestically and globally in an aged society. With the UN's adoption of the CRPD, the adult guardianship system and supported decision-making have become one of the common issues shared by the 185 state parties of the CRPD. In that sense, the research theme of this dissertation is a global issue. Based on this recognition, it was assumed, when the author began research for the dissertation, that participation in an international academic exchange would be indispensable for examining the theme, and thus the author had to draft the dissertation in English. In fact, the author receives comments particularly from the Australian scholars in preparing this dissertation and put them into the dissertation.⁴⁶ It is hoped that the dissertation will introduce the Japanese laws and policies in guardianship and relevant studies to those outside Japan, to receive suggestions from foreign researchers, which would show the significance of this dissertation through two-way exchanges.

(3) Reason Why Australian Law Is Examined

The research of law includes comparative law studies of legislation made in Japan and Australia to support and protect vulnerable adults. The reason Australian law is examined is because two leading States of Victoria and New South Wales (hereinafter referred to as 'NSW') has changed/are in the process of amending state laws related to the guardianship and supported decision-making for the first time in over 30 years. Particularly, the State of Victoria legislated in May 2019 the *Guardianship and Administration Act 2019*, which incorporates supported decision-making in the guardianship law, in response to the request of the Attorney-General of Victoria in May 2009 to the Victorian Law Reform

⁴⁶ The corresponding experts in Australia are Anita Smith, John Chesterman, Terry Carney AO, and Piers Gooding.

Commission (hereinafter referred to as ‘VLRC’). It takes a decade to have legislated the law, while practicing supported decision-making pilot projects in communities.⁴⁷

Australia is in the process of legislating a state law to prevent elder abuse under the national policy. The guardianship and supported decision-making are placed as part of legal devices to combat elder abuse. Therefore, legal devices for the adult guardianship, supported decision-making, and safeguards against elder abuse are closely interrelated. It can be assumed that the significance and purpose of adult support and protection legislation could be clarified by analyzing the Australian legislative project, even though the project has not been completed yet but is likely ongoing.⁴⁸

In addition, in Australia, important roles are played by public agencies in states and special territories, such as the Civil and Administrative Tribunal, which is independent of the state court system, the Office of the Public Advocate or the Public Guardian,⁴⁹ and the public trustee or state trustees limited. These three public agencies are responsible for the guardianship system, simple and quick dispute resolution related to guardianship, and property management. They also respond to supported decision-making and elder abuse in accordance with intended amendments to the law or legislation. Public agencies work with local governments and communities to provide day-to-day support and protection. The academic societies support theoretical and empirical analyses of these activities. The possible implications of Australia’s legislation of the guardianship and supported decision-making as well as elder abuse addressed will be of help in our consideration of Japan’s adult support and protection legislative system. Such implications include not only roles of public agencies but also

⁴⁷ Refers to ‘4.3 Victoria and NSW State Acts Incorporating Supported Decision-Making.’

⁴⁸ Refers to ‘4.5.1 Discussion on Australian Adult Support and Protection.’

⁴⁹ The status and role of ‘public guardian’ varies according to country. In the U.S., a public guardian might be an entity, such as volunteer, agency, or attorney, which receives most, if not all, of its funding from a governmental entity. A public guardian directly advocates principals. In the U.K., a public guardian is an executive public agency under the Ministry of Justice, which indirectly advocates principals through registered guardians and directly advocates guardianship policymaking and relevant programs. Australia, Canada, and Singapore adopt the U.K. system. Pamela Booth Teaster and Stephanie Chamberlain, ‘Public Guardianship: Policy and Practice’ (2020) 1(1) *Journal of Elder Policy* 155, 174.

others, such as respect for the values of the CRPD, legislation of supported decision-making, the dispute response mechanism, and roles of NPOs in communities.⁵⁰

(4) Research Surveys

The research is based on literature research in the field of law in English and Japanese, and interviews with experts. There are many previous studies on the adult guardianship system, supported decision-making; Arai (2010 and 2021), Tayama (2010 and 2021),⁵¹ Suga (2013), Kamiyama (2015 and 2020), Doron (2002), VanPuymbrouck (2017), Ho and Lee (2019), Scholten (2018 and 2021), and Kohn (2021), and those on the social security law; Kawano (1999), Hirata (2012), Akimoto (2012), and Kikuchi (2020), carried out studies on vulnerability approach; Fineman (2008 and 2012), Kohn (2014), Herring (2016) and Clough (2017), and focused on the relevant considerations; Sen (2005 and 2009), Dworkin (2015) and Herring (2017).⁵²

Prior Australian guardianship studies, such as Carney and Tait (1997), Chesterman (2013 and 2019), Field et al (2018), and Gooding and Carney (2021) are also basically reflected in the National and State Law Reform Commission reports. Although comparative law analyses of the adult protection legislation exist mainly in common law jurisdictions, such as Martin et al (2016), Montgomery et al (2016), and Donnelly et al (2017 and 2022), studies on the legal concept of adult support and protection legislation, including supported decision-making, are limited (Chesterman 2013/2019).⁵³

Although prior research in individual areas, such as the adult guardianship system, is substantial, prior research on legal policy for an adult support and protection, including supported decision-making,

⁵⁰ Refers to ‘4.5.2 Implications from Australian Legislative Project.’

⁵¹ Refers to ‘1.1.1 (1) g. Future Developments.’ Teruaki Tayama remarks a view that the adult guardianship system should be transformed into an adult protection law that may be cooperative with social welfare law, which does not restrict human rights and is easy to understand.’

⁵² No citations are shown here regarding previous studies to avoid duplication of those cited in the text.

⁵³ From the interview of John Chesterman by the author in the Victorian OPA on March 5, 2019. John Chesterman recognizes that adult guardianship, supported decision-making, and legal measures against elder abuse are closely interrelated in the law system, although he does not use the term, an adult support and protection.

is inadequate, Therefore, it was decided to research the legal policy for an adult support and protection, including supported decision-making, focusing on the adult protection law (Tayama 2021), which is related to both the Civil Code and the social security law in Japan.

Interviews⁵⁴ with experts include three Australian research opportunities (i.e., Adelaide in 2016 and Melbourne in 2017 and 2019) and attendance to the Australian Guardianship and Administration Council (hereinafter referred to as ‘AGAC’) conference⁵⁵ in Canberra in March 2019 to report research and conduct interviews with Australian experts. The experts are attached to universities, research institutes and public agencies, including the Office of Public Advocate, tribunals, and state trustees limited. The selection criteria include membership in the AGAC, the World Congress of Adult Guardianship (WCAG), or an academic society.⁵⁶ Interviews with experts include in the conferences and individual meetings in other countries than Australia. Interviews are replaced by email correspondence of experts by the author after January 2000 due to COVID-19 pandemic outbreak.

(5) Research Questions

Hence, the main question addressed by this dissertation is ‘What is the framework and value of the adult support and protection legislation that respects the will and preferences of vulnerable adults

⁵⁴ Interviews: Guardianship law experts in Melbourne (Victoria) on March 1–3, 2017 and March 4–12, 2019, in Trieste/Singapore in May/July 2017, and Vienna/Innsbruck in September 2019. The author joined a supported decision-making facilitation training (two weeks), conducted by Cher Nicholson in Adelaide (South Australia) in February 23 to March 4, 2016.

⁵⁵ Conferences: The World Congress of Adult Guardianship (WCAG) September 2016 in Berlin, October 2018 in Seoul, the World Congress of Adult Capacity (WCAC) June 2022 in Edinburg, the Aging and Social Change September 2018 in Tokyo, September 2019 in Vienna, and September 2020 in Vancouver (virtual poster), the Australian Adult Guardianship and Administration Council conference (AGAC2019) in Canberra on March 13–15, 2019, the UBC Law Conference May 2017 in Vancouver, the IEPAS April 2018 in Istanbul, the McGill Law Conference May 2019 in Montreal, May 2021, and May 2022 (online presentations in 2021/22).

⁵⁶ The interview process is as follows. After having an appointment to meet individually with experts, questionnaires are prepared for each expert and sent to experts by email prior to the interviews. Interviews are conducted in experts’ offices in line with questionnaires. Voice records are made with the consent of the experts, and records are summarized as minutes.

with insufficient mental capacity, and how can this legislation be made effective for community support?’ To answer this question, five research questions are outlined hereunder and will be reviewed in the subsequent chapters.

- (a) What is the framework to research legal systems supporting and protecting elderly people with insufficient mental capacity from the viewpoint of the interdisciplinary legal studies of the civil law and the social security law, and what systems and issues does Japan have? (Chapter 1)
- (b) What can the vulnerability approach and the relevant considerations, which may conceptualize adult support and protection through the safeguarding laws, etc., offer us to research systems and issues of elderly people with insufficient mental capacity in a super-aged society? (Chapter 2)
- (c) How do developed countries and areas cope with the adult guardianship system, supported decision-making, and safeguards against elder abuse, and what are the implications of a legal concept of adult support and protection legislation in the international context? (Chapter 3)
- (d) How does states of Australia cope with the adult guardianship system, supported decision-making, safeguards against elder abuse, and legal advocacy policies, and what are the implications of a legal concept and values of adult support and protection legislation in the Australian context? (Chapter 4)
- (e) What legislative idea and values will be feasible for Japan’s adult support and protection legislation and how this idea will be implemented in community support, focusing on supported decision-making, with reference to the implications of Australian law reforms and legislation as well as comparison in the international context? (Chapter 5)

The primary limitation of this study is that Japan, in civil law jurisdiction, may be restricted by legal system to accept an idea available in common law jurisdictions. This limitation, however, does not negate the importance of academic analysis of this research.

3. Composition of the Dissertation

Following this ‘Introduction,’ the dissertation will comprise five chapters in compliance with the five research questions.

Chapter 1 ‘Legal Advocacy and Challenges in Japan’ will establish the framework of research in this dissertation and review the legal advocacy, including the adult guardianship system and relevant issues in Japan. Following the part ‘Introduction,’ the first part, ‘Research Framework of the Dissertation,’ systematically reviews the adult guardianship system and relevant laws/policies, the theories of civil law related to the adult guardianship system, the theories of the social security law on advocacy, and the main functions that are needed to support and protect vulnerable adults. Then, the framework of research is established. The second part, ‘Overview of the Legal Advocacy and Relevant Policy,’ reviews the legal framework and the issues of the adult guardianship system and the Promotion Act as a foundation of the Japanese law, the concept and guidelines of supported decision-making, the framework of the elder abuse prevention law and relevant legal advocacy measures. The third part, ‘Summary: Legal Advocacy to Meet People’s Multiple Needs,’ summarizes the observations addressed in the chapter.

Chapter 2 ‘Vulnerability Approach and Autonomy’ will provide the theoretical framework of the dissertation. This is the foundation on which further discussion in the dissertation would be based. Following the part ‘Introduction,’ the first part, ‘Vulnerable Adults’ will give an overview of vulnerable adults, based mainly on the ageing of populations and the elderly as a contemporary phenomenon that affects societies worldwide. A super-aged situation in Japan and how an ageing affects society will be particularly focused. The second part, ‘Vulnerability and Safeguarding,’ will review how legislative laws and policy should deal with ageing and examine what the vulnerability approach reveals in an alternative legislative policy and laws, referring to previous studies. Analysis of the safeguarding laws based on the vulnerability approach will be carried out to show ways to protect vulnerable adults, referring to common law jurisdictions. The third part, ‘Adult Support and Protection,’ will discuss the

relevant considerations, such as the capability approach and individual/relational autonomy, which should respect right to self-determination and harmonizes with the public welfare. It will then examine how essential an idea of adult support and protection legislation would be. The fourth part, ‘Summary: A Good Balance of Vulnerability and Autonomy’ follows.

Chapter 3 ‘Adult Support and Protection in the International Context’ will review adult support and protection legislation with comparative law analysis. Following the part ‘Introduction,’ the first part, ‘A Comparative Law Study in the International Context,’ provides comparative law studies of the 2000 Protection of Adults Convention and reforms to adult protection related legislation in developed countries, such as Switzerland, Austria, Scotland, the U.S., and Australia. The second part, ‘Analysis of Adult Support and Protection Legislation,’ analyzes the differences and commonalities of these law amendments or legislation to discover the basic concept of adult support and protection. Then, a definition of adult support and protection is clarified after the analysis. The third part, ‘Summary: Adult Support and Protection is Defined,’ summarizes the chapter.

Chapter 4 ‘Adult Support and Protection in the Australian Context’ will examine adult support and protection legislation in Australia in detail. Following the part ‘Introduction,’ the first part, ‘Australian Guardianship Laws,’ reviews the previous and current guardianship laws as the basics in the States of Victoria and NSW, representatives of Australia, after reviewing the basic legal framework in Australia. The second part, ‘Amendments to Victoria and NSW States Acts Incorporating Supported Decision-Making,’ reviews law reforms that has been achieved and to be planned in the same states to ensure legal frameworks and characteristics. The third part, ‘Legislation for Elder Abuse,’ reviews the national elder abuse legislative policies, including the legislation of some states. The fourth part, ‘Australian Principal Values and the Implications,’ advocates the Australian adult support and protection legislation characteristics and its principles and values behind the legislation process, referring to the multi-dimensional model of elder law. Then, possible implications from Australian

legislative project will be summarized. The fifth part, 'Summary: Implications from Australian Legislative Project are Clarified,' summarizes the chapter.

Chapter 5 'The Idea of Adult Support and Protection in Japan' will illustrate how an adult support and protection framework in Japan can be designed and reviews the framework of values behind the relevant legislation and policies. Following the part 'Introduction,' the first part, 'Considerations for a Core Agency and Supported Decision-Making' examines the roles and legal status of a core agency, as well as the legal status and the basic principles of supported decision-making (SDM). A core agency and SDM are the two essential legal devices that can be adopted may frame Japan's adult support and protection legislative architecture; thus, they need further clarification. Particularly, this part reviews comparison between three types of combined models of guardianship and SDM in Australia, Europe, and Japan. With this comparison, the basic stance of Japan regarding guardianship and SDM can be more clearly addressed. Then, a preliminary idea of supported decision-making legislation and the path to legislate it in a step-by-step approach are clarified. The second part, 'The Idea of Adult Support and Protection in Japan,' addresses the framework of legislation and illustrates the adult support and protection legal architecture in Japan. It demonstrates the function-based review of transactions between a core agency and people in a community to show how Japan's adult support and protection can work, including dispute response mechanism. 'The Values of Adult Support and Protection in Japan' reviews the framework of values behind the relevant legislation and policies, referring to the modified multi-dimensional model of elder law. The third, 'Summary: Japan's Adult Support and Protection Legislation Framework,' summarizes the chapter.

Finally, the 'Conclusion' of the dissertation follows.

Chapter 1

Legal Advocacy and Challenges in Japan

1.1 Research Framework of the Dissertation

The purpose of Chapter 1 is to establish the framework of research in this dissertation and to clarify the current situation and the issues related to the legal advocacy, such as the adult guardianship system, supported decision-making, elder abuse prevention law, and relevant policies in Japan. For this purpose, a systematic review of the theories of civil law related to the adult guardianship system, the theories of social security law on advocacy, and the main functions that are needed to support and protect vulnerable adults will be done in the part 1.1. Overview of the legal advocacy and relevant policy measures in Japan will be shown in the part 1.2 in line with the scope of the research framework set out in the part 1.1.

1.1.1 Theoretical Review

(1) Previous Research in Civil Law

Here, an overview of previous research on the adult guardianship system and relevant matters published in 2000–2022 by Japanese scholars of the school of civil law theory is summarized to clarify legal issues based on their theoretical discussions. Then, the author's stance is stated based on scholars' viewpoints.

a. Legal Interpretation of the Adult Guardianship System

In April 2000, the adult guardianship system came into force, and the legal interpretation of the text accompanying the operation of the system was discussed. Jun Sunaga (2004)⁵⁷ provides a comprehensive review of the legal issues of the adult guardianship system in his 'Interpretation and Operation of the Adult Guardianship System and Legislative Issues,' representing the concerns of

⁵⁷ Jun Sunaga was a Japanese civil law scholar (1930–2016). Jun Sunaga, 'Interpretation and Operation of the Adult Guardianship System and Legislative Issues' (2005) 2 *Adult Guardianship Law Research* 3, 26. (in Japanese) *

researchers and practitioners then in Japan. This is the keynote lecture at the first annual conference of Japan Adult Guardianship Law Corporate Association⁵⁸ (hereinafter referred to as ‘JAGA’) held in Tokyo on May 29, 2004.

Sunaga discusses various issues of legal interpretations and operations regarding the statutory guardianship and voluntary guardianship systems.⁵⁹ Namely, Sunaga discusses issues of the statutory guardianship system: ‘Necessity of further flexibility of the system,’ ‘Discretion of the family courts for starting the protection system,’ ‘Theoretical issues of legal acts in daily life,’ ‘Costs and remunerations of adult guardians,’ and ‘Issues on the limits of obligations and power of adult guardians for personal protection.’ Then, Sunaga discusses issues of the voluntary guardianship system: ‘Capacity required to conclude voluntary guardianship,’ ‘Will the voluntary guardianship contract be familiar to a proxy?’ ‘Is an appointment of a sub-agent of the person allowed?’ ‘Designation of adult protection required by a voluntary guardianship contract,’ ‘Granting the right of consent to a voluntary guardian,’ ‘Does the scope of duties of the voluntary guardian includes long-term care (aged care),’ ‘Limitations to what can be executed by the voluntary guardian,’ and ‘Effect of voluntary guardianship contracts that do not comply with the provisions of the Voluntary Guardianship Contract Law.’

Among these issues, Sunaga discusses ‘the obligation and the limited scope of personal protection by adult guardians’ in the greatest detail. Personal protection by adult guardians was the greatest attention from researchers and practitioners. In addition, Sunaga is of the opinion that amendments to relevant laws or legislation should be considered to improve the matters that cannot be resolved by the legal interpretations. Namely, Sunaga discusses possible legislative issues for the statutory guardianship and voluntary guardianship systems: ‘Consent and substituted decision-making

⁵⁸ The Japan Adult Guardianship Law Corporate Association (JAGA) is a national association of scholars and practitioners interested in issues concerning Adult Guardianship Law and policy (President: Prof. Dr. Makoto Arai). The JAGA has approximately 1,000 members, including academics, legal practitioners, social workers, notaries, accountants, court clerks, and medical doctors. JAGA, <<https://jaga.gr.jp/en/>>.

⁵⁹ Refers to ‘1.2.1 Adult Guardianship System and the Promotion Act.’

for medical practice,’ ‘Improve national negative attitude to the adult guardianship system,’ ‘How multiple adult guardians should exercise their duties,’ ‘The ideal way of guardianship and voluntary guardianship,’ ‘Requests for the appointment of a supervisor for a voluntary guardian,’ ‘Immediate and flexible protection measures,’ and ‘Order of the family court in the event of serious or emergency medical practice.’

It is understood that the Civil Law scholars, including Sunaga, and practitioners have discussed various issues regarding the adult guardianship system, since its enforcement in April 2000, not only for legal interpretations and operation but also ideas of amendments to relevant laws or legislation. Some issues discussed by Sunaga remain unchanged as the current issues.

b. Duty of Adult Guardians: Property Management and Personal Protection

Makoto Arai (2010)⁶⁰ shows two contrasting views on the roles of the adult guardianship system. For the traditional and the majority view, Eiichi Hoshino⁶¹ and Takashi Uchida consider that the roles of the adult guardianship system are mainly property management for people with property. This view is influenced by Sakae Wagatsuma⁶² who contributed to the Civil Code studies, including the older incapacity/quasi-incapacity system, to protect property of the principal’s family and limit the scope of personal protection by adult guardians. It can be said that Hoshino and Uchida’s view respects the stability of the Civil Code rather than structural change of the Civil Code in changing social environments.⁶³ Uchida states that, ‘[w]e should not have an excessive illusion in the Civil Code

⁶⁰ Makoto Arai ‘Construction of the Adult Guardianship Law System: What We Learn from the Comparison of the German Adult Guardianship Law and Japan's Adult Guardianship System’ in Makoto Arai, *Generation and Development of the Adult Guardianship System* (Yukikaku, 2021) 3–20 (Reprint from the previously published article: Makoto Arai, the same title (2010) 33 *Adult Guardianship Practices* 5–6). (in Japanese) *

⁶¹ Eiichi Hoshino was a Japanese civil law scholar (1926–2012).

⁶² Sakae Wagatsuma was a Japanese civil law scholar (1887–1973).

⁶³ Eiichi Hoshino remarks in his interview that ‘In the first place, the capacity doctrine is a system for managing people's assets. Therefore, it is written in Wagatsuma's civil law textbook that these systems are for those who have property and

regarding the welfare function of the elderly and people with disabilities. The government's responsibility for welfare must be taken outside the Civil Code.'⁶⁴

The other influential view is advocated by Shoichi Ogano⁶⁵ and Yasushi Kamiyama.⁶⁶ They focuses on the life support function of the adult guardianship system in a changing social environment, such as an ageing society and a national with an increasing number of people with dementia.⁶⁷ Ogano classifies the contents of personal protection affairs into three categories—social welfare-related affairs, medical-related affairs, and living-related affairs—which describe the ideal form of personal protection affairs. Kamiyama assumes that it is necessary for adult guardians to manage property for life support of their principals, and property management and life support are inextricably linked. These views appear in response to emerging needs of vulnerable adults as the national population ages. In this sense, these views are considered reasonable, but the point is in what law these requirements are positioned within law system of Japan.

The former view (Hoshino/Uchida) has been regarded as a majority view in the civil law, staying status quo that property management is central in the adult guardianship system and considering personal protection by means other than civil law (i.e., the welfare law), and the latter view

not to protect those who do not have any property. It is natural that property management is central [in the adult guardianship system].' Eiichi Hoshino, 'Adult Guardianship System and Legislative Process: Interview of Professor Eiichi Hoshino' (2000) 1172 *Jurist* 2-16, 6. (in Japanese) *

⁶⁴ Takashi Uchida, *Civil Law I: General Rules and General Remarks on Property Rights* (University of Tokyo Press, 4th ed. 2008) 119. (in Japanese) *

⁶⁵ Shoichi Ogano, 'Adult Personal Custody System Theory: Guarantee of Rights in Japanese Legal System and Prospects for Adult Guardianship' (Shinzansha Publisher, 2000). (in Japanese) *

⁶⁶ Yasushi Kamiyama, *Professional Guardian and Protection of Personal Affairs* (Civil Law Study Group, 2008) 66. (in Japanese) *

⁶⁷ There are views to positively capture the personal protection of adult guardians in the Civil Code. Noriko Mizuno 'Obligation of the Adult Guardian to Personal Protection' (Online, 2001) (in Japanese) * <<http://www.law.tohoku.ac.jp/~parenoir/shinjou-kango.html>>, Akiko Watanabe, *Adult Guardianship of Personal Custody* (Shinzansha Publisher, 2015). (in Japanese) *

(Ogano/Kamiyama) suggests considering personal protection within the Civil Code as much as possible and some complementary measures other than civil law, in addition to property management. The above contrasting views on personal protection can be regarded as an extension of the debate over personal protection in the Civil Code Subcommittee of the Legislative Council when the draft law was deliberated on before December 1999.⁶⁸

In the deliberations regarding draft amendments to the Civil Code by experts from 1995 to 1997 at the research group organized by the Ministry of Justice of Japan, gaps between the opinions of the experts were found in three issues, namely the statutory guardianship types (a single type of assistance or multiple types), the voluntary guardianship system, and the scope of duty of adult guardians for personal protection of principals.⁶⁹ Eiichi Hoshino, chair of the research group and of the Civil Code Subcommittee of Legislative Council, coordinated the experts' deliberations and concluded on the framework of the adult guardianship system.⁷⁰

Consequently, the multiple statutory guardianship types, including assistance, have been adopted and voluntary guardianship has been newly introduced. The scope of duty of adult guardians for personal protection remains minimal, although Article 858 (Respect for the intention and personal consideration of the adult ward) exists in the Civil Code.⁷¹ The adult guardianship is primarily subject

⁶⁸ The deliberations of the Civil Code Subcommittee of the Legislative Council are analyzed by these articles: Toshiki Nishimori, 'Purpose of the Corporate Guardianship System from the Perspective of the Legislative Process-Focusing on the Deliberation of the Adult Guardianship Subcommittee-' (2013) 22(2) *Yokohama Law Review* 231, 55. (in Japanese) *; Atsushi Omura, 'Study Group on the Adult Guardianship System and Eiichi Hoshino: Eiichi Hoshino Research Survey (Part 2)' (2017) 134 (11) *Journal of the Law Association* 2254, 2280. (in Japanese) *

⁶⁹ Eiichi Hoshino, 'Adult Guardianship System and Legislative Process: Interview of Professor Eiichi Hoshino.'

⁷⁰ Ibid 4. Eiichi Hoshino remarks that the guiding principles of the adult guardianship system are 'harmony between protection and autonomy/self-determination' and 'strike a balance between the protection of the principal and the protection of a third party, that is, the other party of the contract.'

⁷¹ The duty of adult guardians includes legal act and excludes non-legal acts, such as meals and aged care. The principal's daily life and choices, including purchase of daily necessities (Article 9 of the Civil Code), identification (i.e., marriage,

to property management of principles.⁷² There are many voices of practitioners seeking specific guidelines for the performance of adult guardians' duties.⁷³ Recently, the debate regarding the scope of duty of adult guardians for personal protection was deliberated on by experts in the adult guardianship promotion project, which is discussed later.⁷⁴

c. Legal Position of the Adult Guardianship System in Japan Law System

The debate over personal protection is related to the legal characteristic and position of the adult guardianship in law system of Japan. Teruaki Tayama (2010)⁷⁵ states that 'the adult guardianship system is a civil law system whereby an adult guardian appointed by the family court exercises authority in interference with the autonomous territory of the principal. It is not illegal as long as it is based on the law, but if the adult guardian violates the duty of due care as a prudent manager, the specific act will be illegal,'⁷⁶ which may point out the public aspect of the adult guardianship system.

Tayama then states that 'the adult guardianship system should pursue not only the civil law but also cooperate with the social welfare law and the values of social security system stipulated in the

divorce, adoption, etc.), personality (i.e., religion, voting, etc.), where the principal lives, and the principal's consent to medical treatment are not included in the duty of adult guardians. Consequently, adult guardians have only a few duties in regard to their principal's personal protection. Ministry of Justice of Japan, Civil Affairs Bureau Counselor's Office, *Commentary on Proposal Overview for Revision of Adult Guardianship System* (Kinzai Institute for Financial Affairs, INC., 1998) 39-43. (in Japanese) *

⁷² There is an opinion that Article 858 is regarded as the 'guideline' for the responsibility of adult guardianship. One secretariat officer of the Ministry of Justice of Japan remarked that 'adult guardianship is subject to property management. (...) It is based on the understanding that the duty of personal consideration that adult guardians bear, stipulated in Article 858, provides guidelines for carrying out such an adult guardianship duty.' Osamu Kaneko, 'Scope of Adult Guardianship and Obligation to Custody' (2010) 63(8) *Law Plaza* 9, 17. (in Japanese) *

⁷³ Yasuhiro Akanuma, 'Adult Guardian's Duties and Limitations' (2015) 1406 *Hanrei Times* 5, 15. (in Japanese) *

⁷⁴ Refers to '1.2.1 (3) The Basic Plan and the Interim Verification Report.'

⁷⁵ Teruaki Tayama, 'Legal Position of the Adult Guardianship System: Its Private Law and Public Law Aspects' in Kazutoshi Kobayashi, Hidefumi Kobayashi and Akira Murata (eds), *Legal Issues in an Ageing Society: A Collection of 80-year-old Commemorative Papers for Dr. Jun Sunaga* (Sakai Shoten, 2010) 1-29. (in Japanese) *

⁷⁶ Ibid 14.

constitution [because of its public aspect].’⁷⁷ The statutory guardianship system is separately stipulated in the general rules and the family parts of the Civil Code, and the voluntary guardianship system is stipulated in the *Act on Voluntary Guardianship Contract*. The adult guardianship registration system is stipulated in another law. For this reason, the adult guardianship system is a complicated law system. The statutory guardianship system has a public aspect that involves the family courts and thus is difficult for people to understand because it is in part related to the administrative law and the social welfare legislation adjacent to the Civil Code. Based on this recognition, ‘[t]here is no objection to establishing an adult guardianship legislation to be easily understood, which is formed as a package and positioned at the same domain in law.’⁷⁸

d. Research on the *Mental Capacity Act 2005* and the Consumer Contract Law

Research on the adult guardianship system from a new perspective has emerged. This is a study by Fumie Suga on the *Mental Capacity Act 2005* (hereinafter referred to as ‘MCA 2005’) in England and Wales. Suga introduced the MCA 2005 to Japan. The law was enacted in 2005 based on the accumulation of common law cases; deliberated on by experts and came into force in 2008. It is a legal system that formulates supported decision-making, which is not based on the capacity doctrine.⁷⁹ The underlying premise of this law is that ‘a person must be assumed to have capacity unless it is established that he lacks capacity’ (section 1(2)a, MCA 2005), when a third party can then support the principal in decision-making. It allows a third-party’s agency decision only if it is determined by proof that the principal is incapable of making decisions.

⁷⁷ Teruaki Tayama refers to laws of the social welfare law in his text, such as the *Social Welfare Act* (Article 2-3-12 support program for self-reliance in daily life) and *Act on Mental Health and Welfare for the Mentally Disabled* (Article 22-1 protection system). Teruaki Tayama, ‘Legal Position of the Adult Guardianship System: Its Private Law and Public Law Aspects’ 26.

⁷⁸ Teruaki Tayama’s opinion may be based on the German care law, which forms a unique territory within their civil code.

⁷⁹ Fumie Suga, *The Doctrine of Autonomous Support in the English Adult Guardianship System: Towards a Society Pursuing the Best Interests* (Minerva Shobo, 2010). (in Japanese) *

Suga, along with Yasushi Kamiyama, proposes a combination of ‘small adult guardianship’ and ‘large support’ based on comparative law research in the UK, Germany and other European countries, encouraging the adoption of new trends in Japan, such as supported decision-making without restrictions on the rights of the principals.⁸⁰ In anticipation of the *Convention on the Rights of Persons with Disabilities* (hereinafter referred to as ‘CRPD’), Suga advocated for a legal device that combines the adult guardianship system and supported decision-making. Suga’s discussion has become known by researchers and practitioners in Japan.⁸¹ Suga has since shifted her research focus from the adult guardianship system to consumer protection legislation that supports vulnerable adults without restricting human rights.⁸²

Japan’s consumer contract law, which was reformed in 2018, protects the rights of vulnerable adults in a more unique way than the guardianship system does when concluding a contract. The theoretical background of the consumer contract law is similar to that of the guardianship system.⁸³ This law is different from the Civil Code as a general contract law that presupposes equal relationship between the parties in private law. If there is any disparity between the contracting parties, the law may protect the interests of vulnerable contracting parties based on three theoretical regulations:

⁸⁰ Fumie Suga and Ohara Institute for Social Affairs (Hosei University), *New Grand Design of Adult Guardianship System* (Hosei University Press, 2013) (in Japanese) *; Fumie Suga, ‘Comparative Legal Consideration on Adult Guardianship System in the International Trends: Suggestions for reconsidering the agency decision system from the idea of self-determination support’ (2014) 76 *Private Law* 198, 204. (in Japanese) *

⁸¹ This research led to the ‘Guidelines for Adult Guardians Based on Supported Decision-Making,’ which was introduced in October 2020.

⁸² Fumie Suga, *New Consumer Law Research: Legal System and Enforcement System for Inclusion of Vulnerable Consumers* (Seibundo, 2018). (in Japanese) *

⁸³ This paragraph is based on these two articles: Kazuma Yamashiro, ‘Mental Capacity of Contracting Parties and Consumer Law: Issues on Capacity-Type Contract Regulations’ (2021) 9 *Review of Consumer Law* 83–110, 110. (in Japanese) *; Kazuma Yamashiro, ‘The Mental Capacity of Contracting Parties and Consumer Law: Following the Logic of CRPD in Private Law’ (Japan Association of Private Law Symposium Material: Civil Code and Consumer Law in Transition) (2021) 1199 *NBL* 24–31, 28–31. (in Japanese) *

capacity of a person, contract contents, and contract indication.⁸⁴ These legal methods are exceptions to private autonomy, which presupposes equal and horizontal transactions between the parties, and revokes or invalidates the contract as necessary for unequal relationship between the parties. It can be said that this is a vertical relationship intervenes in private autonomy. Public intervention is also seen in the guardianship system and the abuse prevention law. Public intervention in consumer contract law is carried out, taking after prescribed procedures only when it is deemed necessary due to disparity between the contracting parties, and accountability is imposed on the public agencies.

e. The CRPD and the Adult Guardianship System

Keisuke Shimizu (2017)⁸⁵ states that ‘the revision of the Civil Code in 1999 (...) was nothing more than a restructuring of the older incapacity/quasi-incapacity systems within the framework of the existing legal concept prepared by the theory of civil law so far. In contrast, the changes that the CRPD requires of member state parties, including Japan, are on a larger scale.’⁸⁶ The impact of the CRPD on civil law theory based on the keywords ‘capacity, representation, and support’ is extracted in sequence. This is Shimizu’s report at the 13th annual conference of JAGA held in Tokyo on May 28, 2016, which includes the following points of discussion.

First, in the theory of capacity, Shimizu points out that the doctrine of restricted capacity to act could violate Article 12 of the CRPD due to the CRPD’s concept of legal capacity and examines in

⁸⁴ Kazuma Yamashiro argues that capacity is a valid requirement for legal action of adults and limits the possibility of forming legal relationship with others based on private autonomy. The indication doctrine can be used to support adults with insufficient mental capacity without excluding them from the legal action domain. This trend may manifest itself either by reducing the function of *the principle of restricted legal agency* and expanding the response to defects in the manifestation of intention, or by recognizing *the principle of incapacity of intention* as a discipline regarding the manifestation of intention.

⁸⁵ Keisuke Shimizu, ‘The Convention on the Rights of Persons with Disabilities and Civil Law Theory’ (2017) 14 *Adult Guardianship Law Review* 40, 50. (in Japanese) *

⁸⁶ Ibid 40–41.

which part of the Civil Code the statutory guardianship system should be placed.⁸⁷ Regarding mental capacity, ‘The creation of a provision for invalidation of incapacity in the Civil Code⁸⁸ does not pose a problem of conflict with the CRPD. Establishing an invalidation provision (...) without even ensuring a definition of mental capacity’ is ‘a legislation that is somewhat less cautious.’⁸⁹

Second, in the representation theory, ‘it is necessary to coordinate with the protection of the other party regardless of whether the decision is made by the principal or the agent, and where the adjustment point is. It is one of the roles of the Civil Code to determine—and it is inevitable to discuss—this point when introducing a new legal system. However, in the recent discussions on supported decision-making, this point [the protection of the other party] is mostly missed. It is unconscious and only the protection of the principal is emphasized.’⁹⁰ It is understood that the contrast with the fact that European countries, such as France, tend to attach importance to consideration for the security of transactions of the other party and a third party is the basis of awareness of the problem.

Third, in the theory of support, new issues have been presented regarding how to position the concept of ‘support’ that does not exist in the current Civil Code, and the effectiveness of legal acts by

⁸⁷ Japanese researchers argue that Japan’s adult guardianship system conflicts with Article 12 of the CRPD both in legal system and practice. The typical ones: Teruaki Tayama (ed), *Adult Guardianship System and the Convention on the Rights of Persons with Disabilities* (Sanseido, 2012) 169; Makoto Arai ‘Convention on the Rights of Persons with Disabilities and Power of Attorney: Tiger at the Front Gate, Wolf at the Rear Gate’ (2013) 28(1 and 2) *Chiba University Law Studies* 53.

⁸⁸ Refers to Article 3-2 of the Civil Code of Japan. It stipulates that if the person making a juridical act did not have mental capacity when manifesting the relevant intention, the juridical act is void. This provision was created in the 2017 civil code reform and came into force in April 2020.

⁸⁹ Keisuke Shimizu, ‘The Convention on the Rights of Persons with Disabilities and Civil Law Theory’ 40–41.

⁹⁰ Ibid 41–50.

supported decision-making.⁹¹ The ‘de facto adult guardianship’ or ‘informal arrangement’⁹² chosen by most of the population is raised, as well as the issue that should be considered. The term ‘de facto adult guardianship’ means that relatives and nursing-home managers effectively support the person, regardless of the legal system, such as the adult guardianship system.⁹³

f. Supported Decision-Making

Shoichi Sato (2017)⁹⁴ conducted a theoretical examination of supported decision-making. Sato argues that supported decision-making is based on the principle of presuming capacity for a person, and that a person has a decision-making capacity unless proven otherwise. For this reason, ‘If you make a decision on your behalf, you are aware that the supporter does not have the capacity to support

⁹¹ Refers to ‘3.2 (7) Other Statutory Developments.’ Peru in the South America introduced a ‘support’ clause in their civil code in 2018; Keisuke Shimizu, ‘Can the New Peruvian Law Protect the Rights of Persons with Disabilities? Based on the Trend of New Support System’ (2021) 91 *Adult Guardianship Practices* 74–80, 77. (in Japanese) *

⁹² There is a view that de facto guardianship or informal arrangement can be covered by the ‘management of business’ provision of the Civil Code (Article 697). Article 697 of the Civil Code stipulates: (1) A person who commences the management of business for another person without being obligated to do so (hereinafter in this Chapter referred to as ‘Manager’) must manage that business in accordance with the nature of the business, using the method that best conforms to the interests of that another person (the principal). (2) The Manager must engage in management of business in accordance with the intentions of the principal if the manager knows or is able to conjecture that intention. Fumie Suga, ‘Reorganization of *Negotiorum Gestio* Theory for People with Inadequate Mental Capacity: An Attempt to Integrate Interpretation with the Adult Guardianship System based on A Person-centered Approach’ in Takanobu Igarashi et al (eds), *The History and Future of Civil Law* (Seibundo, 2014) (in Japanese) *; There is the case law regarding the management of business: [A Supreme Court of Japan ruling on business management, Supreme Court of Japan, Civil Code Vol. 15, No. 10, page 2629 in Japanese on November 30, 1961].

⁹³ The term ‘de facto guardianship’ is defined as ‘partially or fully incompetent elder people are able to continue to maintain dignified lives, in a caring setting, without the need to resort to legal guardianship,’ which ‘includes both informal relationships, by people who based on kinship or other caring ties provide the care and decision-making, and formal relationships, by employees, paid workers, or other service providers, from various governmental and local agencies or organizations who provide care as part of their professional duty.’ Israel Doron, ‘From Guardianship to Long-term Legal Care: Law and Caring for the Elderly’ (2002) Doctoral dissertation, York University 178-225, 179.

⁹⁴ Shoichi Sato, ‘Is Decision-Making Support Available?’ (2016) 2016 *Annual Report of the Philosophy of Law* 57, 71. (in Japanese) *

your decision-making, and the supporter has a responsibility to explain to others.’⁹⁵ As a result, supported decision-making is prioritized and substituted decision-making is a last resort. This design is based on the MCA 2005 introduced by Suga and is a different approach from the current Civil Code based on the capacity doctrine. Based on this idea, supported decision-making guidelines have been introduced since 2017, and in October 2020, the Guidelines for Adult Guardians Based on Supported Decision-Making were published, corresponding to Sato’s views on supported decision-making as its basics.⁹⁶

Yasushi Kamiyama (2020)⁹⁷ advocates for supported decision-making that confirms to the CRPD based on the previous discussions of Suga and Sato. After analysis, Kamiyama presents three ways of thinking about supported decision-making, namely: (i) ‘The idea that since the CRPD excludes the possibility of all types of substituted decision-making, it must be completely transformed into a supported decision-making system (i.e., the stance of supported decision-making unification by the UN Committee),’ (ii) ‘The direction in which substituted decision-making on behalf of a principal is regarded as a type of supported decision-making by respecting the will of the principal as the standard for decision-making (i.e., being close to a concept of the 1st Government of Japan Report),’⁹⁸ (iii) ‘Supported decision-making and substituted decision-making are separated from the aspect of philosophy, and with prioritization of the principle of supported decision-making, substituted decision-making is used only as a last resort (i.e., the guardianship promotion project is gradually moving in a

⁹⁵ Shoichi Sato, ‘Is Decision-Making Support Available?’ 59.

⁹⁶ When making important legal decisions (i.e., legal acts and relevant non-legal acts), the SDM guidelines for adult guardians allow adult guardians to go through the supported decision-making process and shift to substituted decision-making only if supported decision-making does not work. The guidelines admit that the term decision-making capacity, which is a presumption for supported decision-making, is not based on the law in Japan but the guidelines.

⁹⁷ Yasushi Kamiyama, ‘Recent Policy Trends regarding Supported Decision-Making in Japan’ (2020) 72 (4) [414] *The Doshisha Law Review* 445, 467. (in Japanese)

⁹⁸ Refers to ‘1.2.1 (2) b. Response by the Government of Japan.’

direction that is compatible with this idea).’⁹⁹ Kamiyama is in favor of the idea of (iii) above. Kamiyama's three divisions express the differences in thinking about the supported decision-making concept in Japan from the civil law viewpoint. In the view of (iii) above, the adult guardianship system and supported decision-making can coexist as independent law systems while prioritizing supported decision-making. This is a civil law scholar's unique view on supported decision-making in Japan, which needs further discussion.

g. Future Developments

In his ‘Proposals for the second term Basic Plan,’ Arai (2021)¹⁰⁰ makes the following four points regarding future developments: (i) Consider incorporating the functions of quasi-judiciary institutions into the regional collaboration network to improve the community support system. The quasi-judicial institutions are notaries and the Legal Affairs Bureau. The notaries create voluntary guardianship contracts upon the request of principals as part of the regional collaboration network. Arai proposes to add a monitoring function to the Legal Affairs Bureau, where a voluntary guardianship contract is registered by law, to check when a voluntary guardian should make a petition to the family court to nominate a voluntary guardian supervisor. (ii) Promote supported decision-making to coexist with substituted decision-making in the legal system. (iii) A team comprising an adult guardian and relevant people related to the principle should be more involved in his/her personal protection. (iv) As part of fraud prevention, a registration system for voluntary guardianship contracts with a core agency should be established and the core agency should watch over the invocation of voluntary guardianship contracts in the community. These views correspond to a future prospect based on the Basic Plan in the Promotion Act. Arai states that ‘the Basic Plan is decided by the Ministerial Council of Japan, and

⁹⁹ Yasushi Kamiyama, ‘Recent Policy Trends regarding Supported Decision-Making in Japan’ 447–448.

¹⁰⁰ Makoto Arai, ‘The Adult Guardianship System Talks No.15: III Enactment of the *Act on Promotion of the Adult Guardianship System*, 3 Basic Plan Interim Verification Report’ (2021) 2124 *Periodicals* 60, 64. (in Japanese) *; Makoto Arai, *Formation and Development of the Adult Guardianship System* (Yuhikaku Publishing Co., Ltd., 2021) 220–224. (in Japanese) *

it is a national project that must be realized.’¹⁰¹

In his ‘History, Current Status, and Future of the Adult Guardianship System in Japan,’ Tayama (2021)¹⁰² looks back on the twenty years since the enforcement of the adult guardianship system in 2000 and discusses the ‘idea of adult protection law.’ This is the keynote lecture at the 17th annual conference of JAGA held in Tokyo as the two decades’ anniversary of the adult guardianship system on November 14, 2020. Adult protection law, according to German, Austrian and Swiss civil laws, is defined as ‘the collective legal regulations, including the protection and care of adults with health problems or disabilities that prevent them from engaging in legal transactions without the assistance of a third party.’¹⁰³ It can be understood that the essence of adult protection law is to provide comprehensive care and protection legal measures for vulnerable adults without restricting their human rights. In particular, the adult protection laws of Austria and Switzerland are ‘part of the Civil Code, but they are easy to understand because they have independence as a legal domain as adult protection law.’¹⁰⁴ Tayama states that ‘it is perhaps time for [Japan] to consider transforming the adult guardianship system into a generous [adult protection] system with an emphasis on social welfare measures rather than upgrading the adult guardianship system itself as a legally elaborate one.’¹⁰⁵ Tayama’s views suggest, referring to recent adult protection legislation in European countries, a future direction to transform the adult guardianship system into an adult protection law. This idea implies an alternative legal architecture rather than the Basic Plan.

h. Summary of Civil Law Scholars’ Views and the Author’s Stance

Previous research on the adult guardianship system and relevant matters by Japanese scholars

¹⁰¹ Makoto Arai, *Formation and Development of the Adult Guardianship System* 224.

¹⁰² Teruaki Tayama, ‘History, Current Status, and Future of the Adult Guardianship System in Japan’ (2020) 18 *Adult Guardianship Study* 18, 27. (in Japanese) *

¹⁰³ Ibid 24.

¹⁰⁴ Ibid 27.

¹⁰⁵ Ibid.

of the civil law theory has been reviewed. In the adult guardianship system, the scope and responsibility of adult guardians for personal protection are limited in the deliberations by experts, and a new perspective has been introduced from comparative law studies, such as the MCA 2005. Supported decision-making guidelines are published in the guardianship promotion project, but there are academic opinions that the response to the CRPD is insufficient. The legal issues related to the adult guardianship system and relevant matters have become clear in the twenty years since its enforcement. As for future developments of the adult guardianship system, there are two different opinions of civil law scholars: one opinion is to expect the progress of the guardianship promotion project initiated by the Government of Japan and the other opinion is to consider transforming the adult guardianship system into a generous [adult protection] system with an emphasis on social welfare measures.

The author's stance in relation to the scholarly viewpoints reviewed in this dissertation is now stated below.

- (i) Discussions in this dissertation are based on the premise that the Civil Code and relevant laws related to the adult guardianship system will be maintained. More than twenty years have passed since the enforcement of the adult guardianship system, and the norms of the adult guardianship system have been established. I therefore agree that the adult guardianship system is mainly subject to property management of the principal, and that personal protection of the principal is operated within the scope of authority granted to the adult guardian by the family courts (Hoshino/Uchida). Recognizing the roles of the Civil Code, measures of welfare policy for vulnerable adults will be fulfilled by the national responsibility (Hoshino and Uchida).
- (ii) It is desirable that supported decision-making, rather than the adult guardianship system, should be prioritized, in accordance with the supported decision-making guidelines for adult guardians, which will consequently reduce the use of the adult guardianship system. This direction will result

in a situation of ‘large support’ and ‘small adult guardianship’ (Kamiyama and Suga).¹⁰⁶

- (iii) The legislation of supported decision-making should be considered to establish the advocacy support suitable for Japan as well as to prevent fraud and undue influence¹⁰⁷ damages of vulnerable adults. It should be considered in legislation that ‘supported decision-making and substituted decision-making are separated from the aspect of philosophy, and with prioritization of the principle of supported decision-making, substituted decision-making is used only as a last resort’ (Kamiyama). The adult guardianship system and supported decision-making may coexist independently and complement each other (Kamiyama).

(2) Previous Research in Social Security Law

In the previous section (1), it is recognized necessary to develop complementary systems in the social security law to the adult guardianship system in ensuring personal protection. Therefore, we will review previous research on the social security law regarding policies that would complement the adult guardianship system. The social security system supports the security of the people and the stability of their lives. It consists of social insurance (pension, health care, and long-term care (aged care)), public assistance, health care and public health, and social welfare, and supports people's lives for a lifetime.¹⁰⁸ The social security law is a general term for legislation that regulates legal relationships such as social insurance (pension, health care, and long-term care (aged care)), public assistance, health

¹⁰⁶ If the use of the guardianship type in statutory guardianship is significantly reduced by prioritizing supported decision-making, it could be considered that the revision of the Civil Code related to the adult guardianship system may not be always important. In such a case, the statutory guardianship type would be abolished in statutory guardianship system from the viewpoint of conformity with the CRPD, as both Arai and Tayama opine.

¹⁰⁷ The term ‘undue influence’ is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception, or manipulation (General Comment No.1 by UN Committee on CRPD); ‘Undue influence’ is defined in the State of California, U.S. as an ‘excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity’ (California Welfare and Institutions Code section 15610.70).

¹⁰⁸ Refers to the Ministry of Health, Labour, and Welfare of Japan, ‘What is the Social Security System?’ (Web Page, n/a) (in Japanese) * <https://www.mhlw.go.jp/stf/newpage_21479.html>.

care and public health, and social welfare, which includes the social welfare law and legal advocacy.¹⁰⁹

The social security law is the law of discipline in Japan based directly on ‘Article 25 of the constitution of Japan (...) and provides benefits and burdens that are prerequisites for the purpose of establishing preconditions to enable the people to pursue their own lives.’¹¹⁰ There are various theories about the legal basis of the social security law, such as ‘right to life’ in Article 25 of the constitution, social solidarity, and ‘human dignity’ in Article 13 of the constitution.¹¹¹ In this dissertation, it is understood that all these theories are the legal basis of the social security law.

The challenges faced by adults with insufficient mental capacity are diverse and everyone has a right to enjoy support and protection when it is necessary. Complicated cases are often seen, such as a case where the principal has no relatives and no property and is abused or involved with antisocial forces. In such cases, it is difficult to resolve the challenges only with the adult guardianship system operated by the family courts. Therefore, involvement of the government, public agencies and civil society has become inevitable.¹¹²

Under the circumstances, the deliberations by experts over the adult guardianship system are conducted by the Ministry of Health, Labour and Welfare (Community Welfare and Services Division),

¹⁰⁹ Yoshimi Kikuchi opines that the social security law is structured ‘according to the difference in the content of benefits due to the nature of the security needs and is divided into three divisions: the income security law, which is a monetary benefit, the medical security law, which focuses on service benefits, and social service guarantee, which includes social welfare and legal advocacy.’ Yoshimi Kikuchi, *Social Security Law* (Yuhikaku Publishing Co., Ltd., 2nd ed. 2014) 104. (in Japanese) *

¹¹⁰ Ibid 101.

¹¹¹ Ibid 113–116.

¹¹² The part of the Yokohama Declaration relevant to Japan (which was made at the first World Congress of Adult Guardianship in Yokohama 2010 and partially revised at the 5th World Congress in 2016) states that ‘the system of the legal support and protection for adults should be available for everyone, and for this reason it is essential that the government publicly support the entire system’ (underlined by the author). International Guardianship Network (IGN), *Yokohama Declaration* (Web Page, September 16, 2016) <<https://www.international-guardianship.com/yokohama-declaration.htm>>.

which oversees the guardianship promotion project. In this project, ‘advocacy support’ is positioned at the core of the second term Basic Plan that was implemented in April 2022. The adult guardianship system is said to be positioned as part of the legal advocacy system under the social security law by scholars.¹¹³ Therefore, the theories on the concept of legal advocacy in the Japanese context will be summarized, and the author’s stance will be clarified after the theories on the relationship between the adult guardianship system and the social security law, and the community support that is the site of legal advocacy activities will be reviewed.

a. What is Advocacy in the Japanese Context?

The term ‘advocacy’ is used diversely, which includes multi-functional meanings.¹¹⁴ The concept of ‘advocacy’ is originally based on the act of a lawyer’s proxy in the courts on behalf of a client. This concept applies to the field of social welfare, where a person who is socially disadvantaged cannot claim or remedy their rights or prevent their disadvantage by themselves. The concept now requires an advocacy activity in which a social or similar worker defends the person’s rights.¹¹⁵ The concept of advocacy was introduced in Japan in the 1960s and 1970s and it has been frequently used in the field of welfare since the 1990s. The term ‘advocacy’ is used in legislation.¹¹⁶ In this way, the

¹¹³ Keiko Matsushita, ‘Advocacy by Adult Guardianship System: Establishment of the Significance and Role of Citizen Guardians’ (2020) Doctoral dissertation in Kansai University 1, 96. (in Japanese)

¹¹⁴ Kimiyo Terada, ‘A Discussion of How Advocacy is Conceptualized in Social Welfare Research in Japan’ (2016) 15(2) *Niigata Journal of Health and Welfare* 27, 34. (in Japanese); Williams and Field categorize advocacy into self-advocacy, legal advocacy, social advocacy, and systemic advocacy in the Australian context. Karen Williams and Sue Field, ‘Advocacy and the Rights of the Vulnerable Older Person’ (2021) 12 *Journal of Aging Law & Policy* 1, 37.

¹¹⁵ Miyo Akimoto, ‘Support and Autonomy in Advocacy’ (2004) 4 *Social Policy Research* 26-50, 27 (in Japanese) *; Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems* (Akashi Shoten, 2012) 11–29. (in Japanese) *

¹¹⁶ For example, each Article 1 of the Elder Abuse Prevention Law and the Abuse Prevention Law for Persons with Disabilities uses the word ‘*kenri-yogo*’ in Japanese (advocacy). According to the ordinance and regulations of the Ministry of Health, Labor and Welfare of Japan, ‘Advocacy and the Adult Guardianship System’ is stipulated in the national qualification examination subjects of certified social workers, care workers, and mental health workers.

concept of advocacy has become prevalent in the field of social welfare, although its meaning is not defined by law but is left to the academic studies. Scholars' views are reviewed as follows.

Masateru Kawano (1999)¹¹⁷ states that '[a]dvocacy is the support activities of exercising rights, such as preventing abuse, assisting in the use of welfare services, or managing property, from the standpoint of a person with insufficient mental capacity.'¹¹⁸ The idea of advocacy is to 'respect the will of the person as much as possible in his/her self-determination, (...) and therefore empowerment and self-advocacy are particularly important.'¹¹⁹ The advocacy system can be viewed in a narrow or broad sense.¹²⁰ In a narrow sense, the advocacy system refers to the adult guardianship system and the community welfare advocacy program (currently, support program for self-reliance in daily life), in which adult guardians and daily-life support staff directly support adults with insufficient mental capacity. Advocacy in a broad sense includes, in addition to advocacy in a narrow sense, a comprehensive and specialized consultation desk and information provision, an auditing and self-inspection/third-party evaluation system, and a complaint resolution system.¹²¹ Kawano's view on advocacy paves a way for discussion on the roles and scope of advocacy in the social security law studies, which takes influence on the disability law.¹²² Then, discussion on advocacy explores as below.

Atsushi Hirata (2012)¹²³ asserts that advocacy is 'to support [a] person according to his/her will

¹¹⁷ Masateru Kawano, 'Basic Issues of "Welfare Advocacy in the Community"' (1999) 66(2) *Journal of Law and Politics* 55, 84. (in Japanese) *

¹¹⁸ Ibid 58.

¹¹⁹ Ibid 59.

¹²⁰ Ibid 64–66.

¹²¹ Kazuhiro Nishida follows Kawano's views on the advocacy in narrow and broad senses. Kazuhiro Nishida, 'Procedures for Advocating and Relieving Social Security Rights' in Japan Society for Social Security Law (ed), *Social Security Law in the 21st Century* (Lecture Book, Social Security Law, Volume 1) (Horitsu Bunka Sha, 2001) 167, 193. (in Japanese) *

¹²² Masateru Kawano, 'Disability Law as a "New Social Law"' (2017) 1 *Disability Law* 9, 32. (in Japanese) *

¹²³ Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems* (Akashi Shoten, 2012) 52. (in Japanese) *; Atsushi Hirata, 'What is Advocacy? Focusing on the Adult Guardianship System' (Lecture paper at

and preferences with respect to his/her legal rights based on the idea of enhancing the [person's] right to self-determination.'¹²⁴ Advocacy, in a narrow sense, is 'supporting self-determination ("supporting the self-determination process") and representing self-determination ("supporting the self-determination assertion stage")'¹²⁵ for adults with insufficient mental capacity. Advocacy, in a broad sense, is 'support for the realization of rights, such as acquisition of rights based on self-determination and restoration of rights ("supporting at the stage of realization of self-determination")',¹²⁶ in addition to the two supports under advocacy in a narrow sense. The advocacy system in a narrow sense includes the adult guardianship system, support program for self-reliance in daily life, and various consultation support systems. The advocacy in a broad sense includes a complaint resolution system, an ombudsperson system, and an abuse prevention system, in addition to the narrow-sense systems.¹²⁷

Miyo Akimoto (2012)¹²⁸ states that advocacy is 'to support "weak" individuals who are unable to enjoy freedom and benefits specified in the human image of the civil law (namely, "strong" individuals)... Advocacy covers problems that have been considered in non-legal activities in addition to legal activities.'¹²⁹ Akimoto divides the advocacy system into two : (i) an adult guardianship system that directly supports vulnerable people and ensures accountability at the time of concluding a contract (social welfare law), and (ii) a consumer contract law that indirectly supports and protects vulnerable people, universal design, fraud prevention activities, and monitoring activities in the community.¹³⁰

the seminar on social welfare sponsored by public interest incorporated foundation Tokyo 23-City on November 12, 2010). (in Japanese)

¹²⁴ Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems* 52.

¹²⁵ Miyo Akimoto and Atsushi Hirata, *Social Welfare and Advocacy: Theory and Practice for Human Rights* (Yuhikaku Publishing Co., Ltd., 2015) 115. (in Japanese) *

¹²⁶ Ibid 116–118.

¹²⁷ Ibid.

¹²⁸ Miyo Akimoto and Atsushi Hirata, *Social Welfare and Advocacy: Theory and Practice for Human Right* (Miyo Akimoto-written part).

¹²⁹ Ibid 24–25.

¹³⁰ Ibid 81–89.

Akimoto shows a unique composition of social welfare whereby vulnerable adults pursue well-being by choosing their own way of life by themselves. It combines advocacy in the ‘world of law’ (i.e., adult guardianship, social welfare law) and that in the ‘world of facts’ (i.e., information gathering, support program for self-reliance in daily life, etc.) which are supported by social workers.

b. Adult Guardianship System and Social Security Law

Theories on the relationship between the adult guardianship system and the social security law, which is mediated by the concept of advocacy, will be reviewed. Nobuyuki Iwama (2011)¹³¹ describes what the point of contact between the adult guardianship system and social welfare brings about. Iwama addresses three points, namely: (i) Government responsibility as a safety;¹³² (ii) Positioning the persons as the subject of the contract,¹³³ and (iii) Building an advocacy system in the community. Regarding (iii) above, a comprehensive advocacy system is being built in the community in which the local government, public agencies, NPOs, practitioners, and citizens can participate. Iwama then discusses the role of social workers and the promotion of community-based welfare.¹³⁴

In the book entitled as *Advocacy and Welfare Practice Activities*, Hirata (2012)¹³⁵ states that ‘Article 858 (Respect for the Intention and Personal Consideration of the Adult Ward) of the Civil Code implies that the adult guardianship system is part of advocacy systems and stipulates two

¹³¹ Nobuyuki Iwama, ‘Adult Guardianship System and Social Welfare: Exploring New Possibilities from the Point of Contact’ (2011) 627 *The Journal of Ohara Institute for Social Research* 19, 29. (in Japanese) *

¹³² The responsibility of the Government and public agencies is stated in the abuse response program that is based on the Elder Abuse Prevention Law. There are cases in which the municipality supports the adult guardianship system, including the municipality’s mayor lodging a petition.

¹³³ The social security system changes from a public measure method to a contract method, and the parties need to conclude a contract to have welfare services. The adult guardianship system can be used when those who lack mental capacity conclude a contract.

¹³⁴ Nobuyuki Iwama states that ‘advocacy must guarantee efforts for realizing the way of life of the person to ensure that they live their own lives.’ Nobuyuki Iwama, ‘Adult Guardianship System and Social Welfare: Exploring New Possibilities from the Point of Contact’ 22.

¹³⁵ Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems*.

obligations to adult guardians, namely, the obligation to respect the intention of the principal and the obligation to consider mental and physical condition and living circumstances of the principal. It is important to balance these two different obligations.’ Hirata goes on to explain how adult guardians should balance these two obligations towards the principals.¹³⁶

Toshiro Ishibashi (2014)¹³⁷ observes that ‘[the] adult guardianship system is closely related to the welfare and long-term care [aged care] systems, and it is premised that these are the systems that should complement one another. This interdisciplinary relationship, on the contrary, makes it difficult [for practitioners] to clearly understand the scope of duties, responsibilities, and obligations of adult guardians [in personal protection].’¹³⁸ Regarding legislation that complements the adult guardianship system, Ishibashi refers to the following list of laws and policies: the disability law (i.e., *Basic Act for Persons with Disabilities, Act on Comprehensive Support for the Daily and Social Life of Persons with Disabilities, Act for the Mental Health and Welfare of Persons with Mental Disorders*), the abuse prevention law (i.e., Elder Abuse Prevention Law, Abuse Prevention Law for Persons with Disabilities), subsidies related to the use of the adult guardianship system (the *Social Welfare Act* and relevant ordinances), and the support program for self-reliance in daily life (based on the *Social Welfare Act*).¹³⁹

Civil law scholars address the relationship between the adult guardianship system and the social security law. For example, Kamiyama (2012)¹⁴⁰ states that the ‘Elder Abuse Prevention Law [Article 28] and the Abuse Prevention Law for Persons with Disabilities [Article 44] regard the adult guardianship system as one of the effective legal instruments to prevent abuse. [According to Article

¹³⁶ Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems* 179–180.

¹³⁷ Toshiro Ishibashi, ‘Advocacy Services and the Social Security Law’ in Akira Moriyama and Nobuyuki Koike (eds), *Realization of Citizen's Guardianship* (NIHON KAJO Publishing Co., Ltd., 2014) 231, 299. (in Japanese) *

¹³⁸ Ibid 256.

¹³⁹ Ibid 258–288.

¹⁴⁰ Yasushi Kamiyama, ‘Introduction of the Public Adult Guardianship System in Japan: Referring to the German Operation Scheme’ (2010) 641 *The Journal of Ohara Institute for Social Research* 44, 58. (in Japanese) *

32 of the *Act on Social Welfare for the Elderly*, Article 28 of the *Act for the Welfare of Persons with Intellectual Disabilities*, and Article 51-11-2 of the *Act for the Mental Health and Welfare of Persons with Mental Disorders*,] it is important that the right to petition for adult guardianship by a mayor of the municipality is regulated as the role of the municipality. Here, a scheme that attempts to realize a social welfare policy (i.e., prevention of abuse of vulnerable adults) is clearly seen in a form where the adult guardianship system under the Civil Code and the system under the social security law are interlinked.’¹⁴¹ Kamiyama (2015)¹⁴² also addresses ‘adult guardianship as a social security law,’ referring to passages of ‘the advocacy function of the adult guardianship system’ and ‘cooperation with the social security law in the operational process [of the adult guardianship].’¹⁴³

c. Community support

Advocacy activities are implemented in a community to take care of vulnerable adults by law. Here, community support is focused on. One of the common goals of the social security law and policies is to realize a diverse society,¹⁴⁴ and to achieve this, the Government of Japan has adopted relevant policies to enhance the ability to solve community issues, strengthen communal ties, improve the comprehensive support system in the community, and encourage the utilization of skillful practitioners.¹⁴⁵ Therefore, advocacy should be observed in the context of where and how it is positioned in such policies.

¹⁴¹ Yasushi Kamiyama, ‘Introduction of the Public Adult Guardianship System in Japan: Referring to the German Operation Scheme’⁵⁴.

¹⁴² Yasushi Kamiyama, *Professional Guardian and Protection of Personal Affairs* (Civil Law Study Group, 3rd ed, 2015) (in Japanese) *

¹⁴³ Ibid 21–24.

¹⁴⁴ A ‘diverse society’ refers to ‘a society in which the community and various local actors participate, and the people are connected to other people and social resources across generations and fields for better living and purpose.’ Ministry of Health, Labour, and Welfare of Japan, *Toward the Realization of a ‘Diverse Society in Community’* (Web Page, February 7, 2017) (in Japanese) * <<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000184346.html>>.

¹⁴⁵ It can be understood that a diverse society demonstrates an image of a community where people help one another, where the value of equality is enhanced, and no discrimination is available due to a person’s disability.

Yoshimi Kikuchi (2019)¹⁴⁶ addresses ‘the importance of supported decision-making in supporting the lives of persons in the community, (...) and there is an aspect of the adult guardianship system that overlaps with the principles of a community-based general support center and a diverse society.’¹⁴⁷ Kikuchi states, ‘Legal support, such as the adult guardianship system, should be positioned [not in the center but] in one corner of the overall picture of ‘community-based integrated care system’ and a ‘diverse society.’¹⁴⁸

Atsushi Hirata (2012)¹⁴⁹ states that ‘[w]e need a “consultation support system” to prevent infringing on the person’s rights and to restore and remedy the person’s rights in the event of infringement.’¹⁵⁰ Jun Nishimura (2018)¹⁵¹ asserts that ‘[s]ince the social welfare basic structural reform around 2000 when a contract method was introduced, (...) the welfare support law, which is indirect support through information provision, consultation support, skill development by practitioners, community planning, etc., has come to play an important role.’¹⁵²

Policy measures, such as comprehensive consultation support, community development support, participation support, and multi-layered support, were introduced in 2020 through the revision of the *Social Welfare Act* [Article 106-4-2].¹⁵³ In the article ‘Social Security Law in the Light of Adult

¹⁴⁶ Yoshimi Kikuchi, *Supporting Social Security: Rethinking <Community>* (Iwanami Shoten, Publishers, 2019). (in Japanese) *

¹⁴⁷ Ibid 193.

¹⁴⁸ Ibid 194.

¹⁴⁹ Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems*.

¹⁵⁰ Ibid 208.

¹⁵¹ June Nishimura, ‘Legal System of the Personal Social Services in terms of Participation Support’ (2018) 15(1) *Journal of Kanagawa University of Human Services* 1, 13. (in Japanese)

¹⁵² Ibid 13. June Nishimura states that ‘consultation support does not always involve benefits. Initial consultation may lead to assistance planning, but in some cases, it may be limited to consultation assistance only.’ Jun Nishimura, ‘Legal Analysis of the Process of Social Service Provision: Tentative Study for Social Work Law’ (2020) 14 *Annals of Public Policy* 119–135, 129. (in Japanese)

¹⁵³ Refers to the Ministry of Health, Labour, and Welfare of Japan, *About the Multi-layered Support System Project* (Web Page, n/a) (in Japanese) * <<https://www.mhlw.go.jp/kyouseisyakaiportal/jigyoku/>>.

Guardianship and Advocacy,’ Hiroshi Kawakubo (2000) ¹⁵⁴ focuses on consultation support, concluding that ‘[t]he consultation support system, which is positioned as part of advocacy, empowers its nature in the community, and will expand the possibility of advocacy.’¹⁵⁵ There are various forms of consultation support, such as information provision, education and consultation, and consultation support in abuse cases, some of which are regulated by law and others are not. Because of these diverse forms, Kawakubo states that ‘the legal evaluation [of consultation support] is a challenge.’¹⁵⁶

d. Summary of Social Security Law Scholars’ Views and the Author’s Stance

Previous research on advocacy, the adult guardianship system and the social security law, and community support by Japanese social security law and social welfare studies scholars of the advocacy theory has been reviewed. Some theories on advocacy have some aspects that change with the times. Therefore, it cannot be said that there is an established theory on advocacy from the social security law and social welfare studies viewpoints. Advocacy has a role of establishing a welfare system, sharing the value and purpose of the social security law with concerned parties, and linking this law to practitioners’ activities in a community.¹⁵⁷ The concept of advocacy makes it possible to go for the domain of social welfare, where the scope will expand from the ‘world of law’ to the ‘world of facts’ (Akimoto). The social security system has changed from a public measure method to a contract method, and parties come to participate in the welfare system through contracts based on their own will. The realization of a diverse society is stipulated in Article 1 of the *Act on Promotion of the Adult Guardianship System*, and the Basic Plan focuses on ‘advocacy support.’ For this reason, there is a high possibility that the measures of the *Social Welfare Act* and the adult guardianship system, which share the same goal, will be functionally interlinked in the community.

¹⁵⁴ Hiroshi Kawakubo, ‘Social Security Law in the Light of Adult Guardianship and Advocacy’ (2020) 12 *Review of Social Security Law* 3, 22. (in Japanese)

¹⁵⁵ Ibid 21.

¹⁵⁶ Ibid.

¹⁵⁷ Atsushi Hirata, *Advocacy and Welfare Practice Activities: Re-questioning Concepts and Systems* 30–35.

The author's stance in relation to the scholarly viewpoints is now stated below.

- (i) In this dissertation, advocacy refers to 'support for a person with insufficient mental capacity of their legal rights, according to their will and preferences, including preventing their abuse, assisting in their use of welfare services, and managing their property.'
- (ii) The advocacy system, in a narrow sense, comprises an adult guardianship system, supported decision-making, abuse prevention law, and relevant policies, such as a support program for self-reliance in daily life and subsidies for expenses related to the use of the adult guardianship system, which directly supports a person with insufficient mental capacity in line with definition (i) above. The advocacy system, in a broad sense, comprises consumer contract law, disability law, and complaint resolution, which indirectly support the relevant persons in addition to the advocacy measures in a narrow sense. Supported decision-making is specified for important legal acts and relevant non-legal acts as stipulated in the SDM Guidelines for Adult Guardianship.
- (iii) A core agency may play a significant role in adult guardianship and supported decision-making, supporting adults with insufficient mental capacity in the community. Realizing multi-layered and comprehensive community support through the cooperation of the regional collaboration network of the adult guardianship system centered on the core agency, community-based integrated care system, including nursing care institutions, and the local government dealing with abuse is considered useful community support for a diverse society.

1.1.2 Function-based Review

Next, the 'functions' needed to support and protect adults with insufficient mental capacity in the community will be sorted out. This dissertation mainly targets elderly people with dementia and assumes a process in which their cognitive capacity gradually declines with ageing. With the decline in their cognitive capacity, the following support and protection functions are required.

- (a) The number of elderly people living alone increases with ageing of the population. For this reason, the number of areas where neighborhood associations and caregivers (i.e., care managers, helpers

in aged care) watch over vulnerable people is increasing. Caregivers regularly visit elderly people who live alone, so they are aware of their current situation. Relevant institutions, such as the municipality (if necessary), are notified of such on-site information directly or via a community-based general support center.

- (b) With ageing of the principal, it is possible for the principal and/or its stakeholders to consult with the core agency in the community or community-based general support center about the principal's property management and personal protection, and confirm what kinds of support system are available, and their terms and conditions of use. It is recommended that the principal discuss their plans for older age with their relatives or close friends at a 'life planning meeting'¹⁵⁸ to convey their personal wishes. When the principal's mental capacity is still intact, they can conclude a voluntary guardianship contract or a property management agency contract with a third party in preparation for a possible decline in cognitive capacity. In preparation for a future decline in cognitive capacity, it is possible to designate a relative (within two degrees) as an agent of the principal in the deposit account of a financial institution.¹⁵⁹
- (c) If mild cognitive impairment occurs, it is recommended that the principal undergo an examination test for dementia. At this stage, the voluntary guardianship system may be used according to the relevant mental capacity of the principal. If there are no relatives or close friends to take care of the principal, the principal can apply for the council of social welfare's support program for self-reliance in daily life. It is extremely difficult to participate in the program because it is conducted

¹⁵⁸ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Life Planning Meeting* (Web Page, n/a) (in Japanese) * <https://www.mhlw.go.jp/stf/newpage_02783.html>.

¹⁵⁹ Financial institutions in Japan started providing bank deposit services in which relatives (within two degrees) can function as agents for managing the principals' deposit accounts. This is a memorandum recently circulated among banks as the banking industrial guidelines for the agency of financial transactions: The Japanese Bankers' Association, *About the Way of Thinking about the Agency of Financial Transactions and Strengthening Cooperation between Banks and Local Governments/Social Welfare Institutions* (Web Page, February 18, 2021) (in Japanese) * <<https://www.zenginkyo.or.jp/news/2021/n021801/>>.

with a limited budget under a strict qualification test, which tries to find out such information as whether the person can understand the contents of the support contract and what the financial condition of the person is like. Priority is given to elderly people who needs public assistance.

- (d) The overwhelming majority of people receive informal arrangement from relatives or nursing-home managers when their mental capacity becomes insufficient. Informal arrangement is available to those under the care of relatives or nursing-home managers. If there are no relatives or are relatives but no intention of support, the principal may consult with the core agency. In some cases, the principal or a mayor of the municipality may lodge a petition for adult guardianship. When using the adult guardianship system, the SDM Guidelines for Adult Guardians are applied, and the supported decision-making process is implemented as a priority as much as possible while considering the will and preferences of the principal.
- (e) In the adult guardianship system, the conclusion of welfare service contracts should be based on personal protection. Daily life (i.e., purchase of daily necessities), identification, and personality matters are not subject to adult guardianship. In addition, the adult guardian does not have the legal authority to determine by himself/herself whereabouts the residence of the principal or to give medical consent to doctors on behalf of the principal. The principal or the principal's stakeholders can consult with the adult guardian regarding the principal's residence and medical consent as a team. Regarding property management, deposits and savings can be managed by an adult guardian, but daily spending and identification activities, including wills, are outside the scope of the adult guardian's business. In principle, the principal manages daily spending, and if this is practically difficult, the principal is subjected to informal arrangement of relatives or the nursing-home manager.
- (f) If the person does not have any financial property, the core agency will notify the local government, and if it is deemed necessary by the local government's assessment, the procedure for the mayor's petition for adult guardianship may begin and subsidies for the guardianship fee be recognized. In

a difficult case in which the principal is being abused or is a victim of antisocial forces, the local government may be notified by a core agency or a community-based general support center, which is the source of the monitoring watch in a community, and the local government or police may intervene to protect the principal. The adult guardianship system is used to separate the principal from their adult children or relatives suspected of abusing the principal, and to change the principal's residence to independently support the principal.¹⁶⁰ Currently, the adult guardianship system and the abuse response program are simultaneously applied to such cases by the local government as an emergency response. Difficult cases,¹⁶¹ for example, include a complicated background, such as one case for *hikikomori*,¹⁶² a form of severe social withdrawal of the principal's adult children, and the other case for the principal who lives in a house filled with garbage or together with numerous pet dogs or cats.¹⁶³

¹⁶⁰ Refers to the response to a '80/50 problem' (or recently called a '90/60 problem') in which an unemployed son in his 50s (or 60s) is financially dependent on an elderly mother in her 80s (or 90s) who receives a pension.

¹⁶¹ Difficult cases include five categories: financial problem, the need for living supports, family problems, service usage problems, and community and workplace problems, which are clarified by empirical studies. Noriharu Unuma and Kaoru Sekine, 'A Study of Difficult Cases in Adult Guardianship: Analyses the Contents and Support Methods through Corporate Guardianship by the Council of Social Welfare' (2022) 12 *Kogakkan University of Japanese Studies* 1, 28. (in Japanese)

¹⁶² The term '*hikikomori*' in Japanese is 'characterized by adolescents and adults who become recluses in their parents' homes, unable to work or go to school for months or years.' Alan R. Teo and Albert C. Gaw, 'Hikikomori, A Japanese Culture-bound Syndrome of Social Withdrawal? A Proposal for DSM-5' (2010) 198(6) *The Journal of Nervous and Mental Disease* 444, 449; The 2018 national survey estimated that 613,000 adults are in a state of severe social withdrawal, which is 1.45 per cent of the Japanese population aged 40 to 64.

¹⁶³ The knowledge of a member of staff of a public agency is referred to, who has been directly or indirectly involved in dealing with abuse cases for twenty years at the Adachi District Office in the Metropolitan Tokyo Government. Ichiro Watanabe, 'Aspects of the Adult Guardianship System from the Viewpoint of Local Governments—Citizen's Guardianship, Abuse Response, Support for the Elderly without Relatives, etc.' (2015) 3 *Quarterly Journal of Comparative Guardianship Law* 102, 131. (in Japanese) *; Ichiro Watanabe, 'Limitations of the Adult Guardianship System from the Safety Net Perspective: From Rescue to Preventive Advocacy' (2021) 15 *Quarterly Journal of Comparative Guardianship Law* 36, 63. (in Japanese) *

The above support and protection function flow is summarized in Table 1. This table corresponds to the scope of research in this dissertation. The kinds of support and protection function needed by a principal as their cognitive capacity declines can be understood from the table. The function column shows the functions of systems with legal and policy bases, such as the adult guardianship system and the abuse response program, and of systems with no legal and policy basis, such as informal arrangement. This function list is organized according to the main terms, and detailed functions may be required. The function of supporting and protecting the principal is diverse, and the relevant institutions that provide this function, relevant legislation, and policies, are also diverse.¹⁶⁴

Table 1: List of Main Functions to Support and Protect the Principal

<i>Status</i>	<i>Classification</i>	<i>Function</i>	<i>Directly Related System</i>
Ageing, single		Watching over	Watching over activity
Same as above		Consultation	Consultation support system
Same as above		Support planning	Life meeting, voluntary guardianship system/delegation contract (notaries)
Same as above		Deposit account agent, etc.	Contracts with financial institutions, etc.
Mild cognitive impairment, Insufficient mental capacity	Personal protection, Property management	Informal arrangement	Support by relatives or the nursing-home manager, Consultation support system
Mild cognitive impairment		Support for daily life	Support program for self-reliance in daily life, Voluntary guardianship system/delegation contract
Insufficient mental capacity	Personal protection	Welfare service contract, etc.	Adult guardianship system/Supported decision-making guidelines
Same as above		Daily life and personal matters	Management by the principal, Informal arrangement by relatives or the nursing-home manager
Same as above		Residence decision	Determined by the principal and stakeholders (the adult guardian) as a team

¹⁶⁴ It is a challenge for a principal and its stakeholders to understand the overall picture in Table 1. Advanced directives or estate planning is recommended when a principal is healthy. Masayuki Tamaruya, 'Japanese Wealth Management and the Transformation of the Law of Trusts and Succession' (2019) 33 *Trust Law International* 147, 168.

Same as above		Medical consent	Determined by the principal and stakeholders, medical guidelines ¹⁶⁵
Same as above	Property management	Management of deposits, real estate, etc.	Adult guardianship system/Supported decision-making guidelines
Same as above		Daily consumption, Wills	Determined by the principal, Informal arrangement by relatives or the nursing-home manager
A principal without financial property	Personal protection, Public Assistance	Support by public agencies	Support program for self-reliance in daily life, adult guardianship system/Supported decision-making guidelines, Welfare program
Difficult cases (abuse, etc.)	Abuse, victim of antisocial force etc.	Intervention by public agencies or police, etc.	Elderly Abuse Prevention Law, Adult guardianship system/Supported decision-making guidelines

Source: Made by the Author

1.1.3 Research Framework

The purpose of this dissertation is to research the possibility of the adult support and protection legislation becoming part of the complex law of the adult guardianship system, supported decision-making, and elder abuse against vulnerable adults, based on issues related to Japan's adult guardianship system. A systematic review of the adult guardianship system and relevant laws/policies, the theories of civil law related to the adult guardianship system, the theories of the social security law on advocacy, and the main functions that are needed to support and protect vulnerable adults have been done. The author's stance in regard to the civil law and the social security law theories is clarified. Through this arrangement, the scope of the legal and policy system and the main functions of supporting and protecting adults with insufficient mental capacity have been clarified. Based on this systematic review, the research framework of this dissertation is now stated below.

First, the subject of this dissertation is basically specified for legal acts involving the principal, and interdisciplinary legal studies based on the civil law and the social security law are applied. Legal

¹⁶⁵ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Revised Guidelines for the Medical Supported Decision-Making Process in the Final Stages of Life* (Web Page, March 14, 2019) (in Japanese) * <<https://www.mhlw.go.jp/stf/houdou/0000197665.html>>.

affairs after the death of the principal are outside the scope of this dissertation. Focusing on an international trend regarding legislation for support and protection of adults with insufficient mental capacity, particularly the revision of the laws in Australia, we will develop a legislative theory on the support and protection of vulnerable adults in Japan based on comparative law analysis.

Second, the subject of legal and policy systems, such as the adult guardianship system, supported decision-making, elder abuse prevention law, and relevant policies (i.e., the ‘support program for self-reliance in daily life’ and ‘community-based integrated care system’), is included in this dissertation. We call the subject of these legal and policy systems as ‘legal advocacy,’ which is part of advocacy, that mainly deal with legal acts of the principal. Elder abuse prevention law is legally interlinked with the adult guardianship system and is listed in Table 1 (List of the Main Functions to Support and Protect Vulnerable Adults) to show a functionally close relation. This is the reason this law is placed as the subject of legal system. In contrast, the consumer contract law, trust law and medical law are excluded from the scope of this dissertation because they indirectly support vulnerable adults and require a separate systematic examination.

Third, we will proceed with the discussion with the assumption that the civil and relevant laws concerning the adult guardianship system will stay status quo. Focusing on supported decision-making, which respects the will and preferences of the principal, supported decision-making will become an independent legal system, and we envision a legislation on supported decision-making to coexist with the adult guardianship system. Supported decision-making is based on existing guidelines set by the Ministry of Health, Labour, and Welfare of Japan, which do not include supported decision-making in healthcare and terminal care.

Fourth, although the new coronavirus infection has had a wide range of effects on social life, it cannot be said that the full picture of the effects has been accurately grasped and that academic analysis of these effects has been sufficiently conducted. Discussions on the effects of the new coronavirus infections are beyond the scope of this dissertation.

1.2 Overview of the Legal Advocacy and Relevant Policy

1.2.1 Adult Guardianship System and the Promotion Act

(1) Adult Guardianship System in Japan

a. Statutory Guardianship System

Overview of Statutory Guardianship System

The number of adults with insufficient mental capacity who may have some troubles managing their property, such as real estate and money savings, and personal affairs, such as concluding a contract regarding aged care and admission to nursing home, is increasing.¹⁶⁶ Particularly, the number of elderly people with dementia increases as population ages, and it is estimated that there are approximately 6.0 million such people in Japan.¹⁶⁷ Even if the contract is disadvantageous to such people, they may conclude it without making careful consideration. In such cases, they may eventually suffer from their rash decisions. Supporting adults with insufficient mental capacity in a societal system is an urgent issue in a diverse society where they may cohabit with others. The adult guardianship system, with the aim to uphold such values as respect for self-determination, utilization of the remaining capacity of the principle, and normalization, came into effect on April 1, 2000. This was the enactment with the amendments to the Civil Code of Japan (hereinafter referred to as ‘Civil Code’) and some relevant legislation.¹⁶⁸ This system was implemented at the same time as the inauguration of the long-term care (aged care) insurance system. Therefore, both systems were called the two

¹⁶⁶ This part is based on the previously published research note that analyzes the deliberations of experts in 2016–2021 on the adult guardianship system. Yukio Sakurai, ‘Current Status and Issues of the Japan’s Adult Guardianship System in the Promotion Act: Focused on the Deliberation Process of the Basic Plan’ (2021) 30(1) *Yokohama Law Review* 397, 432. (in Japanese)

¹⁶⁷ Refers to the Ministry of Health, Labour, and Welfare, *Comprehensive Promotion of Dementia Measures* (Web Page, June 20, 2019) 4. (in Japanese) * <<https://www.mhlw.go.jp/content/12300000/000519620.pdf>>.

¹⁶⁸ Four relevant legislations on the adult guardianship system in Japan, i.e., *Act for Partial Revision of the Civil Code* (Act No. 149 of 1999), *Act on Voluntary Guardianship Contract* (Act No. 150 of 1999), *Act of Guardianship Registration* (Act No. 152 of 1999), and *Act on Coordination* (Act No. 151 of 1999).

driving wheels of a car for elderly people's policy. It was expected that adult guardians would support the legal acts of principals to conclude contract as the national welfare system changed from public measures to contracts. The adult guardianship system consists of two types of legal entities: the statutory guardianship system regulated by the Civil Code and the voluntary guardianship system regulated by the *Act on Voluntary Guardianship Contract*. There are associated laws to regulate the adult guardianship registration system and the administrative procedures that support the systems.

The statutory guardianship system is divided into three types as stipulated in the Civil Code, namely, 'guardianship,' 'curatorship,' and 'assistance,' according to the relevant mental capacity of the principal.¹⁶⁹ The 'guardian,' 'curator,' or 'assistant' who is appointed by the family court on petition (hereinafter referred to collectively as 'adult guardian') shall support and protect the principal with insufficient mental capacity. Support and protection should be done by adult guardians: (a) by acting on his or her behalf in performing legal acts, such as concluding contracts, (b) giving consent when the principal conducts a legal act by himself or herself, or (c) later revoking disadvantageous legal acts that the principal performed without consent of the adult guardian in his or her property management and personal affairs. The statutory guardianship system is a legal method based on a harmony between the values of respect for self-determination of the principal and the value of protection of the principal.¹⁷⁰ The three types of statutory guardianship are summarized in Table 2.

Table 2: Statutory Adult Guardianship System by Type

TYPE	GUARDIANSHIP	CURATORSHIP	ASSISTANCE
TARGET	Any person who constantly lacks the capacity to discern	Any person whose capacity is extremely insufficient to	Any person who has insufficient capacity to appreciate right or

¹⁶⁹ This paragraph relies on the Ministry of Justice of Japan, *Adult Guardianship System and Adult Guardianship Registration System*.

¹⁷⁰ The autonomy and right to self-determination of the principal are emphasized as values and the protection must be carried out as far as it is necessary. Ministry of Justice of Japan, Civil Affairs Bureau Counselor's Office, *Commentary on Proposal Overview for Revision of Adult Guardianship System* (Kinzai Institute for Financial Affairs, INC., 1998) Appendix 1. (in Japanese) *

	right and wrong due to mental disability. (Article 7 of the Civil Code)	appreciate right or wrong due to any mental disability. (Article 11)	wrong due to any mental disability. (Article 15)
THOSE WHO CAN MAKE A PETITION	The person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian of a minor, the supervisor of the guardian of a minor, the curator, the supervisor of the curator, the assistant, the supervisor of the assistant, or a public prosecutor (Article 7); municipal mayor (<i>Elder Welfare Act</i> etc.; R-1).	The person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian, the supervisor of the guardian, the assistant, the supervisor of the assistant, or a public prosecutor (Article 11); municipal mayor (<i>Elder Welfare Act</i> etc.; R-1).	The person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian, the supervisor of the guardian, the curator, the supervisor of the curator, or a public prosecutor (Article 15); municipal mayor (<i>Elder Welfare Act</i> etc.; R-1).
ACTS REQUIRING THE CONSENT OF ADULT GUARDIANS		Act of Paragraph 1, Article 13 of the Civil Code. (R-2, R-3, R-4)	Within the scope of the petition, 'a specific law act' (Paragraph 1, Article 13) specified by a family court on trial. (R-1, R-2, R-4)
ACTS THAT CAN BE REVOKED	Acts other than acts related to daily life.	Same as above. (R-2, R-3, R-4)	Same as above. (R-2, R-4)
SCOPE OF POWER OF REPRESENTATION GIVEN TO ADULT GUARDIANS	All legal acts on property.	Within the scope of the petition, 'specific legal conduct' as the family court decides at the trial. (R-1)	Same as left. (R-1)

Source: Ministry of Justice of Japan¹⁷¹

Remarks: (R-1): The consent of the principal will be required if the petition is made by the person other than the principal to give a right of representation to a curator. The same is true when giving a right of consent and a right of representation to an assistant, or for the start of assistance.

(R-2): Article 13 (1) of the Civil Code states actions, such as debt, litigation, approval and abandonment of inheritance, and new construction, reconstruction, and extension construction.

(R-3): By trial in the family court, the scope of the right of consent and the right of revocation can be extended in addition to the acts prescribed in Article 13 (1) of the Civil Code.

(R-4): Activities related to daily life are excluded.

¹⁷¹ Refers to the Ministry of Justice of Japan, *Adult Guardianship System and Adult Guardianship Registration System*.

Before the current adult guardianship system was enacted in 2000, the Civil Code of Japan had an ‘incompetence’ and ‘quasi-competence’ system.¹⁷² The incompetence/quasi-competence system was the legal instrument to regulate an adult with insufficient mental capacity. However, people saw the incompetence/quasi-competence system punitively colored, such as depriving the rights of the individual in a uniform manner. Because the principal’s administrative register states clearly that they are incompetent/quasi-competent persons. Consequently, people avoided using the system and the number of users was minimal.¹⁷³ Comparing with the old system, the current adult guardianship system has significantly improved.¹⁷⁴ The adult guardianship system is defined as ‘respecting the will of the adult custodian and considering the physical and mental condition of the person and the situation of life’ (Article 858 of the Civil Code).

Whilst the guardianship registration system of the Legal Affairs Bureau gives some consideration to secure commercial transactions with third parties. The adult guardianship registration is a system that registers the contents of adult guardian authority and voluntary guardianship contracts, and to disclose registered information by issuing a document certifying the particulars recorded in a file of guardianship registration (i.e., a ‘certificate of registered matters’ or a ‘certificate of no registration’ according to its contents). Before concluding important contracts, contractors can confirm by registered information whether or not the parties have legal capacity to conclude the contracts.

¹⁷² The legal terms ‘incompetence’ and ‘quasi-competence’ in English are referred to the article: Arai Makoto and Akira Homma, ‘Guardianship for Adults in Japan: Legal Reforms and Advances in Practice’ (2005) 24 *Australasian Journal on Ageing* 19-24, 20; Before 1948 civil code reform, the incompetence/quasi-competence system was used mainly for preserving family property by proxy decision of the spouse on behalf of the principal.

¹⁷³ Some 25,000 cases of the incompetence/quasi-incompetence system were registered on family register in the period from 1948 to 1997. This record shows that the incompetence/quasi-incompetence system was not used that much. Akiko Noda, Kiyoko Ishiguro, Kiyoko Okabe et al., *Q & A for the Realization of a Symbiotic Society* (Gyousei Corporation, 2008) 9. (in Japanese) *

¹⁷⁴ Teruaki Tayama, *Commentary on Adult Guardianship System* (Sanseido, 2nd ed, 2016). (in Japanese) *

Issues of Statutory Guardianship

When the statutory guardianship system was inaugurated, there were operational complaints, such as regarding the time it took from the petition for the guardianship to the family court to the appointment of an adult guardian.¹⁷⁵ There have been cases of adult guardians involved in illegal conducts due to a simple mistake, negligence, or some intention. The number of adult guardian misconduct reported to the courts was 311 cases in 2011 with a total damage of approximately 3,340 million yen (US\$ 29.0 million), which is the oldest record available in website.¹⁷⁶ Then, academic society and law/welfare professional associations published their own recommendations on improving the adult guardianship system.¹⁷⁷ At the tenth anniversary of the enforcement of the adult guardianship system (2010), the Ministry of Justice of Japan conducted a commissioned survey to verify the system.¹⁷⁸ There seemed to be some opinions to consider reforming the adult guardianship system.¹⁷⁹ However, the legislative measures regarding the adult guardianship system did not materialize until

¹⁷⁵ The court data indicates a significant improvement: 35 per cent of the statutory guardianship cases in 2001 completed the appointment of the adult guardians within three months, but 89 per cent of the adult guardianship cases completed within three months in 2021. The Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022) (in Japanese) * <https://www.courts.go.jp/toukei_siryu/siryo/kouken/index.html>.

¹⁷⁶ Refers to the Courts of Japan, *The Progress Report based on the Interim Verification Report: The Courts of Japan* (Web Page, March 29, 2021) (in Japanese) * <<https://www.mhlw.go.jp/content/12000000/000760232.pdf>>.

¹⁷⁷ The Japan Adult Guardianship Law Corporate Association (JAGA) published recommendations for the proposal of amendments to the statutory guardianship system in 2008 and the voluntary guardianship system in 2012. The Japan Federation of Bar Association, Legal-Support Adult Guardian Center (Japan Federation of ‘Shiho-Shoshi’ Lawyers’ Associations), and Japanese Association of Certified Social Workers independently published their own proposals on operational improvements and law revisions.

¹⁷⁸ This study group (chair Akio Yamanome) published the report: Ministry of Justice of Japan, *Research Report: Analysis of the Current State of the Adult Guardianship System and Examination of Issues—Toward Smoother Use of the Adult Guardianship System* (Japan Institution of Business Law, 2010). (in Japanese) *

¹⁷⁹ A court judge states in his article that ‘it is necessary for the adult guardianship system to clarify the parts that the courts should and can bear, and to have the civil society to take charge of the other parts.’ Masato Kusano, ‘Current Status and Future of the Adult Guardianship System from the Perspective of the Family Court’ (2009) 47 *Japan Women's Bar Association Bulletin* 32–36, 35.

the Promotion Act in 2016, with the exception of the partial amendments to the *Public Offices Election Act* (Act No. 100 of 1950) in 2013.¹⁸⁰ Consequently, the adult guardianship system has been left to the family courts. The number of adult guardianship users has steadily grown since the implementation of the guardianship law in April 2000. The number of adult guardianship users in December 2021 was 239,933 cases (3.3 per cent year-on-year increase).¹⁸¹ The annual increase, however, has been declining in recent years.¹⁸² The number of adult guardianship users is thought to be ‘significantly small compared to the number of elderly people with dementia’¹⁸³ and is estimated to be equivalent to approximately 2 per cent of potential users with insufficient mental capacity.¹⁸⁴ The remaining 98 per cent are estimated to be supported by relatives or nursing home managers.¹⁸⁵ The operational manner of the family courts has slightly changed with time.

¹⁸⁰ By the law revisions, principals with mental disabilities have the right to vote and are eligible to contest for elections announced after July 1, 2013. To ensure the fair implementation of elections, those who assist the voters to vote by proxy are limited to those who are engaged in the affairs related to the vote, and the obligational efforts to ensure fair implementation of absentee ballots, such as having witnesses present, have been established for absentee ballots in hospitals, nursing homes, etc. Ministry of Internal Affairs and Communications, *Adult Guardians' Voting Rights* (Web Page, May 2013) (in Japanese) * <https://www.soumu.go.jp/senkyo/senkyo_s/news/touhyou/seinen/index.html>.

¹⁸¹ The number of adult guardianship cases was 166,189 in 2012 (8.5 per cent year-on-year increase), 184,670 in 2014 (4.6 per cent year-on-year increase), 203,551 in 2016 (6.4 per cent year-on-year increase), 218,142 in 2018 (3.7 per cent year-on-year increase), and 239,933 in 2021 (3.3 per cent year-on-year increase).

¹⁸² Ibid.

¹⁸³ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Basic Plan for Promoting the Adult Guardianship System* (Web Page, March 24, 2017) 2. (in Japanese) * <<https://www.mhlw.go.jp/file/06-Seisakujouhou-12000000-Shakaiengokyoku-Shakai/keikaku1.pdf>>.

¹⁸⁴ The ratio of adult guardianship users in Japan is estimated 2 to 3 per cent of the potential users, assuming that there is a total of 10 million people with insufficient mental capacity, such as 6 million elderly people with dementia, 0.7 million people with intellectual disabilities, 2.7 million people with mental disorders, and 0.5 million people with higher brain dysfunction. Regional Guardianship Promotion Project, *The Overview of the Adult Guardianship System* (Web Page, n/a). (in Japanese) *

¹⁸⁵ Makoto Arai states that ‘at least 1 per cent of the national population is a potential user of the adult guardianship system by international standard.’ Makoto Arai, ‘Enactment of the Act on Promotion of the Adult Guardian System and Prospects

Due to the operation of the family courts, 80.2 per cent of non-relatives, mostly lawyers, were appointed as adult guardians in December 2021. It is much higher than principals for which relatives were appointed, that is a significant change from the ratio of relative guardians in December 2001 (86.0 per cent).¹⁸⁶ In fact, the family courts have appointed mainly lawyers as adult guardians to administer property management of principals, which has made more burden on the family of the principal in guardianship fees and other aspects other than the fees.¹⁸⁷ Consequently, there is seen little progress in supported decision-making and personal protection from a social welfare perspective.¹⁸⁸ Cases in which adult guardians embezzled the property of the principals were reported, and the credibility of the system was questioned.

for the Adult Guardian System.’ 52. (in Japanese) *; Yasushi Kamiyama states that ‘it seems controversial whether Japan assumes the use of more than 1.2 million guardians in the current situation.’ Yasushi Kamiyama, ‘The Issues Based on the Basic Plan for Promoting the Adult Guardianship System’ 108. (in Japanese) *

¹⁸⁶ Refers to the Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022). (in Japanese) *; Yasushi Kamiyama states that the tendency to avoid appointing relatives as adult guardians and appoint professional guardians has increased after a decision made by the Hiroshima High Court on February 20, 2012 (page 141 of Law Times Report 1385). In this case, the high court admitted that the family court judge was liable for state compensation for failing to take appropriate supervisory measures to prevent further misappropriation by the adult guardian as a relative of the principal. Yasushi Kamiyama, ‘The Issues Based on the Basic Plan for Promoting the Adult Guardianship System’ (2018) 20 *Clinical Legal Research* 111. (in Japanese) *

¹⁸⁷ Shinya Saisho, ‘Socialization of Care in View of the Socialization of Adult Guardianship: Impact of Occupational Professionalization on the Family’ (2016) 28(2) *Family Sociology Research* 148–160, 148. (in Japanese) *; In contrast, there was a court decision in 2018 where a judicial scrivener appointed as an adult guardian was dismissed by the court because (1) the incomprehension of Article 858 (respect for the person's intention) of the Civil Code and (2) unreasonable refusal to explain to relatives made him unsuitable as an adult guardian. The dismissal decision No. 52 of the Nagoya High Court (March 28, 2017) was included in the Tokyo District Court Decision No. 26349 on January 22, 2018.

¹⁸⁸ It is noted that for the operation of adult guardianship system, the viewpoint of property management was emphasized, and respect for the will of the principal and welfare viewpoint were insufficient in some cases. Ministry of Health, Labour, and Welfare of Japan, *Interim Verification Report on Basic Plan for Promoting Adult Guardianship System* (Expert Commission, March 17, 2020) 4. (in Japanese) * <<https://www.mhlw.go.jp/content/12201000/000609007.pdf>>.

The Regional Guardianship Promotion Project summarized the issues of the statutory guardianship system into eight items as follows:¹⁸⁹ (i) The number of the adult guardianship system users is low,¹⁹⁰ (ii) It has become difficult for relatives of the principal to be appointed as adult guardians,¹⁹¹ instead professional guardians¹⁹² have been appointed in recent years,¹⁹³ (iii) The ratio of statutory ‘guardianship type’ users based on substituted decision-making to the total number of adult guardianship users is dominant,¹⁹⁴ (iv) It cannot be said that the appointment of community guardians¹⁹⁵ has been sufficient, (v) The need to respond to municipal mayors’ petition cases is

¹⁸⁹ Refers to the ‘Regional Guardianship Promotion Project,’ which is joint research between the Division of Lifelong Learning Infrastructure Management, Graduate School of Education, the University of Tokyo, and the Regional Guardianship Promotion Center, *The Gist of the Adult Guardianship System* (Web Page, n/a) (in Japanese) * <<https://kouken-pj.org/about/>>.

¹⁹⁰ Approximately 97 to 98 per cent Japanese adults with insufficient mental capacity is estimated to live in informal arrangements. Regional Guardianship Promotion Project, *The Overview of the Adult Guardianship System* (Web Page). (in Japanese) *; Terry Carney states, ‘[1999 Japanese guardianship law] reforms underestimated the Japanese traditions of kinship and collective responsibility.’ Terry Carney, ‘Aged Capacity and Substitute Decision-Making in Australia and Japan’ (2003) 2003/2004 *LAWASIA Journal* 1, 21.; Israel Doron states that ‘Japan and Israel are much more family and community oriented. (...) Both Sweden and Japan have preferred to base the alternatives to guardianship on a communal and cooperative approach.’ Israel Doron, ‘Elder Guardianship Kaleidoscope—A Comparative Perspective’ (2002) 16(3) *International Journal of Law, Policy, and the Family* 368–398, 389.

¹⁹¹ The Japan Penal Code Article 244 regulates exemption from criminal acts by relatives. This provision is based on the idea that ‘law does not enter into home.’ If the relative is an adult guardian who looks after the principal, this rule does not apply [The Supreme Court of Japan ruling on a defendant’s case of business embezzlement, Supreme Court of Japan, Penal Code Vol. 66, No. 10, page 981 on October 9, 2012]. Due to this case law, many relative guardians who violate law are revoked and relative guardians are replaced by professional guardians by the family courts. Toyohiro Sukimoto, ‘Contemporary Challenges of Larceny Committed against Relatives’ (2009) 78 *Seijo Jurisprudence* 95, 120. (in Japanese)

¹⁹² A ‘professional guardian’ refers to a person who has national qualification licenses, such as an attorney in law, a judicial scrivener, or licensed social worker, based on the relevant law, who has been appointed as an adult guardian.

¹⁹³ Relative guardians in December 2021 were 19.3 per cent. The Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022). (in Japanese) *

¹⁹⁴ Ibid. The breakdown by type was guardianship 177,244 (73.9 per cent), curatorship 46,200 (19.2 per cent), assistance 13,826 (5.8 per cent), and voluntary guardian 2,663 (1.1 per cent).

¹⁹⁵ Third party non-professional guardian appointed by the family court is called ‘citizen guardian’ in Japan, but the term ‘community guardian’ is used in this dissertation.

significantly increasing,¹⁹⁶ (vi) Gap exist in each municipality's efforts toward the adult guardianship system, (vii) Fraudulent conducts by adult guardians cannot be eliminated,¹⁹⁷ and (viii) The increasing use of guardianship support trust system leads to less financial freedom of the principal.¹⁹⁸

b. Voluntary Guardianship System

Voluntary Guardianship

The voluntary guardianship system involves the management of a principal's personal affairs and property by a voluntary guardian who is nominated by the principal while the principal has mental capacity. This is a legal method to prepare for a future when the mental capacity of the principal becomes insufficient. This system is regulated by the *Act on Voluntary Guardianship Contract* (Act

¹⁹⁶ It was established in 1999 that the mayor of a municipality can request a petition for adult guardianship (Article 32 of the *Elder Welfare Act*, Article 28 of the *Intellectually Handicapped Persons Welfare Act*, and Article 51–11 of the *Mental Health and Mental Disability Welfare Act*), when it is recognized that there is a particular need for the welfare of a person aged 65 and over (including one even under the age of 65, when it is deemed necessary), person with intellectual disabilities, and person with mental disabilities. The municipal mayor petition cases increased to be the largest in the annual guardianship petitions in 2020 and 2021. This is because 'a particular need for the welfare of a person aged 65 and over,' who has no relatives and close friends to look after and has no asset or enough money, increases in Japan.

¹⁹⁷ The family courts introduced the safeguard measures, such as guardianship support trust system and appointment of an adult guardian's supervisor. Consequently, the misconduct cases that reported to the courts have been radically reduced, i.e., from the peak of the 831 misconduct cases with damage of 5,670 million yen (US\$49.3 million) in 2014 to 169 misconduct cases with damage of 530 million yen (US\$4.6 million) in 2021, but adult guardians' misconducts still happen. The Courts of Japan, *The Survey Report No. 2-3 to the Expert Commission* (Web Page, May 18, 2022) <<https://www.mhlw.go.jp/content/12000000/000938659.pdf>>.

¹⁹⁸ The 'guardianship support trust system' is a financial management system in which the guardians manage the financial payment within daily uses at deposits and savings and trust the money that is not usually used to the trust bank under the family court's supervision. This system was introduced in February 2012 and the cumulative trust and deposited property amount increased to approximately 1,014 billion yen (US\$ 8.8 billion) as of December 2020. This system contributes to protection of financial assets of the principal but prevents from financial freedom of the principal. Whilst 'the guardianship support deposit system' has been widely implemented in banks, which is a mechanism where the guardian manages the money necessary for payments among the person's property as savings and deposits the money that is not normally used in the guardianship support deposit account for security. The Courts of Japan, *About the Usage Status of Guardianship System Support Trusts, etc.* (January to December 2020) (Web Page, 2022) (in Japanese) * <https://www.courts.go.jp/vc-files/courts/2021/20210528sintakugaikyou_R02.pdf>.

No. 150 of 1999). This was newly introduced legal system in 2000.¹⁹⁹ As a popular procedure, a proxy contract between the principal and the nominee (the voluntary guardian) given the power of representation is prepared by a notary public.²⁰⁰ The voluntary guardianship contract must be made in the form specified by the Ordinance of the Ministry of Justice of Japan (Article 3). When the mental capacity of the principal begins to decline, the voluntary guardian makes a petition with the family court to appoint the voluntary guardian's supervisor in adherence to the law (Article 4). The voluntary guardian then makes legal decisions, including signing contracts, on behalf of the principal under the supervision of the supervisor (article 7). In some cases, the voluntary guardian can provide support specifically to the principal in personal protection and/or property management, according to the principal's own intentions on the contract. The guardianship registration system of the Legal Affairs Bureau, which is applied to the voluntary guardianship system, gives some consideration to secure commercial transactions with third parties.

¹⁹⁹ The legislative process, including the preliminary research by the legislative secretariat group, to conclude voluntary guardianship system in 1999 was summarized in the article: Makoto Arai, 'An Observation of the Voluntary Guardianship System—From its Birth to the Future—' (2009) 5 *Tsukuba Law Journal* 63, 74. (in Japanese) *; Makoto Arai addressed a reference statement on legislation of the adult guardianship system in the National Diet of Japan. House of the Representatives, the National Diet of Japan, *Minutes of the 20th Meeting of the Law Committee in the 145th National Diet* (Laws Committee, June 15, 1999). (in Japanese) *

²⁰⁰ Relevant law and regulations for notary duties stipulate, 'A notary may not create any instrument with regard to matters that are in violation of laws and regulations, juridical acts that are void, or juridical acts that may be rescinded on the grounds of limited capacity.' (Article 26 of the *Notary Act*). Article 13 (1) of the *Regulation for Enforcement of the Notary Act* states that 'When a notary is to create or certify an instrument for a juridical act but there is doubt as to whether the juridical act is valid, whether the party has given due consideration to the juridical act, or whether the party has the capacity to do the juridical act, the notary must caution the persons concerned and have them provide the necessary explanations.' The Notification No. 634, March 13, 2000, Chief of Civil Affairs Bureau, the Ministry of Justice 'Regarding the handling of official affairs accompanying the enforcement of laws that partially amend the Civil Code' states, 'When there is a doubt about the principal's capacity to make decisions, a notary is requested to request the principal the submission of a medical certificate, etc. and save it, or create and save a document that records the points of the principal's situation, etc.'

Challenges of Voluntary Guardianship System

There are some challenges facing the voluntary guardianship system.²⁰¹ First, it is rare for a voluntary guardian to lodge a petition with the family court, in adherence to the law, to appoint a supervisor of the voluntary guardian. A voluntary guardian agreement, like a lasting power of attorney²⁰² (hereinafter referred to as ‘LPA’) and a supervisor nominated by the family court, is not always a single contract. In fact, a property management agreement, like an LPA, and a supervision agreement for personal affairs, including post-mortem affairs, are often concluded together as one package. In most popular cases in Japan, property management and supervision agreements are legally active when the mental capacity is sufficient. The voluntary guardian often keeps those agreements effective even after the mental capacity of the principal declines. In such a case, a petition with the family court indicating the decline in mental capacity of the principal is often not lodged.

This may be due to four reasons. First, a voluntary guardian has little knowledge to do so in case the voluntary guardian is a relative of the principal. According to the Research survey by the Ministry of Justice of Japan on May 18, 2022, the respondents who answered no idea of the law provision to lodge a petition to the family court account for 24 per cent, and 92 per cent of these respondents were relatives of the principals.²⁰³ Relatives of the principals account for 63 per cent of the voluntary

²⁰¹ Yasushi Sakai, ‘The Actual Situation and Problems of the Voluntary Guardianship System from the Viewpoint of Notary Practice’ (2010) 12 *Journal of Asian Cultures* 279, 295. (in Japanese) *

²⁰² A lasting power of attorney (LPA) is a legal document that lets the donor appoint one or more people known as attorneys to help him/her make decisions or to make decisions on behalf. There are two types of LPA in the UK: ‘health and welfare’ and ‘property and financial affairs.’ While an enduring power of attorney (EPA) is a legal document that lets the donor appoint one or more people, known as attorneys, in register to help make decisions or to make decisions on their behalf about their property or money. GOV. UK, *Make, Register or End a Lasting Power of Attorney* (Web Page, n/a) <<https://www.gov.uk/power-of-attorney>>.

²⁰³ Refers to the Ministry of Justice of Japan, ‘Efforts to Promote the Adult Guardianship System: After November 2021’ (Web Page, May 18, 2022) (in Japanese) * <<https://www.mhlw.go.jp/content/12000000/000938658.pdf>> 1–28, 10–13 and 16–28.

guardians while third party practitioners account for 12 per cent and other institutions account for 15 per cent.²⁰⁴

Second, there is a legal interpretation of the Civil Code: it is the majority views of the civil law scholars in Japan regarding Article 111 (ground of termination of authority of agency) of the Civil Code that the authority of agency shall not be terminated without the respective items of the preceding paragraph upon the termination of the contract appointing him/her, even if the principal becomes incapacitated. This understanding comes from the older German civil code and its interpretation, which is different from that in common law jurisdictions.²⁰⁵ This is one of the reasons a voluntary guardian does not always lodge a petition to the family court to appoint the supervisor because the contract is valid even after the principal becomes incapacitated and the voluntary guardian receives remuneration. A petition to the family court relies on the voluntary guardian's discretion because the principal with insufficient mental capacity cannot provide instructions to do so to the voluntary guardian. From the voluntary guardian's viewpoint, no incentive appears, at least for receiving remuneration, that the voluntary guardian must lodge a petition to the family court to appoint his/her supervisor.

Third, there is the issue of the principal's payment of remuneration to both the guardian and the guardian's supervisor. In the statutory guardianship, the guardian's supervisor is not always appointed by the family court, and the principal basically pays remuneration to the guardian. The statutory guardian's remuneration is determined by the family court annually after the yearly service is complete, mainly considering the property of the principal and the guardian's workload. In contrast, the voluntary guardian's remuneration is concluded in the contract. There are some cases where the voluntary

²⁰⁴ The number of respondents was 11,079 out of 80,000 contracting parties who concluded their contracts more than ten years ago (selected by the Ministry of Justice of Japan).

²⁰⁵ Takeshi Shimura, 'A Consideration on the Survival of Voluntary Agency Rights When the Person is Incapacitated (part 1)' (1996) 71(3) *Waseda Law Review* 1, 38. (in Japanese)

guardian's remuneration in the contract is set at a much higher rate than usual.²⁰⁶ The principal pays such fees to the voluntary guardian and the supervisor (actually, the payment procedures are conducted by the voluntary guardian) until the principal dies. If a voluntary guardian is a relative of the principal, most contracts are based on no remuneration and above-mentioned issue does not occur.

Fourth, there is fundamental issue of who can be trusted to be responsible for the management of the property and personal affairs of the principal with insufficient mental capacity. Without this clarification, even if the law were properly reformed, the voluntary guardianship system would never work in practice.²⁰⁷

Discussion

The voluntary guardianship system is designed as a combination of an LPA and a safeguard for the principal by the voluntary guardian's supervisor appointed by the family court. This system is theoretically logical, but practically not workable.²⁰⁸ Why are voluntary guardianship contracts not popular in Japan? One reason is regarding a systemic risk. In most cases, the voluntary guardian does not lodge a petition with the family court to appoint a supervisor to avoid safeguarding the principal. It can be assumed that this is a systemic risk associated with the voluntary guardianship system, where illegal conducts might happen. In fact, illegal conducts happened after the enforcement of the law in

²⁰⁶ For example, an inappropriate voluntary guardianship case was reported where a judicial scrivener received four million yen (US\$ 34,800) as remuneration for one and a half year in the voluntary guardianship in 2004. This case was found during the associations' in-house auditing to the members. Ministry of health, Labour, and Welfare of Japan, *Expert Commission Meetings: The Minutes of the 4th Interim Verification Working Group Session* (Web Page, December 26, 2019) 14. (in Japanese) * <<https://www.mhlw.go.jp/stf/shingi2/0000212875.html>>.

²⁰⁷ It is not so easy to find a trustworthy practitioner or institution other than relatives. A public agency which can function as a voluntary guardian with a reasonable remuneration would be a possible alternative entity if such an agency is available.

²⁰⁸ Trevor Ryan, an Australian researcher, analyzes possible reasons why voluntary guardianship are underutilized and finds out 'unsuitable social norms, a lack of awareness, excessive regulation, unresponsive doctrine, and entrenched judicial values.' He recommends promoting legal development based on 'imposition of formal legal norms and market mechanisms' replacing informal arrangement and administrative ordering. Trevor Ryan, 'Is Japan Ready for Enduring Powers? A Comparative Analysis of Enduring Powers Reform' (2014) 9(1) *Asian Journal of Comparative Law* 241–266, 243.

2000.²⁰⁹ The Bureau of Social Welfare and Public Health, Tokyo Metropolitan Government alerts the banner ‘please be careful about malicious criminal acts related to voluntary guardianship system’ on their website, which is cited by other websites, such as local governments, law firms, and NPOs. Recently, this alerting banner was deleted on the renewal of their website, but some trace of this remains on the website.²¹⁰ This risk is responsible for the system’s negative reputation among potential users.

Another reason is a unique mentality of Japanese elderly, which is pointed out by Japanese legal practitioners.²¹¹ There is a tendency that Japanese elderly do not entrust property management to their family members or relatives when they are healthy. This tendency is due to a complex and nuanced psychological diagnosis of Japanese older women in particular.²¹² Behind such a tendency, there may be a unique legal culture in Japan. One researcher wonders whether a legal culture of self-determining matters of a principal, contracting them with a voluntary guardian, will ever take root in Japan.²¹³ This remark may correspond to the well-known observation of what Takeyoshi Kawashima researched in

²⁰⁹ Refers to the Japan Federation of Bar Associations, *Recommendations for Improvement regarding the Voluntary Guardianship System* (Web Page, July 16, 2009). (in Japanese)

<https://www.nichibenren.or.jp/library/ja/opinion/report/data/090716_3.pdf>.

²¹⁰ For example, Higashiyamato City (rural part of Tokyo Metropolitan jurisdiction), *Please Be Careful about Malicious Criminal Acts Related to Voluntary Guardianship System* (Web Page, April 1, 2012) (in Japanese)

<<https://www.city.higashiyamato.lg.jp/index.cfm/32,29495,341,583,html>>.

²¹¹ Legal practitioners in Yokohama opine two reasons by email correspondence with the author on March 25, 2022: The first is that, even in preparation for future risk of dementia, they have an ardent desire not to entrust property management to anyone (including relatives) while they are healthy. The second is that, if someone in their relatives is entrusted with property management, they do not want to be asked by other relatives why they entrust it to that person, that is, they do not want to be resented by others. As a result, most parties may develop dementia and file a petition for adult guardianship without any future allowance. Some other legal practitioners also agree with these views.

²¹² Ibid.

²¹³ Tomoko Fukuda, ‘Incapacity Planning used by Revocable Living Trust: Proposal on Estate Planning for Incapacitated People’ (2018) 47 *Bulletin of Graduate Studies of Law, Chuo University* 23-39, 38. (in Japanese) * <<https://core.ac.uk/download/pdf/229779078.pdf>>.

his socio-legal studies in the 1960s. Namely, Japanese people have a unique legal consciousness on contracts and judicial resolutions, which differs from that in the Western countries.²¹⁴ Japan is the country with the rules of law, and the people generally respect the law system and social norms as ethical standards. The Japanese legal culture has changed for a half century; however, their change of legal culture is not adapted to the area of private autonomy for property management and personal affairs.

This issue needs more empirical data to clarify why Japanese elderly do not like to have voluntary guardianship. Nevertheless, the trend is confirmed by the data. The number of voluntary guardianship users who registered in the Legal Affairs Bureau by December 2021 was only 2,663 cases (1.1 per cent of all guardianship cases), although a total of approximately 250,000 voluntary guardianship contractors concluded the contracts drawn up by notary publics.²¹⁵ The most frequently occurring age among users was 70s.²¹⁶ This implies that most contracts do not develop to voluntary guardianship with the appointment of a supervisor by the family court, but remain merely a property management agreement and a supervision agreement. It can be said that the voluntary guardianship system has not worked as intended by law.²¹⁷

²¹⁴ Takeyoshi Kawashima's observation is known by law scholars in and outside Japan, but his essay is sometimes criticized by scholars due to insufficient evidence. Kawashima responded that this was just an essay. Takeyoshi Kawashima, *Legal Consciousness in Law in Japan* (Tokyo: Iwanami Shoten, Publishers 1967) (in Japanese); Takeyoshi Kawashima, 'The Legal Consciousness of Contract in Japan' (translated by Charles R. Stevens) (1974) 7 *Law in Japan* 1, 21. <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/lij7&div=5&id=&page=>>>.

²¹⁵ The breakdown of 250,000 contract cases is as follows: 70,000 cases within three and a half years after the conclusion of the contract, 100,000 cases three and a half to ten years after the conclusion of the contract, and 80,000 cases after ten years or more. Research Survey by the Ministry of Justice of Japan as of May 18, 2022. Ministry of Justice of Japan, 'Efforts to Promote the Adult Guardianship System: After November 2021.'

²¹⁶ Ibid.

²¹⁷ In Asia, Singapore is the country where LPAs are relatively accepted by the people. Namely, approximately a total of 135,000 LPAs, which is equivalent to 3.4 per cent of the national population of Singapore (Singapore nationalities and permanent residents with foreign passports), have been registered during the period between 2014 and 2021. The

c. Risk–Benefit Comparison Analysis

It is recognized that the practice of the adult guardianship, including both statutory and voluntary guardianships, results in unexpected social risk.²¹⁸ Some risks may cause serious financial damages to principals and should not be overlooked.²¹⁹ The risks that may typically arise from the adult guardianship system are summarized as follows: First, there have been a number of incidents where adult guardians embezzled the proceeds from the principal's property. Second, there are no clear guidelines on how to respect the principal's intention as Article 858 of the Civil Code stipulates, which may consciously or unconsciously lead a risk of misconduct by the adult guardian. Third, the voluntary guardian may not lodge a petition to the family court to appoint a supervisor for the adult guardian even if the principal's mental capacity declines. The voluntary guardian might maintain the agency contract to continue receiving remuneration, and possibly misuse the authority to intercept the principal's property. The principal bears these three risks. Fourth, an adult guardian may be liable for unexpected compensation as a quasi-supervisor for damages to third parties caused by the principal.²²⁰ The adult guardian bears this risk.

contracting parties ('donees') are mostly family members or relatives (96 per cent). Singapore Government promotes digitalization of LPAs in 2022 by reform of law. Office of the Public Guardian, Singapore, *Indicators of Activities* (Web Page, n/a) <<https://www.msfgov.sg/opg/Pages/Indicators-of-Activities.aspx>>.

²¹⁸ This part is a summary of the previously published article in Japanese by the author: Yukio Sakurai, 'A Risk Analysis on Japan's Adult Guardianship System Practice against Principals and Adult Guardians' (2017) 9 *Journal of Urban Social Studies* 175, 84. (in Japanese).

²¹⁹ The term 'risk' refers to 'the effect of uncertainty on purpose, which can be expressed as a combination of social context, subject, including an individual and groups, the magnitude of impact and likelihood of impact.' Osamu Saito, 'Conceptual Framework and Analysis Method for Risk Trade-off Analysis Part 1: Conceptual Framework for Risk Trade-off Analysis' (2010) 20 (2) *Journal of Japan Risk Research Journal* 97–106, 100–101. (in Japanese).

²²⁰ On March 1, 2016, the Supreme Court of Japan handed down a decision related to the liability of caregivers who take care of the elderly with dementia [A Supreme Court of Japan ruling on claims for damages, Supreme Court of Japan, Civil Code Vol. 70 No. 3 Pages 681 in Japanese on March 1, 2016 (Hanrei Jiho No. 1647, p.1) 'Central Japan Railway case']. The Supreme Court of Japan judged that the 'spouse of the principal with dementia does not fall under the statutory

The adult guardianship system, however, secures the social benefits based on its legislative objectives as follows: (i) Ensuring smooth social transactions and day-to-day life of a principal by substituted decision-making for legal acts, including financial transactions and concluding the contract, of adults with insufficient mental capacity. (ii) Recovering the economic damages of a principal by revoking the contracts that would be financially damaging. (iii) Providing a voluntary guardianship agreement through a principal's own intention to prepare for the future when the principal's mental capacity declines, thereby recognizing the principal's right to self-determination.

In fact, there is no accumulation of quantitative case data for a risk–benefit comparison of the adult guardianship system; thus, it is not possible to quantify the probability of risk occurrence based on data. For this reason, only a conceptual comparison can be made. Apparently, the magnitude of influence of all risks cannot be said to be so large that it exceeds the total benefits of the adult guardianship system. Thus, in a general sense, it can be said that the adult guardianship system be maintained, with possible amendments introduced to minimize social risks on legislation and practice. The clarifications in the policies can be concluded in this risk–benefit comparison analysis, (a) to take safeguards that will reduce each systemic risk as much as possible; and (b) to shift from informal arrangement to the adult guardianship system or the like to legally protect the principal, if the principal or relevant persons so wish.

supervisory obligation prescribed in Article Paragraph (1), Article 714 of the Civil Code.’ When some special circumstance may exist for the supporter, including a spouse or an adult guardian, the court might hold that an objective standard and equity should be applied to determine whether a person is to be regarded as a person with such an obligation. This case may hint that an adult guardian who closely supports the principal might be regarded as a person with such an obligation. There was one case by Tokyo High Court (October 29, 2015) that a dementia nursing-home manager affirmed its responsibility for quasi-supervision. Keisuke Shimizu, ‘Reading and Understanding the Supreme Court Decision of the Central Japan Railway Case-Including the Perspective of Adult Guardianship’ (2016) 6 *Adult Guardianship Practices* 84, 93. (in Japanese) *; Critical comments were addressed by Shigeto Yonemura, ‘Central Japan Railway Case: From Civil Law Perspective’ (2017) 7 *Social Security Studies* 191, 211. (in Japanese) *

(2) The CRPD and the General Comment No.1

a. Adoption of the CRPD

Regarding the adult guardianship legislation, there were some developments in the international community.²²¹ The United Nations *Convention on the Rights of Persons with Disabilities* (hereinafter referred to as ‘CRPD’) was adopted on December 13, 2006 and came into effect on May 3, 2008.²²² Some 164 Parties have signed and 185 have ratified the CRPD as of May 2022.²²³ The phrase ‘*Nothing about us without us*,’ emphasizing autonomy and right to self-determination of persons with disability, is a principle embodied in the CRPD. The purpose (Article 1) of the CRPD states that ‘persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others.’²²⁴ Article 12 (equal recognition before the law) mentions that ‘parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’²²⁵ The CRPD stipulates measures to realize the rights of persons

²²¹ This part is an updated version of the previously published article in Japanese by the author: Yukio Sakurai, ‘UN Convention on the Rights of Persons with Disabilities and Supported Decision-Making’ (2017) 47 *The Graduate School Law Review, Nihon University* 276, 243. (in Japanese)

²²² The CRPD has an *Optional Protocol* signed by 94 Parties and ratified by 100 Parties as of February 2022, but the Government of Japan has not signed nor ratified it. The Optional Protocol of the CRPD stipulates an individual complaints mechanism for persons with disability, when they have their rights breached under the CRPD, to directly make complaints with the UN CRPD Committee.

²²³ Refers to the UN, *Convention on the Rights of Persons with Disabilities (CRPD)* (Web Page, May 6, 2022) <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#:~:text=Ratifications%2FAccessions%3A%20184>>.

²²⁴ Theresia Degener, the former chair of the UN Committee, at a public lecture ‘The Impact of the CRPD on the Legislation of Parties’ held in Tokyo on December 4, 2019, stated that the general idea of Article 12 was based on the human rights model of disability.

²²⁵ The term ‘legal capacity’ does not exist in Japanese law, if dare described in the existing concept, that would be a concept that includes ‘mental capacity’ and ‘capacity to act.’ Teruaki Tayama, ‘Ratification of the Convention on the Rights of Persons with Disabilities and the Adult Guardianship System’ (2019) 30(1) *Geriatric Psychiatry Magazine* 27–

with disabilities, with the aim of ensuring their enjoyment of human rights and fundamental freedoms and promoting respect for their inherent dignity.²²⁶

The UN Committee on the Rights of Persons with Disabilities (hereinafter referred to as ‘UN Committee’) has a system of state review for examining government reports submitted by the state parties in accordance with Article 35 (reports of Parties).²²⁷ The UN Committee has repeatedly recommended the state parties under review to shift from substituted decision-making to supported decision-making.²²⁸ Then, the UN General Comment No.1, adopted on April 11, 2014,²²⁹ notes that Article 12 implies a possible ‘paradigm shift from substituted decision-making to supported decision-making (SDM)’ in order to understand the principals’ will and preferences and to implement their

33, 28. (in Japanese)’; A new publication: Mary Donnelly, Rosie Harding, and Ezgi Tascioglu (eds), *Supporting Legal Capacity in Socio-Legal Context* (Hart Publishing, 2022).

²²⁶ Article 12 (4) and (5) of the CRPD stipulate the matters to be noted in detail when realizing Article 12 (1) to (3). Paragraph (4) includes the wording ‘respect the rights, will and preferences of the person.’; ‘CRPD are described as centering on four key values: equality, autonomy, participation, and solidarity.’ Eilionoir Flynn, *From Rhetoric to Action* (Cambridge University Press, 2013) 13. A similar view is addressed by Gerard Quinn and Theresia Degener et al., *Human Rights and Disabilities* (Office of the High Commissioner for Human Rights, UN, 2002) 1.

²²⁷ Article 35 of the CRPD stipulates that ‘a Party shall report the comprehensive progress of domestic measures to the UN Committee within two years of the CRPD becoming effective in their country and submit a report at least every four years’; UN CRPD Committee has issued concluding observations that include the positive aspects of the member states. The first 68 member states’ positive aspects were based on ‘law enactment or amendment’ at 86.8 per cent and ‘action plan’ at 64.7 per cent according to analysis report by the Japan Council on Disabilities (May 2018).

²²⁸ Refers to the UN, *UN Treaty Body Data Base. Concluding Observations* (Web Page, February 2022)

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5>.

²²⁹ Paragraph 13, General Comment No. 1 states that ‘legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.’ UN, Committee on the Rights of Persons with Disabilities, *General Comment No. 1* (Web Page, April 11, 2014) 6–8 <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>>.

wishes.²³⁰ From the perspective of the state parties (including Japan) that ratified the CRPD before the adoption of the General Comment No.1, it was perceived that the interpretation of Article 12 of the CRPD was overwritten by the adoption of the General Comment No.1.²³¹ Since then, however, some state parties have implemented or are considering legislation or reforms of the adult guardianship law.²³² What these state parties have in common is that they will legislate support measures or supported decision-making system in order to replace the adult guardianship system and reduce the use of the adult guardianship.

b. Response by the Government of Japan

The Government of Japan signed the CRPD on September 28, 2007 and ratified it on January 20, 2014, after amending the relevant disability laws.²³³ The Policy Committee for Persons with

²³⁰ Article 12 of the CRPD does not have a clear statement of supported decision-making but have a statement of the General Comment No. 1. Paul Skawron points out that ‘the best interpretation should be preferred: one that requires the process of interpretation to be responsive to both truth and the detailed substantive rights found in the CRPD.’ Paul Skowron, ‘Giving Substance to the Best Interpretation of Will and Preferences’ (2019) 62 *International Journal of Law and Psychiatry* 125, 134.

²³¹ The General Comment No.1 is previously criticized because of being ‘regressive.’ Adrian D. Ward, ‘Abolition of All Guardianship and Mental Health Laws?’ (Online, April 14, 2014) *Law Society of Scotland* <<http://www.journalonline.co.uk/Magazine/59-4/1013832.aspx>>.

²³² Refers to ‘3.2 Comparative Law Studies’; Volker Lipp remarks that guardianship and autonomy will become friends ‘if we were to take the rights and requirements of the CRPD seriously and implement the concept of “supportive guardianship” in law and practice.’ Volker Lipp and Julian O. Winn, ‘Guardianship and Autonomy: Foes or Friends’ (2011) 5 *Journal of International Aging and Policy* 41, 56.

²³³ In December 2009, the Government of Japan established the Headquarters for Promotion of Disability System Reform with the Prime Minister as the head, promoted reforms of domestic law system, namely, legislated the relevant laws, such as *Basic Law for Persons with Disabilities* (August 2011) and *Act to Comprehensively Support Daily Life and Social Life of Persons with Disabilities* (June 2012), and revised some acts, such as *Act on Promotion of Elimination of Discrimination on the Grounds of Disability* and *Act on Promotion of Employment of Persons with Disabilities* (June 2013). Cabinet Office of Japan, *CRPD* (Web Page, n/a) (in Japanese) <https://www8.cao.go.jp/shougai/un/kenri_jouyaku.html>.

Disabilities²³⁴ (hereinafter referred to as ‘Policy Committee’) in the Cabinet Office of Japan deliberated on the draft of the first Government of Japan Report (hereinafter referred to as ‘Japan Report’) in 2015.²³⁵ At the deliberations, the Policy Committee summarized the ‘Points of Discussions’²³⁶ and mainly examined three points concerning the adult guardianship system: (i) whether or not the adult guardianship system in Japan may conflict with Article 12 of the CRPD, (ii) whether or not the adult guardianship system may have the limitation of scope in supporting the principal, and (iii) whether or not the administrative burden on the family courts may be heavier with the adult guardianship operation.

Regarding the issue (i) above, there are views that Japan’s adult guardianship system is most likely to conflict with Article 12 of the CRPD.²³⁷ Nevertheless, the Ministry of Justice of Japan

²³⁴ The Policy Committee was established by law in the Cabinet Office in August 2011 to investigate and deliberate on the formulation or modification of the ‘basic plan for persons with disabilities,’ and to monitor and recommend the implementation status of the plan.

²³⁵ The Policy Committee discussed the first draft Japan Report at the 26th to 28th sessions in the period of September 24 to December 18, 2015. The Policy Committee unanimously agreed to add the observation remarks, such as ‘The establishment of a social framework to assist decision making and the excise of legal capacity is urgently needed etc.’ (Paragraph 83, underlined by the author) to the Japan Report, considering that Japan’s Adult Guardianship System does not explicitly violate Article 12 of the CRPD, but Japan needs improvements to meet the value of Article 12 of the CRPD. UN Human Rights Treaty Bodies, *UN Treaty Body Data Base: CRPD/C/JPN/1* (Web Page, October 7, 2017) 18. <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fJPN%2f1&Lang=en>.

²³⁶ Refers to the Policy Committee, *The Points of Discussions—Issues Based on the Implementation Status of the Third Basic Plan for Persons with Disabilities* (Web Page, September 2015) (in Japanese) * <<https://www.mofa.go.jp/mofaj/files/000171084.pdf>>.

²³⁷ There are Japanese researchers’ majority views that Japan’s adult guardianship system conflicts with Article 12 of the CRPD both in legal design and practice. The views are common that the statutory guardianship-type, in which the rights of the principal are automatically and uniformly restricted by the relevant capacity of the principal, accounts for about 75 per cent of the adult guardianship cases, has a high probability to violate Article 12 of the CRPD that respects the principal’s rights and will and preferences. The typical ones : Teruaki Tayama (ed), *Adult Guardianship System and the Convention on the Rights of Persons with Disabilities* (Sanseido, 2012) 169; Teruaki Tayama ‘Ratification of the Convention on the

expressed the view that ‘Japan’s adult guardianship system does not conflict with Article 12.’²³⁸ The first Japan Report is based on the Ministry of Justice’s view and explains the relationship between the adult guardianship system in Japan and Article 12 in the legal text. In June 2016, the Government of Japan submitted the first Japan Report and the annex survey the ‘Points of Discussion’ to the UN Committee.²³⁹ Following this submission, the Japan Federation of Bar Associations and other nine institutions for persons with disabilities submitted their own reports (parallel reports) to the UN Committee analyzing the frameworks and practices of the Japan laws related to the CRPD.²⁴⁰

c. Enactment of the Promotion Act

Although the adult guardianship system is a legal instrument of supporting adults with insufficient mental capacity, it is underutilized.²⁴¹ Considering such a situation, the *Act on the Promotion of the Adult Guardianship System*²⁴² (Act No. 29 of 2016, hereinafter referred to as ‘Promotion Act’) was enacted on April 15, 2016 and came into effect on May 13, 2016.²⁴³ The

Rights of Persons with Disabilities and the Adult Guardianship System’ (2019) 30(1) *Geriatric Psychiatry Magazine* 27, 33; Makoto Arai ‘Convention on the Rights of Persons with Disabilities and Power of Attorney: Tiger at the Front Gate, Wolf at the Rear Gate’ (2013) 28(1 and 2) *Chiba University Law Studies* 53; Yasushi Kamiyama, ‘International Monitoring of the Convention on the Rights of Persons with Disabilities’ (2015) ‘Evaluation of the Adult Guardianship System’ (2015) 2851 *Weekly Social Security* 48, 53. (all in Japanese) *

²³⁸ Refers to the Policy Committee, *The Points of Discussions—Issues Based on the Implementation Status of the Third Basic Plan for Persons with Disabilities* 1.

²³⁹ The UN Committee’s state review of the Japan Report in 2020 was postponed to 2022 due to COVID-19 pandemic.

²⁴⁰ Refers to the UN, *UN Treaty Body Data Base. Concluding Observations*. (Web Page, February 2022) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5>.

²⁴¹ Refers to Article 1 (purpose) of the Promotion Act.

²⁴² Refers to the commentary survey of the Acts: Yoshiguchi Oguchi et al, *Handbook of the Adult Guardianship Two Acts: Commentary on the Act on the Promotion of the Adult Guardianship System, the Civil Code and the Act on Revision of the Domestic Case Procedure* (Soseisha 2016). (in Japanese) *

²⁴³ At the deliberations in the National Diet, questions were raised regarding respect for the purpose of Article 12 of the CRPD and strengthening of supervision for adult guardians. House of Councillors adopted an ‘Attachment Resolution’ to ensure these two points. House of the Councillors, *Attachment Resolutions* (Web Page, April 5, 2016) (in Japanese) *

Promotion Act stipulates the legal frameworks for nationwide promotion of the adult guardianship system and establishes the Commission on Promotion of the Adult Guardianship System (hereinafter referred to as ‘the Commission’) to implement measures comprehensively and systematically for promoting the adult guardianship system.²⁴⁴

The structure of this Act²⁴⁵ is as follows: The purpose of the Act states that ‘supporting adults with insufficient mental capacity in a societal system is an urgent issue in an ageing society and contributes to the diverse society where [such people] cohabit with others’ (Article 1).²⁴⁶ Considering such a situation as the adult guardianship system is underutilized, the basic principles (Article 3)²⁴⁷ are mentioned and the responsibilities of the national and local governments, the effects of the relevant people, and the cooperation of relevant institutions are stipulated (Articles 4 to 8). The legal measures and the implementation status of these measures are stipulated (Articles 9 and 10). Eleven basic

<https://www.sangiin.go.jp/japanese/gianjoho/ketsugi/190/f063_040503.pdf>; House of the Representatives, *The Reasons of Legislation* (Plenary session of the 190th House of Representatives, March 24, 2016) <[http://www.shugiin.go.jp/internet/itdb_annai.nsf/html/statics/housei/pdf/190hou20an.pdf/\\$File/190hou20an.pdf](http://www.shugiin.go.jp/internet/itdb_annai.nsf/html/statics/housei/pdf/190hou20an.pdf/$File/190hou20an.pdf)>.

²⁴⁴ Refers to the House of the Representatives, *The Reasons of Legislation*.

²⁴⁵ The bill was based on Japan’s part of the Yokohama Declaration of the 2010 the first World Congress on Adult Guardianship in Yokohama. The Declaration recommends a system that the government supports the adult guardianship system in addition to the courts. The ‘Yokohama Declaration’ (the original version) refers to 2010 Adult Guardianship World Congress Organizing Committee (ed), *Autonomy and Protection in Adult Guardianship System* (NIPPON HYORON SHA CO., LTD., 2012). (in Japanese)

²⁴⁶ Shoichi Ogano, ‘The Role of Adult Guardianship System and Community Comprehensive Care: Community Symbiosis Society’ (2020) 12 *Review of Social Security Law* 23, 48. (in Japanese)

²⁴⁷ The basic principles (Article 3) include respect for the values of the adult guardianship system (i.e., respect for the right to self-determination, emphasis on personal protection, and normalization), promotion of the adult guardianship system responding to the local demands, and the establishment of a regional collaboration network for the adult guardianship system. It was confirmed that a principle of ‘utilization of the remaining capacity’ mentioned as the value of the adult guardianship system at the reform of the Civil Code in 1999 was replaced by ‘emphasis on personal protection’ in the Promotion Act and the Basic Plan. It shows how important ‘emphasis on personal protection’ is in the Basic Plan.

policies are shown (Article 11).²⁴⁸ The Ministerial Committee on Promotion of the Adult Guardianship System (hereinafter referred to as ‘Ministerial Committee’), headed by the Prime Minister, and the Commission on Promotion of the Adult Guardianship System (hereinafter referred to as ‘the Commission’), organized by experts, are established (Article 13). To conclude the Basic Plan is established (Article 12). The Cabinet Office of Japan will play secretariat roles and cooperate with courts and ministries to promote measures related to the adult guardianship (Article 13). It obliges the municipalities and prefectures to formulate their own basic plans and make efforts for necessary assistance (Articles 23 and 24).²⁴⁹

It is one of the ‘promotion type of laws’²⁵⁰ in Japan, and its legal character is a program style of regulation that clarifies an order for the conduct of the public agencies to take the policy but does not have specific legal enforcement over the conduct or procedure of an individual entity. This Act was originally based on ‘Komeito’ (one of the leading coalition parties) lawmaker’s draft legislation.

²⁴⁸ Eleven items regarding the basic policies are listed in Article 11, the Promotion Act, which can be summarized as follows: (a) Examination of measures to promote curatorship and assistance, (b) Review of the legal system for restricting the rights due to the principal, (c) Examination of support for principals who have difficulty in making decisions regarding medical care, nursing care, etc., (d) Review of the scope of work of adult guardians after the death of principals, (e) Activation of the voluntary guardianship system, (f) Dissemination to the national public, (g) promotion according to the needs of community, (h) Securing human resources who will be adult guardians in the community, (i) Supporting the activities of the adult guardianship implementing agency, (j) Enhancement and strengthening of the system in relevant agency, and (k) Ensuring close cooperation among relevant agencies.

²⁴⁹ In line with Ministry’s guidelines, basic plans of municipalities and prefectures are placed under the existing ‘municipal welfare plans’ and ‘prefectural plans for supporting community welfare,’ which are stipulated by Articles 107 and 108 of *Social Welfare Act*. With these arrangements, the adult guardianship system is a part of the community welfare program in municipalities and prefectures.

²⁵⁰ Refers to the House of the Councillors, *Law [Window]—Basic Law* (Web Page) (in Japanese) *

<<https://houseikyoku.sangiin.go.jp/column/column023.htm>>; Kazunori Miyazaki, ‘Structural Analysis of “Basic Laws”’ (2017) 5 *Public Policy Shibayashi* 43, 57.

(3) The Basic Plan and the Interim Verification Report

a. The Basic Plan

The Commission comprised the members from the academia, the Supreme Court, disability associations, and local governments, and six extraordinary members from professional guardianship associations, the medical field (doctors), guardianship support agencies, and the editorial writing profession. The role of the Commission was to deliberate on the matters to be included in the Basic Plan for Promoting the Adult Guardianship System (Hereinafter referred to as ‘Basic Plan’) and report to the Ministerial Committee. How did the members of the Commission recognize the scope of deliberation?²⁵¹ The following three points can be derived by analyzing the statements that indicated the basic recognition of the members in the minutes. (i) Improve the practices of the adult guardianship system under the current legal framework. (ii) Establish regional collaboration network in communities for the adult guardianship. (iii) Deliberate on the minimal items associated with the adult guardianship system. Beginning from September 23, 2016, the Commission held a total of sixteen deliberations and concluded the draft basic plan. After the approval of the Ministerial Committee, the Cabinet of Japan decided the Basic Plan on March 24, 2017.

The Basic Plan has policy objectives that aim to improve the adult guardianship practices and enable users to realize their benefits. It may create a regional collaboration network for advocacy support of human rights, prevent fraud, and maintain social harmony by providing easy access to the core agency in the community.²⁵² The implementation plan for five years, covering until March 2022, was shown to the public. The Cabinet Office of Japan has informed the local governments of the Basic Plan, asking them to set up core agencies in communities and to formulate their own basic plan. The main points of the Basic Plan are summarized in Table 3.

²⁵¹ Yukio Sakurai, ‘Current Status and Issues of the Japan’s Adult Guardianship System in the Promotion Act: Focused on the Deliberation Process of the Basic Plan.’ (in Japanese)

²⁵² Refers to ‘5.2.1 Roles and Legal Status of a Core Agency for Community Support.’

Table 3: Main Points of the Basic Plan

(i) Improvement in systems and practices that enable users to realize benefits	
✓	Appointment of guardians who emphasize not only property management but also supported decision-making and personal protection.
✓	Examination of how a medical certificate can describe the contents of diagnosis based on the living situation of the person.
(ii) Creation of a regional collaboration network for advocacy support²⁵³	
✓	Improvement in functions, such as (a) public relations of the system, (b) consultation on system usage, (c) promotion of system usage (matching), and (d) guardian support.
✓	Development of “team” formation to watch over the principals, to coordinate cooperation system of local professional organizations (‘council’), and ‘core agency (center).’
(iii) Thorough prevention of fraud and harmony with use	
✓	Examination of new measures to co-exist with and replace guardianship support trust system.

Source: Ministry of Health, Labour, and Welfare of Japan, *Basic Plan*²⁵⁴

A core agency is a focal point in a community that plays a leading role for advocacy in the Basic Plan to promote the adult guardianship system. The Promotion Act obliges the municipalities and prefectures to formulate their own basic plans within the regional welfare plans and make efforts for necessary assistance (Article 23 and 24 of the Promotion Act). This requires uniformly formulating core agencies nationwide with flexibility in scale and form. The authority of a core agency can be a choice either in a municipality or in a larger jurisdiction according to the needs of the adult guardianship system. As of October 2021, only 31.9 per cent of the 1,741 municipalities have established core agencies, while 16.7 per cent of the municipalities have the other existing agencies

²⁵³ The term ‘advocacy support’ is defined as ‘support activities which have a common foundation for support and activities centered on the person, which are support for exercising their rights through supported decision-making and support for recovering from infringement of their rights in dealing with abuse and unfair property transactions, for adults with insufficient mental capacity to participate in the community and live independent lives.’ Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System* (Web Page, 2022) (in Japanese) <https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html>.

²⁵⁴ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Basic Plan for Promoting the Adult Guardianship System* (Web Page, March 24, 2017) (in Japanese) * <<https://www.mhlw.go.jp/file/06-Seisakujouhou-12000000-Shakaiengokyoku-Shakai/keikaku1.pdf>>.

such as advocacy centers or adult guardianship support centers.²⁵⁵ The situation reveals gaps between municipalities in regional collaboration network centered on core agencies. Currently, three types of entities of core agencies are seen as: (a) directly managed by the municipalities (19.3 per cent), (b) outsourced to the Council of Social Welfare, NPOs, etc. (62.7 per cent), and (c) a combination of these two types (18.0 per cent).²⁵⁶

b. The Interim Verification Report

In April 2018, the office for the promotion project was transferred from the Cabinet Office to the Ministry of Health, Labour, and Welfare of Japan. This was presumably because the Ministry may execute the Basic Plan to promote nationwide regional collaboration network. The Ministry, on June 21, 2018, established the Ministerial Council on Promotion of the Adult Guardianship System, which comprises the Minister of Justice, the Minister of Health, Labour, and Welfare, and the Minister of Internal Affairs and Communications (hereinafter referred to as ‘Ministerial Council’), and the Expert Commission on Promotion of the Adult Guardianship System (hereinafter referred to as ‘Expert Commission’), which comprises experts from various fields. The role of the Ministerial Council and the Expert Commission is to examine the measures stipulated in the Basic Plan and verify the progress of the project, based on Article 13-2 of the Promotion Act.

The six Expert Commission and four Interim Verification meetings were held from July 2018 to March 2020. The following three points can be derived from the remarks made by the Expert Commission members. First, the expert Commission stuck to the scope of the deliberations in the

²⁵⁵ Refers to the Ministry of Health, Labour, and Welfare of Japan, ‘Results of A Survey on the Status of Measures Related to the Promotion of the Adult Guardianship System in October 2021 (Summary)’ 1 (Web Page, May 18, 2022) (in Japanese)

* <<https://www.mhlw.go.jp/content/12000000/000938666.pdf>>.

²⁵⁶ Ibid.

previous Commission and conducted a detailed examination of the Basic Plan.²⁵⁷ Second, the members aired frank opinions during the deliberations.²⁵⁸ Third, there was an opinion to broaden the scope of the deliberations to discuss a possible reform of the Civil Code and relevant laws.²⁵⁹ The Expert Commission concluded the Interim Verification Report on the Basic Plan in March 2020.²⁶⁰ Even after then, the Working Group for Supported Decision-Making published the ‘Guidelines for Adult Guardians Based on Supported Decision-Making’ in October 2020.²⁶¹ The Ministry started the basic virtual training program on supported decision-making for municipality officers in December 2020.

²⁵⁷ Many research surveys were submitted to the Expert Commission by the Supreme Court and ministries on requests. Ministry of Health, Labour, and Welfare of Japan, *Promotion of the Adult Guardianship System* (Web Page, n/a) (in Japanese) * <<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622.html>>.

²⁵⁸ For example, a medical doctor member stated the actual situation in the hospital as follows: ‘The guidelines are flooding the field, and when you look at the contents, you can see a lot of flapping across multiple departments of the Ministry of Health, Labour, and Welfare...The hospital is very confused now due to many relevant guidelines (November 20, 2019).’ A member representing the disability institution aired their view on an issue regarding professional guardians. ‘We are aware that there are many professional guardians who do not come to see principals and only get remuneration, and the remuneration for not doing anything. There are voices in community saying that they shouldn’t have adult guardians (May 27, 2019).’ Ministry of Health, Labour, and Welfare of Japan, *Expert Commission Meetings* (Web Page, February 2022) (in Japanese) * <<https://www.mhlw.go.jp/stf/shingi2/0000212875.html>>.

²⁵⁹ One member wrote this view: Akio Yamanome, ‘Interim Verification of the Basic Plan and the Future Prospects’ (2020) 88 *Adult Guardianship Practices* 82–89, 89; Makoto Arai previously states that ‘Japan’s adult guardianship law is under pressure to undergo a drastic review.’ Makoto Arai, ‘Enactment of Act of Promotion of Adult Guardian System and Prospects for the Adult Guardian System’ (2017) 1 *Disability Law* 51–76, 53. (in Japanese) *

²⁶⁰ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Interim Verification Report on Basic Plan for Promoting Adult Guardianship System* (Expert Commission, March 17, 2020). (in Japanese) *

²⁶¹ The guidelines encourage adult guardians to go through the additional process of supported decision-making based on Article 858 of the Civil Code even in limited cases. An adult guardian is required to participate in supported decision-making for legal acts of the principal that will have a significant impact on him/her (i.e., decision on the principal’s residence, sale of the principal’s assets, and gifts and expenses of the principal to a third party) and relevant non-legal acts. Ministry of Health, Labour, and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* (Web Page, October 30, 2020) (in Japanese) * <<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622.html>>.

(4) Measures and Theory for Updating the Adult Guardianship System in 2000–2022

The legislation, guidelines, and policy measures regarding the adult guardianship system implemented between April 2000 and March 2022 are summarized in Table 4. This table implies the updating process of Japan's adult guardianship system and its associated matters.

Table 4. Measures for Updating the Adult Guardianship System in 2000–2022

<i>Date</i>	<i>Contents</i>	<i>Decision Body</i>
April 1, 2000	Enforcement of the Adult Guardianship System	
May 21, 2013 (Enforced on June 30)	Promulgated the <i>Act to Partially Revise the Public Offices Election Act, etc. for the Restoration of the Right to Vote for Principals</i> ²⁶² (Act No. 21 of 2013)	The 183 rd National Diet
April 6, 2016 (Enforced on October 13)	Promulgated the <i>Act to Partially Revise the Civil Code and the Domestic Affairs Case Procedure Act to Facilitate the Work of the Adult Guardianship System</i> ²⁶³ (Act No. 27 of 2016)	The 190 th National Diet
April 15, 2016 (Enforced on May 13, 2016)	Promulgated the <i>Act on the Promotion of the Adult Guardianship System</i> (Act No. 29 of 2016)	The 190 th National Diet
May 13, 2016	Established the Ministerial Council and the Commission	Cabinet Office
March 24, 2017	The Cabinet of Japan decided on the Basic Plan for Promoting the Adult Guardianship System.	The Cabinet
March 31, 2017	Published the Guidelines of Supported Decision-Making for Using Disability Welfare Services, etc. ²⁶⁴	Ministry of Health, Labour,

²⁶² Refers to the Ministry of Internal Affairs and Communications, *Adult Guardians' Voting Rights* (Web Page, May 2013) (in Japanese) * <https://www.soumu.go.jp/senkyo/senkyo_s/news/touhyou/seinen/index.html>.

²⁶³ The key points of the amendments to the Civil Code are: (i) adult guardians who have been nominated by a family court become possible to receive the transfer of the principal-addressed postal mails (postal transfer, Article 860–2 and Article 860–3 of the Civil Code), (ii) the contents and procedures of office work that an adult guardian can perform even after the death of an adult guardian (post-mortem office work, Article 873–2 of the Civil Code) are clarified. Along with these, the *Domestic Affairs Case Procedure Law* has been amended. The target of these amendments is limited to adult guardianship type and does not cover curatorship and assistant types. Ministry of Justice of Japan, *Act to Partially Revise the Civil Code and the Domestic Affairs Case Procedure Act* (Web Page, October 13, 2013) (in Japanese) * <http://www.moj.go.jp/MINJI/minji07_00196.html>.

²⁶⁴ Refers to the Ministry of Health, Labour and Welfare of Japan published the report at the Disabled Persons Group, Social Security Council in December 2015. The report states that guidelines should be created that summarize the definition and significance of supported decision-making, standard processes, and points to keep in mind, and should be shared and

		and Welfare (MHLW)
December 1, 2017	Published the Working Paper to Review the Systems That Have Restrictions on the Rights of the Principals, etc. (the summary of discussion) ²⁶⁵	MHLW
March 14, 2018	Revised Guidelines for the Medical Supported Decision-Making Process in the Final Stages of Life ²⁶⁶	MHLW
April 1, 2018	The Ministry of Health, Labour, and Welfare is responsible for the promotion project	MHLW
June 21, 2018	Established the Ministerial Council and the Expert Commission	MHLW
June 2018	Published the Guidelines of Supported Decision-Making for People with Dementia in Their Daily and Social Lives ²⁶⁷	MHLW
April 1, 2019	Started to use the new formats of medical certificate form ²⁶⁸ in the adult guardianship system and personal information sheet ²⁶⁹	The Courts

disseminated among stakeholders, including those responsible for adult guardianship. Ministry of Health, Labour, and Welfare of Japan, *Guidelines for Supported Decision When Using Disability Welfare Services* (Web Page, March 31, 2017) <<https://www.mhlw.go.jp/file/06-Seisakujouhou-12200000-Shakaiengokyokushougaihokenfukushibu/0000159854.pdf>>. (in Japanese) *

²⁶⁵ This is the review policy of disqualification clauses summarized by the Commission. Cabinet Office, *Working Paper to Review the Systems that Have Restrictions on the Rights of the Principals, etc.—Summary of Discussion* (The Commission, December 11, 2017) (in Japanese) * <<http://www.moj.go.jp/content/001250073.pdf>>.

²⁶⁶ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Revised Guidelines for the Medical Supported Decision-Making Process in the Final Stages of Life* (Web Page, March 14, 2018) (in Japanese) * <<https://www.mhlw.go.jp/stf/houdou/0000197665.html>>.

²⁶⁷ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Guidelines of Supported Decision-Making for People with Dementia in Their Daily and Social Lives* (Web Page, June 2018) (in Japanese) * <<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000212395.html>>.

²⁶⁸ About 5.5 per cent of the cases related to adult guardianship were appraised on psychological certificates in 2021; The doctor's medical certificate is often used in the petition procedures for adult guardianship. Thus, the format of the doctor's medical certificate was reviewed. Akiko Ota, 'Revision of Medical Certificate Format and Practical Status After Introduction of Personal Information Sheet' (2020) 90 *Adult Guardianship Practices* 3, 14. The Courts of Japan, *Medical Certificate Form and Its Guidelines* (Web Page, n/a) (in Japanese) * <https://www.courts.go.jp/saiban/syurui/syurui_kazi/kazi_09_02/index.html>.

²⁶⁹ To properly protect the person's personality, a personal information sheet format was created for social workers and others; the sheet describes personal information, such as the characteristics of disabilities; it is attached to petitions. The

May 2019	Published the Guidelines for Hospitalization of Unrelated People and Support for People Who Have Difficulty in Making Medical Decisions ²⁷⁰	Research Group, ²⁷¹ MHLW
June 7, 2019 (Enforced after June 14)	Promulgated the <i>Act on the Development of Related Laws for Appropriate Measures to Restrict the Rights of Principals, etc.</i> (Act No. 37 of 1989) ²⁷²	The 198 th National Diet ²⁷³
June 18, 2019	Described the Promotion of the Adult Guardianship in the Outline to Promote Dementia Policy ²⁷⁴	MHLW
December 11, 2019 (Enforced March 1, 2021)	Promulgated the <i>Act for Partial Revision of the</i>	Ministry of Justice

national average as of December 2020 was 84.3 per cent for this sheet submission rate. The Courts of Japan, *Personal Information Sheet Form and Its Guidelines* (Web Page, n/a) (in Japanese) * <https://www.courts.go.jp/saiban/syurui/syurui_kazi/kazi_09_02/index.html>.

²⁷⁰ The adult guardian is legally not involved in the medical consent of the person by law, but if the person has no relatives or other close kin, the adult guardian may have to be involved in the medical consent in practice. This guideline was reported to the second Expert Commission on March 18, 2019. Ministry of Health, Labour, and Welfare, *Guidelines for Hospitalization of Unrelated People and Support for People Who Have Difficulty in Making Medical Decisions* (Web Page, May 2019) (in Japanese) * <<https://www.mhlw.go.jp/content/000516181.pdf>>.

²⁷¹ Refers to the ‘Study on Understanding the Adult Guardianship System in the Medical Field and Understanding the Situation of the Roles that Hospitals Demand from Guarantors.’ The principal investigator was Ryotaro Yamagata (Department of Social Medicine, Graduate School of Comprehensive Research, Yamanashi University).

²⁷² Refers to the Reference Survey No.8 at the third Interim Verification Working Group Meeting in the Experts Commission. For each system that has provisions (disqualification clauses) that uniformly exclude principals from qualifications, occupations, duties, etc., the situation, such as physical and mental disorders, is examined individually and practically, and it is necessary for each system to optimize the provisions for determining the presence or absence of various abilities (individual examination provisions), the necessary provisions for the procedures having been prepared in 187 Laws; Yasushi Kamiyama, ‘Trends in Uniform Review of Disqualification Clauses for Adult Guardians, etc.’ (2018) 72 [2975] *Weekly Social Security* 42, 47.

²⁷³ The Attachment Resolutions were adopted by both the House of Representatives and the House of Councillors at the enactment of this law. The Attachment Resolutions comprise eleven items, including respect for the purpose of Article 12 of the CRPD, and request the government to understand the current problems with the participation of representing persons with disabilities, and take necessary measures when proposals or recommendations are made by the CRPD Committee.’ House of the Councillors, the National Diet of Japan, *Attachment Resolutions* (Web Page, June 6, 2019) (in Japanese) * <https://www.sangiin.go.jp/japanese/gianjoho/ketsugi/198/f063_f060601.pdf>.

²⁷⁴ ‘The promotion of the adult guardianship system’ was described in (1) the Promotion of Dementia Barrier-Free of the Outline to Promote Dementia Policy Program. Cabinet Office, *The Outline to Promote Dementia Policy Program* (Web Page, June 18, 2019) 24. (in Japanese) * <https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000076236_00002.html>.

	<i>Companies Act</i> (Act No. 70 of 2019) ²⁷⁵	
March 24, 2020	Published the Interim Verification Report/Basic Plan	MHLW
April 1, 2020	Started to use the new Petition Form for the Adult Guardianship System ²⁷⁶	The Courts
October 30, 2020	Published the Guidelines for Adult Guardians Based on Supported Decision-Making ²⁷⁷	SDM Working Group, Expert Commission
December 22, 2021	The Expert Commission summarized ‘The Matters to be included in the Second Term Basic Plan for Promoting the Adult Guardianship System (final summary)’ ²⁷⁸	MHLW
March 25, 2022	The Cabinet of Japan decided on the Second Term Basic Plan for Promoting the Adult Guardianship System. ²⁷⁹	The Cabinet
June 7, 2022	The study group on the ideal adult guardianship system (chair Akio Yamanome) started deliberations on. ²⁸⁰	Ministry of Justice

Source: Made by the author

(5) The Issues of the Legislative Policy of Japan

Comparing the responses of the Government of Japan regarding the adult guardianship system with those of other developed countries/areas, gaps are found that can be summarized in two points:

(a) Japan makes operational improvements to the adult guardianship system with the current legislative framework, while some countries/areas that have signed or ratified the CRPD have amended their adult

²⁷⁵ Refers to the Ministry of Justice of Japan, *Regarding the Law to Partially Revise the Companies Act* (Web Page, December 21, 2021). (in Japanese) * <http://www.moj.go.jp/MINJI/minji07_00001.html>.

²⁷⁶ Refers to the Courts of Japan, *Petition Formats for Adult Guardianship* (Web Page, February 2022) (in Japanese) * <https://www.courts.go.jp/saiban/syosiki/syosiki_kazisinpan/syosiki_01_01/index.html>.

²⁷⁷ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* (Web Page, October 30, 2020) (in Japanese) * <<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622.html>>.

²⁷⁸ The Ministry was allocated a system for promoting the adult guardianship 800 million yen (US\$ 7.0 million) as a budget for the fiscal year 2020, 590 million yen (US\$ 5.1 million) as a budget for the fiscal year 2021, and 950 million yen (US\$ 8.3 million) as a budget for the fiscal year 2022.

²⁷⁹ Refers to the Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System* (Web Page, 2022) (in Japanese) <https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html>.

²⁸⁰ Refers to the Japan Institute of Business Law, *The Study Group on the Ideal Adult Guardianship System* (Web Page, June 2022) <<https://www.shojihomu.or.jp/kenkyuu/seinenkoukenseido>>. (in Japanese) *

guardianship laws through law reform or legislation. (b) Japan promotes the adult guardianship system through the Promotion Act, while some countries/areas restrict the use of the adult guardianship system as a last resort and encourage the use of SDM. Some countries/areas have even abolished the term ‘guardian/guardianship’ in their laws.²⁸¹

We now try to understand the above-mentioned gaps (a) and (b). Regarding (a), at the first meeting of the Commission on September 23, 2016, chair Satoshi Omori²⁸² pointed out the existence of an agreement between the Liberal Democratic Party (LDP) and ‘Komeito,’ as a coalition of ruling parties, not to amend the Civil Code under the Promotion Act. Therefore, this is a political decision.²⁸³ Though the reasons of this decision were not disclosed because of a political decision, it can be assumed that the ruling parties were involved in some deliberations as follows: (i) A legislative revision of the adult guardianship system requires much work,²⁸⁴ but improvement of the system is an urgent issue.²⁸⁵ It may be determined to prioritize operational improvements of the adult guardianship system with the current legislative framework. (ii) Discussion of law reform of the adult guardianship system

²⁸¹ Refers to ‘3.2 A Comparative Law Study: The International Context,’ where Switzerland and Austria abolished the terms ‘guardian/guardianship’ in their civil code.

²⁸² Emeritus professor at the University of Tokyo.

²⁸³ The ruling parties have power to determine the policy of legislation in the National Diet. In legislation process in the National Diet, any preliminary legislation study is under control of the ruling parties even before tabling the bill. Lobbying is carried out by some interest groups to influence the legislation and there is a tendency for petition to be assessed to determine what is consistent with the ruling parties’ policy and interests. Katsuhiro Mutoh, ‘Efficiency of the Diet Deliberation and the Representative System: How Should the Diet Deliberation Be Changed? (Report of the Hokkaido University Legislative Process Study Group)’ (2016) 66 (5) *Hokkaido University Law Review* 186, 161. (in Japanese) *

²⁸⁴ When the current adult guardianship system was enacted in December 1999, more than five years were spent to achieve the amendments to the Civil Code and the relevant legislation through full deliberation by the Legislative Council upon the request of the Minister of Justice. Ministry of Justice of Japan, Civil Affairs Bureau Counselor's Office, *Commentary on Proposal Overview for the Revision of the Adult Guardianship System* (Kinzai Institute for Financial Affairs, INC., 1998) (in Japanese) *

²⁸⁵ Elderly people of the baby boom generation will be aged 75 and over in 2025 and Japan will have more populations aged 75 and over (‘the year 2025 problem’). The elderly people with dementia will increase as the population ages. Japan needs some countermeasures as a public policy.

is not that mature in public opinion, and amendments to the Civil Code and the relevant laws are not at a stage where most people will understand.²⁸⁶ (iii) Komeito, as a party for promoting welfare, is motivated to take leadership to improve the adult guardians' personal protection to adults with insufficient mental capacity within the current legal framework.²⁸⁷ It is likely that the item (iii) above is most affected.

Regarding (b), Japan's policy is to promote the adult guardianship system, which is unique, unlike in other developed countries. The reasons for this policy can be understood due to the following points that are relevant to Japan in a super-aged society. (i) The adult guardianship system is underutilized as the Promotion Act and the Basic Plan mention. Many potential users of the adult guardianship are expected, considering many elderly people with dementia or the like. (ii) As the number of elderly households and single-living elderly people increases, it is expected that relatives of the elderly will not be able to take on duties, such as the adult guardianship or even informal arrangement as in the past, and the number of petitions by relatives will decrease.²⁸⁸ To protect elderly people with dementia or the like who cannot access the family court or welfare office by themselves, it is necessary to establish regional collaboration network such that the community will take on these

²⁸⁶ Academic societies and law/welfare associations deliberated and summarized the idea on the reform of law and regulations; however, the public has no idea of these views because little attention has been paid to the idea.

²⁸⁷ Komeito established the 'Adult Guardianship System Promotion Project Team' (chair Yoshinori Oguchi) in the party in December 2010 and made draft bill in 2012. Then, the lawmaker of Komeito submitted the Promotion bill to the National Diet. The chair Oguchi took office as Vice Minister of the Ministry of Health, Labour, and Welfare of Japan in 2018 to 2019 when the Expert Commission commenced deliberations.

²⁸⁸ The 57.8 per cent of households with persons aged 65 and over comprise households with single persons or households with a married elderly couple. The number of households with single persons, households with elderly single persons, and households with single parents are expected to increase. Households with single persons are expected to reach about 40 per cent in 2040. On the other hand, the number of households with couples and child continues to decrease. Ministry of Health, Labour, and Welfare of Japan, *Reference Survey No. 4 for Working Group (Web Page, May 12, 2021)* 5–6. <<https://www.mhlw.go.jp/content/12000000/000777930.pdf>>.

elderly people.²⁸⁹ (iii) The adult guardianship system in Japan has worked largely for their management of the finances of the elderly by professional guardians.²⁹⁰ Elderly people in Japan have nearly 60 per cent ownership of the household financial assets amounting to 2,005 trillion yen (US\$ 17.4 trillion) as of June 2022.²⁹¹ Thus, a reliable system is required for the management of their property. (iv) The Government of Japan promotes the adult guardianship system to protect the interests of the principal not only for their property but also for their personal protection. This is in part because it is not common for most Japanese people to conclude a lasting power of attorney (LPA) when they are healthy.²⁹²

The reasons why the Government of Japan promotes the adult guardianship system have been addressed, and considering these practical reasons, the current policy of the Government of Japan appears to be understandable because there are no immediate alternative measures available to administer financial management of the principals at this stage. In the middle and long term, however,

²⁸⁹ Tokiyo Shimizu, 'Current Status and Development of the Adult Guardianship System' (2019) 24(1) *International Public Policy Studies* 15–28, 22–23. (in Japanese); Aya Yamaguchi, 'Case Study on the Actual Condition and Function of the Community Support Network for Legal Support for the Elderly' (2022) 105 *Rikkyo Law Review* 208, 240. (in Japanese)

²⁹⁰ The 58 per cent of reasons by motive to make a petition to the adult guardianship system is related to property management, such as management of saving accounts, sale of real estate, inheritance procedures, and insurance claim receipt. The Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022). (in Japanese) *; In fact, at the workshop of the 5th World Congress of Adult Guardianship in Seoul (October 26, 2018), Arai responded to an audience member's question thus 'I understand the significance of policies in developed countries that limit the adult guardianship system as a last resort and encourage (...) [greater] use [of] supported decision-making (...) In Japan, where the most appropriate property management for the elderly should be implemented, the introduction of supported decision-making in property management is premature.' 5th World Congress on Adult Guardianship in Seoul, South Korea (Web Page, October 23–26, 2018) <<http://wcag.gabia.io/wcag2018j/glance/parallel-dialogues/#tab-id-6>>.

²⁹¹ This is the highest record of the household financial assets in Japan. Bank of Japan, *Money Circulation in the First Quarter of FY2022* (Web Page, June 2022) (in Japanese) * <<https://www.boj.or.jp/statistics/sj/sjexp.pdf>>.

²⁹² To date, approximately a total of 250,000 cases of lasting power of attorneys have been concluded between contract parties (report by the Ministry of Justice of Japan on May 18, 2022) and 2,663 cases were registered as the voluntary guardianship by law, attached with a supervisor to the voluntary guardian nominated by the family courts, as of December 2021.

it can be assumed that the Government of Japan has room to consider other alternative legislative measures than the promotion of the adult guardianship system. As discussed so far, such complex issues as vulnerable adults need multiple measures to be enacted from the perspectives of law, policy, and community support.

1.2.2 Supported Decision-Making (SDM)

The following support measures addressed in 1.2.2 and 1.2.3 are developed based on amendments to the social security laws, such as the *Social Welfare Act* or some disability law. They may share the similar purpose with the adult guardianship system, but the legal basis and the characteristics of the measures are different from those of the adult guardianship system.

(1) What is Supported Decision-Making (SDM)?

In this part, discussion is focused on supported decision-making in a Japanese context. The concept of supported decision-making differs in respect of definition, scope of the subject, and legal basis according to the country. For example, in the U.S. and Australia, supported decision-making as a legal device is regarded as an alternative to substituted decision-making, which is applied to the wider scope of subjects by law in some states while they have the guardianship system by their other law.²⁹³ In Japan, supported decision-making, which is attached to the guardianship system, is regarded as the standard of decision-making to understand the intentions of the principal, as Kamiyama addresses.²⁹⁴ Supported decision-making is not always based on law but on a bilateral support

²⁹³ Refers to ‘3.2 (5) U.S. Supported Decision-Making Acts and (6) Changes to Victoria and NSW State Acts in Australia,’ ‘3.4.4 (2) c. Guidelines for Supported Decision-Making Practice’ and ‘4.5.1 (1) Australian Adult Support and Protection Legislation.’

²⁹⁴ Refers to ‘1.1.1 (1) f. Supported Decision-Making.’ Yasushi Kamiyama presents three ways of thinking about supported decision-making, namely: (i) ‘The idea that since the CRPD excludes the possibility of all types of substituted decision-making, it must be completely transformed into a supported decision-making system,’ (ii) ‘The direction in which substituted decision-making on behalf of a principal is regarded as a type of supported decision-making by respecting the will of the principal as the standard for decision-making,’ (iii) ‘Supported decision-making and substituted decision-making

agreement or the guidelines without enforcement. There is no unified view on supported decision-making and each country or state applies the legislation or practices of supported decision-making stipulated in their own policy. Some commonly shared international guidelines are Article 12 of the CRPD and the General Comment No.1.²⁹⁵

(2) The SDM Guidelines

After the Government of Japan signed the CRPD in September 2007, the term something like ‘supported decision-making’ (hereinafter referred to as ‘SDM’) was inserted into disability laws, such as Article 23 of the *Basic Act on Persons with Disabilities* (revision in 2011, Act No. 84 of 1970) and Article 1-2, Article 42, and Article 51-22 of the *Act on Comprehensive Support for the Daily and Social Life of Persons with Disabilities* (revision in 2012, Act No. 123 of 2005).²⁹⁶ No legislation however has defined what SDM should be or is like. Instead, further considerations of how to support decision-making for persons with disabilities have been carried out by three working groups by experts that were designated by the Ministry of Health, Labour, and Welfare of Japan by law.²⁹⁷ The process of considerations was implemented after the Government of Japan ratified the CRPD on January 20, 2014.

are separated from the aspect of philosophy, and with prioritization of the principle of supported decision-making, substituted decision-making is used only as a last resort.’

²⁹⁵ Refers to ‘1.2.1 (2) The CRPD and the General Comment No.1.’

²⁹⁶ The term ‘supported decision-making’ was additionally inserted into welfare laws without definitions, such as Article 21–5–17 of the *Child Welfare Act* (Act No. 164 of 1947) and *Article 15–3 of the Act on Welfare of Mentally Retarded Persons* (Act No. 37 of 1960).

²⁹⁷ Refers to Article 2 (Considerations) of Supplementary Provisions of the *Act on Comprehensive Support for the Daily and Social Life of Persons with Disabilities*. The law stipulates that approximately after three years of the enactment of this Act, the government of Japan shall take measures, if necessary, after due consideration of the matters pertaining to the provisions of the Act.

It was based on the decisions of the Social Security Council (Welfare Division)²⁹⁸ regarding how to promote SDM and the adult guardianship system for people with disabilities on December 14, 2015.²⁹⁹

After deliberations by experts, three SDM guidelines were published step by step addressing nursing home managers, managers for the elderly with dementia, and adult guardians. These are ‘SDM Guidelines for the Provision of Disabilities Welfare Services (March 2017),’ ‘SDM Guidelines for People with Dementia in Daily Life and Social Life (June 2018),’ and ‘Guidelines for Adult Guardians Based on SDM (October 2020).’ The first two SDM guidelines are for nursing home managers regarding SDM activities for people with disabilities and people with dementia. These two operational guidelines cover SDM activities in general for people with disabilities and with dementia in their personal daily life and their social life at home or in nursing home.

In contrast, the third SDM guidelines are addressed specifically for adult guardians who are requested to adopt SDM methods in their guardianship duties in legal acts and its associated personal acts in order to understand the will and preferences of their principals.³⁰⁰ If SDM methods adopted by

²⁹⁸ The ‘Social Security Council’ is one of the councils established by the Ministry of Health, Labour, and Welfare of Japan. This is an advisory body to the Minister of Health, Labour, and Welfare, which deliberates and investigates basic matters related to the social security system in general and the ideal form of various social security systems, and reports opinions. The ‘Welfare Division’ deliberates and investigates welfare policies.

²⁹⁹ The Social Security Council (Welfare Division) requested the Ministry to publish the SDM guidelines to make sure the definition, significance, standardized methods, and points to be reminded of SDM etc., to share them with the nursing home managers who support people with disabilities, and to provide the SDM training program with managers to improve their knowledge and skills of SDM. Ministry of Health, Labour, and Welfare of Japan, *The Social Security Council, Welfare Division the 79th Session Survey: About Review Three Years after the Enforcement of the Services and Support for Persons with Disabilities Act (Draft): 5. How to support decision-making for persons with disabilities and promote the use of the adult guardianship system* (Web Page, December 2015) 16–17 (in Japanese) <https://www.mhlw.go.jp/file/05-Shingikai-12601000-Seisakutoukatsukan-Sanjikanshitsu_Shakaihoshoutantou/0000106993.pdf>.

³⁰⁰ Yasushi Kamiyama states that ‘clearly separating supported decision-making and proxy/substituted decision-making, approving the priority of supported decision-making as a rule, and showing room to accept proxy/substituted decision-making as a last resort at the minimum necessary cases only.’ Yasushi Kamiyama, ‘Recent Trends in Supported Decision-Making: Focusing on the Relationship with the Adult Guardianship System’ (2020) 72(4) [414] *The Doshisha Law Review* 445, 467. (in Japanese) *

the adult guardians cannot be accepted by the principals due to the relevant capacity, then the adult guardians will be obliged to use substitute decision-making. The third SDM guidelines were deliberated and drafted by the working group under supervision of the Expert Commission by Promotion Act.

(3) The Content of ‘Guidelines for Adult Guardians Based on Supported Decision-Making’

a. Purpose of the Guidelines

The Civil Code of Japan stipulates that an adult guardian ‘shall respect the intention of the adult ward and consider his/her mental and physical condition and living circumstances’ (Articles 858, Paragraph 1 of Article 876-5, and Paragraph 1 of Article 876-10). In practice, an adult guardian may well exercise legal authority based on their own personal values without consideration for the principal’s will and preferences and without contacting the principal’s stakeholders. This may arise when the adult guardian assumes their position superior to that of the principal with insufficient mental capacity.³⁰¹ The Basic Plan includes a passage to ‘clarify the role of an adult guardian as a decision-making supporter, along with general measures ensuring procedures and operational processes of supported decision-making.’³⁰² For users of adult guardianship to realize its benefits, it is essential for an adult guardian to carry out their duties based on the concept of supported decision-making. The Expert Commission understands the need to formulate guidelines on how an adult guardian should apply supported decision-making while discharging their duties.³⁰³

³⁰¹ For example, even though a principal wants to live at their home in their community, an adult guardian may decide to put the principal in a nursing home without careful consideration, persuading the principal in the name of protection.

³⁰² Refers to the Ministry of Health, Labour, and Welfare of Japan, *Basic Plan for Promoting the Adult Guardianship System* (Web Page, n/a) 25. (in Japanese) *

³⁰³ Before the SDM-WG-made guidelines, Okayama prefecture’s local guidelines are voluntarily created. The Courts of Japan, [*Okayama version*] *About Guidelines for Decision-Making Support for Adult Guardians (Okayama Decision-Making Support Project Team)* (Web Page, 2018/2021) (in Japanese) <<https://www.courts.go.jp/okayama/saiban/tetuzuki/kouken-tetuzuki-syosiki/gaidorain/index.html>>.

In response to this need, a Supported Decision-Making Working Group (hereinafter referred to as ‘SDM-WG’) was established in May 2019 under the Expert Commission, which is made up of members of the Supreme Court, the Ministry of Health, Labor and Welfare, and professional associations (i.e., the Japan Federation of Bar Association, the Legal-Support Adult Guardian Center (Japan Federation of ‘Shiho-Shoshi’ Lawyers’ Associations), and the Japanese Association of Certified Social Workers).³⁰⁴ Since then, the SDM-WG has deliberated on how to formulate the guidelines mainly from the perspective of the principal, conducted hearings for relevant associations that represent potential users, and completed the draft of the ‘Guidelines for Adult Guardians Based on Supported Decision-Making’ (hereinafter referred to as ‘the Guidelines’). With some amendments after public reviews of the summary draft in June 2020, the Guidelines were published on October 30, 2020.

In the Guidelines, supported decision-making is defined as ‘activities for the principal to make decisions based on [the principal’s] own values and preferences performed by supporters related to the principal, including an adult guardian, such as providing necessary information to the principal and drawing out the intentions and preferences of the principal, when there is a problem with the principal’s mental capacity on a specific act.’³⁰⁵ Since supported decision-making is provided by an adult guardian as part of guardianship duties, situations in which an adult guardian is required to directly participate in decision-making support are in principle limited to such legal acts and relevant factual acts (i.e., decisions on the principal’s residence, sale of the principal’s assets, and gifts and expenses of the principal to a third party) that may have a significant impact on the principal.³⁰⁶

³⁰⁴ Refers to the Ministry of Health, Labor and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* (Web Page, October 30, 2020) 1.

<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00019.html>. (in Japanese) *

³⁰⁵ Refers to the Ministry of Health, Labor and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* 2.

³⁰⁶ Ibid.

b. Seven Principles of the SDM Guidelines

The Guidelines clarify the ‘seven principles’³⁰⁷ (given below) regarding the procedures and operational processes of supported decision-making, including substituted decision-making, that adult guardians should take into consideration. The Guidelines were drafted by the SDM-WG based on the Mental Capacity Act 2005 of England and Wales and the CRPD. The seven principles are composed of the five main principles (the first, second, third, fifth, and sixth principles), which are basically based on the MCA 2005, and the remaining two principles (the fourth and seventh principles), which are added to call attention to adult guardians who are not familiar with the idea of supported decision-making capacity and SDM. The Guidelines also propose the reporting formats for each process.³⁰⁸ Unlike the Expert Commission, the materials of the SDM-WG's deliberations are undisclosed. It can be assumed that the policy intention of the guidelines can be in part clarified by referring to the published articles of an SDM-WG member.³⁰⁹ Below, the seven principles and some comments are summarized.

First Principle: All persons are presumed to have decision-making capacity.

In the Guidelines, ‘decision-making capacity’ is defined as the capacity to make one's own decision with some support, and is composed of four elements: understanding information, memory

³⁰⁷ The seven principles in the text are ones that were translated into English by the Japan Network for Supported Decision-Making <<https://sdm-japan.net/>>. The author received a permission to cite them from Toshihiko Mizushima on August 3, 2022.

³⁰⁸ Refers to the Ministry of Health, Labor and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* [attachments].

³⁰⁹ Toshihiko Mizushima, ‘Mission of the Guidelines for Adult Guardians Based on Supported Decision-Making’ (2021) 142 *Social Welfare Research* 45, 54. (in Japanese) *; Toshihiko Mizushima, ‘Issues and Responses to Practice the Guidelines for Adult Guardians Based on Supported Decision-Making’ (2021) No. 92 *Adult Guardianship Practices* 23, 31. (in Japanese) *; Toshihiko Mizushima, ‘Points of Supported Decision-Making Measures in the Second Term Basic Plan on for Promoting the Adult Guardianship System’ (2022) 2022.2. *Law Plaza* 45, 49. (in Japanese) *

retention, comparative examination, and expression of intention.³¹⁰ Decision-making capacity is not a concept stipulated by the law of Japan and is different from mental capacity (Article 3-2) and capacity to act (section 3) stipulated in the Civil Code.

Regarding the first principle, views were expressed during the SDM-WG's deliberations that '[the first principle] should be regarded as a matter of dimension rather than [consider] whether or not the capacity is available, reviewing each element of the decision-making capacity of the principal. If an adult guardian makes a substituted decision-making on behalf of the principal because it is perceived that the principal does not have a decision-making capacity, the principal may feel that he/she has been denied this capacity. This perception of the principal's lack of decision-making capacity may arise from a lack of skill on the part of the supporter³¹¹ to fully understand and interpret the principal's will and preferences.'³¹² Assuming that a person more or less has a decision-making capacity, then when it is difficult for the supporter to understand the person's intention after all possible efforts, or when a serious influence that cannot be overlooked by the principal cannot be ruled out, it should be regarded as difficulty on the supporter side. In a situation where it is necessary to decide such a pressing issue, it should be arranged such that the transition from supported decision-making to substituted decision-making must be considered because of the difficulty on the supporter side.³¹³

³¹⁰ Refers to the Ministry of Health, Labor and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* 3.

³¹¹ Refers to '1.1.1 (1) f. Supported Decision-Making' Shoichi Sato points out that the reason why the supporter cannot understand the will and preference of the principal may be largely due to lack of the decision-making support competence of the supporter [Shoichi Sato, 'Is Decision-Making Support Available?' 59].

³¹² Toshio Mizushima remarks that the SDM-WG understand that 'decision-making capacity is regarded as a total of the individual capacity of the principal and the decision-making support competence of the supporter.' Toshihiko Mizushima, 'Mission of the Guidelines for Adult Guardians Based on Supported Decision-Making' (2021) 142 *Social Welfare Research* 45–54, 46–47. (in Japanese) *

³¹³ Ibid 47.

Second Principle: The guardian must not move to substituted decision-making unless all practicable steps have been tried to help enable the person to make decisions for themselves.

The second principle is based on Paragraph 3, Article 1 of the *Mental Capacity Act 2005* (hereinafter referred to as ‘MCA 2005’). The supported decision-making process includes to prepare for the formation of a support team, explain the purpose to the principal, and hold regular meetings with the principal. The purpose of this process is to support the formation and the expression of the intentions of the principal. The subject of supported decision-making by an adult guardian is specifically limited to ‘legal acts that may have a significant impact on the person and relevant factual acts.’³¹⁴ This is according to the guidelines based on the scope of responsibility of the adult guardian appointed by the family court as stipulated in the Civil Code.

Third Principle: Even if a decision made by a person seems unreasonable at first glance by others, it should not be enough to judge that the person does not have decision-making capacity.

The third principle shows that the principal has the right to do stupid things.

Fourth Principle: If the guardian and team members working for the person tried all practicable steps to help enable the person to make decisions by themselves and have significant difficulty confirming the person's will and decision, then substitute decision-making is to be considered. Still, even in such a case, the guardian shall act first based on the person's will, which is reasonably presumed on clear evidence (presumed will).

Regarding the fourth principle, if it is difficult to grasp the will and preferences of the principal despite all the decision-making support for a specific decision, and the decision-making cannot be postponed for legal protection, then the decision-making capacity of the principal should be reassessed. In the assessment for a specific decision-making situation, the supporter and the principal are examined respectively based on the following two points of view for each of the four elements of

³¹⁴ Toshihiko Mizushima, ‘Mission of the Guidelines for Adult Guardians Based on Supported Decision-Making’ 47.

the decision-making capacity (i.e., understanding information, memory retention, comparative examination, and expression of intention): (i) if all the possibilities for supported decision-making have been exhausted (assessment of the supporter's support competence) and (ii) whether it is difficult for the person to make a decision or confirm the decision (assessment of the principal's decision-making capacity). Since medical assessment of the principal is conducted to certify mental capacity conditions in a petition for adult guardianship, some member was of the opinion in the deliberations of the SDM-WG that 'the description of the decision-making capacity assessment of the principal should focus on the functional assessment, following the MCA 2005 which requires both medical and functional assessments, and the SDM-WG members agreed [on] this view.'³¹⁵

The guidelines attempt to estimate the principal's intention (i.e., best interpretation of the will and preferences of the principal) based on clear evidence. 'At the beginning of the SDM-WG deliberations, it was assumed that there would be five principles according to the model of the MCA 2005. (...) The fourth principle was then added in response to members' opinion that substituted decision-making in the principal's best interests should be (...) [a] last resort.'³¹⁶ This position was adopted because the SMD-WG members recognized that substituted decision-making in the principal's best interests would tend to lead to a paternalistic decision-making by the adult guardian.

In theory, the guardian shifts from SDM to substituted decision-making as a last resort under such conditions as mentioned above. In practice, however, how much efforts the guardian spends to

³¹⁵ Toshihiko Mizushima, 'Mission of the Guidelines for Adult Guardians Based on Supported Decision-Making' 48.

³¹⁶ Ibid 49. The term 'best interests' is a statutory principle stipulated in section 4, the *Mental Capacity Act 2005*. It states that 'Any act done, or decision made for, or on behalf of, a person who lacks capacity must be done or made in his or her best interests.' British Medical Association (BMA), *Best Interests Decision-Making for Adults who Lack Capacity: A Toolkit for Doctors Working in England and Wales* (BMA, 2019) <<https://www.bma.org.uk/media/1850/bma-best-interests-toolkit-2019.pdf>>; The term 'best interests' include both subjective and objective aspects. Masaru Nagawa, 'Supported Decision-Making, Adult Guardianship System, and Guidelines (draft) (Special feature: Concepts of decision-making support for persons with disabilities and its application to adult guardianship)' (2016) 64 *Adult Guardian Practices* 36, 44. (in Japanese)

understand the will and preferences of the principal and when the guardian shifts from SDM to substituted decision-making can be assumed to be decided by the guardian in his/her discretion. Consequently, the boarder between SDM and substituted decision-making in this scheme tends to be ambiguous.

Fifth Principle: The guardian shall adopt a policy based on the best interests of the person, with the greatest possible respect for the person's beliefs, values, and preferences, when: (1) it is difficult even to presume the person's will, or (2) the person's presumed will or expressed wishes will have a significant impact that cannot be overlooked. For (2) significant impact, all three of the following conditions must be met: (i) The option is clearly disadvantageous to the person in comparison with other options available to the person. (ii) Once it occurs, the impact will be so serious that it will be difficult to recover. (iii) The likelihood of its occurrence will be highly certain.

Regarding the fifth principle, the idea is to consider other objective factors on the ground that the best interests of the principal are respected as much as possible in every respect, namely, their intention, feelings, and values. To avoid risk of harm while respecting the intention or presumed intention of the principal for legal protection, there are limited cases where substituted decision-making with outcomes that may differ from the intentions, or be contrary to the intentions, of the principal. In such cases, these decisions shall be conducted by the adult guardian on their own responsibility. Consideration of the best interests of the principal is only allowed as a last resort.

Sixth Principle: Substituted decision-making based on the best interests of the person can only be made to the minimum extent necessary when the decision cannot be further postponed from the perspective of the legal protection of their rights, and no other measures are available.

Seventh Principle: Even once a substituted decision has been made, the guardian must return to Principle 1 and begin with a presumption of decision-making capacity in the next decision-making situation.

The sixth principle represents the least restrictive alternative. Regarding the seventh principle, ‘this principle is added in formulating the guidelines together with the fourth principle in order to call attention to adult guardians who are not familiar with the idea of decision-making capacity.’³¹⁷ Decision-making capacity is examined for each action and each situation, and when the need for supported decision-making arises again, an adult guardian is required to return to the first principle and apply the supported decision-making processes all over from scratch.

(4) Developments and Challenges of the SDM Guidelines

a. Developments

First, the project of the SDM guidelines is a positive development, namely, to take necessary measures for nursing home managers, social workers, and adult guardians to guide SDM in the community support fields for people with disabilities and/or with dementia to respect the will and preferences of the principals. In Japan, there is seen a tendency to rely on guidelines instead of law particularly for a bioethical issue, such as medical care in the end-of-life situation. Norio Higuchi states that ‘The guidelines are evaluated as useful and practical because they can be interpreted flexibly and can be easily changed.’³¹⁸ Like this view, a guiding principle of the SDM guidelines as a soft law would be practical and ethical regulation on SDM at the initial stages, because regulating SDM through a hard law at this stage might be unworkable when an SDM method has not yet been clearly fixed.³¹⁹ With this framework, improvement of guidelines based on practices on site should be recommended. Second, the positive aspect of SDM guidelines is to require supporters, including adult guardians, to take necessary process of SDM according to the seven principles and keep records in designated formats. Supporters and the principal’s stakeholders as a team may review the process of SDM as to

³¹⁷ Toshihiko Mizushima, ‘Mission of the Guidelines for Adult Guardians Based on Supported Decision-Making’ 50.

³¹⁸ Norio Higuchi, ‘Current Status and Challenges of End-of-Life Care Legal Issues’ (2020) 2(5) *Geriatrics* 579-584, 581 (in Japanese) *

³¹⁹ Yukio Sakurai, ‘The Role of Soft Law in the Ageing Society of the Twenty-First Century’ (2018) 13(1) *The International Journal of Interdisciplinary Global Studies* 1–10, 7.

what they understand, how and why they decide so. These procedures may empower accountability of the supporters' activities to foster trust between the supporter and the principal.³²⁰ Third, the SDM Guidelines may prioritize SDM rather than the substituted decision-making, even though it takes time for adult guardians to do so.

b. Challenges

There will be, however, some challenges to indefinitely maintain SDM guidelines, viz.:

- (i) The guidelines can be applied with flexibility by users, but when a problem arises, the legal basis is ambiguous, and the responsibility is unclear. It is difficult to know which guideline should be prioritized among multiple guidelines in related disciplines, including other guidelines regarding terminal care and health care.³²¹
- (ii) The risk of SDM practices concerns undue influence. Undue influence may happen when a supporter, by virtue of their superior or powerful position, tries to control a principal or to exercise improper persuasion.³²² Under the name of autonomy of the principal, a principal with insufficient mental capacity should ideally be assisted by their third-party supporter to realize their will and preferences. In fact, however, the principal might be improperly influenced to engage in action

³²⁰ This opinion was addressed by lawyers under adult guardianship at the panel discussion of the SDM Guidelines online seminar, which was sponsored by the Legal-Support Adult Guardian Center in Tokyo on March 18, 2022.

³²¹ An Expert Commission member, a medical doctor stated on 20 November 2019 the actual situation in the hospital as follows: 'The guidelines are flooding the field, and when you look at the contents, you can see a lot of flapping across multiple departments of the Ministry of Health, Labour, and Welfare...The hospital is very confused now due to many relevant guidelines.' Ministry of Health, Labour, and Welfare of Japan, *Expert Commission Meetings: The Minutes of the 2nd Interim Verification Working Group Session* (Web Page, November 20, 2019) (in Japanese) * <<https://www.mhlw.go.jp/stf/shingi2/0000212875.html>>.

³²² Mary Joy Quinn, 'Undue Influence and Elder Abuse' (2002) 23 (1) *Geriatric Nursing* 11–17, 15; Daniel A. Plotkin et al, 'Assessing Undue Influence' (2016) 44(3) *The Journal of the American Academy of Psychiatry and the Law* 344, 352.

that serves the interests of the third party.³²³ In this regard, safeguards to protect against this risk are vital.³²⁴ SDM guidelines struggle to provide such safeguards because of inability to provide workable means for their enforcement.³²⁵ This is an ambiguity of the SDM function, scope, and legal status. In the middle to long-term, legislating SDM will be an issue, taking the CRPD requirements and the safeguards for SDM operational risk into consideration.³²⁶

In addition, SDM guidelines include some substantial issues as follows:

³²³ There is a case occurred in Japan (i.e., reported in an article of 2015 newsletter of the NPO, ‘Tokatsu Community Guardianship Association’ in Chiba prefecture). An elderly woman with dementia left her notarized will to indicate that all her property (equivalent to almost US\$1.7 million) should be given to her social worker exclusively in her nursing home for her appreciation when she passed away. The question was raised whether the will could reflect her proper wishes, or those fully or partly controlled by others, including her social worker. In this case, there was no single putative heir who had grounds for a lawsuit. The social worker finally received all her property, ignoring in-house disciplines of the nursing home and the social worker’s associations she belonged to. This kind of situation, modeled on an actual incident that occurred, can be assumed at a high ratio to be a case of undue influence. This is because the elderly woman with dementia needed assistance of her social worker to have concluded the notarized will at a notary public with two witnesses’ signatures. Yukio Sakurai, ‘The Role of Soft Law in the Ageing Society of the Twenty-First Century’ 6–7.

³²⁴ Thomas F. Coleman states that ‘for people with questionable capacity, [supported decision-making] procedures should be developed to reduce or eliminate the risk of abuse or exploitation of seniors, people with disabilities, or other vulnerable adults’ at ‘Overview’ in the report. Thomas F. Coleman, ‘Supported Decision-Making: My Transformation from a Curious Skeptic to an Enthusiastic Advocate’ (Online, 2017) <<https://tomcoleman.us/publications/sdm-essay-2017.pdf>>.

³²⁵ In Germany, the first court of the Federal Constitutional Court decided that the federal legislature violated Article 3.3, Paragraph 2 of the Basic Law (Constitution) on December 16, 2021 [1BvR 1541/20] because the federal legislature did not legislate law to ensure that nobody with disability is at a disadvantage when allocating intensive care resources that are not available to all [in triage cases], and relied on the recommendations of the German Intensive Care Unit Interdisciplinary Association (DIVI), which were non-binding and not synonym for medical standards in specialized law. This decision shows that legislation must be conducted in such ethical issue as triage cases based on their constitution.

³²⁶ An idea of legislative framework that includes the protections offered by the Civil Code for vulnerable adults is vital and thus should be considered. Hayashi and Obara suggest that it is necessary to build a training system for practitioners as well as legislation in Japan to build a new support system with reference to English law and practice. Maho Hayashi and Naoyasu Obara, ‘The Current Situation and Issues of Making Decisions for People who Lack Capacity: Based on the Survey of Mental Capacity Act 2005’ (2019) 60 *Memoirs of Beppu University* 89–101, 97; Japan Federation of Bar Associations, *Declaration Calling for the Establishment of a System for Comprehensive Supported Decision-Making* (Web Page, October 2, 2015) (in Japanese) * <https://www.nichibenren.or.jp/document/civil_liberties/year/2015/2015_1.html>.

- (iii) The definition, standardization of methods, legal examination, safeguards for risk, human resources development and such for SDM are under development. The SDM guidelines for adult guardians fall short of the legal basis of the term ‘supported decision-making capacity.’³²⁷ Therefore, SDM is not yet a finished product able to be put into practical use in Japan at large. Review of SDM guidelines based on practices and experiences in support is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards for risk of the principals.³²⁸ The guidelines should be unified into one representative set of guidelines to explicitly stipulate principles and due procedures.
- (iv) Yasushi Kamiyama states that there are two views on the relationship between the guardianship and SDM in Japan: one is that the guardianship and SDM are independent each other, and the other is that they are inter-linked. In the former view, SDM is regarded as a ‘legal system that will replace the adult guardianship system’ to meet the requirements of Article 12 of the CRPD. In the latter view, SDM is regarded as a ‘support method for substituted decision-making’ to comply with Article 858 of the Civil Code.³²⁹ Combining Article 12 of the CRPD and the General Comment No.1, SDM is regarded as a ‘legal system’ that will replace the adult guardianship system. In the SDM guidelines for nursing managers and managers of the elderly with dementia, however, SDM is regarded as a ‘support method’ of practicing Article 858 (Respect for the will of the adult ward and consideration for their personality) of the Civil Code.³³⁰ In other words, ‘SDM as a support method’ is subordinated to Article 858 of the Civil Code. From policy and legal studies

³²⁷ Refers to ‘5.2.2 Combined Models of Guardianship and Supported Decision-Making.’

³²⁸ In the circular of the first SDM guidelines addressed to local governments on March 31, 2017, the Ministry of Health, Labour, and Welfare of Japan states that ‘it is necessary to review the contents of the guidelines based on SDM practices.’

³²⁹ Refers to ‘1.3.1 (2) The CRPD and the General Comment No.1.’

³³⁰ Yasushi Kamiyama basically supports the latter view but does not agree with the opinion that SDM is subordinated to the Civil Code. Yasushi Kamiyama, ‘Recent Policy Trends regarding Supported Decision-Making in Japan’ (2020) 72(4) [414] *The Doshisha Law Review* 445–467, 447–448. (in Japanese)

perspectives, it is questioned whether it is deserved necessary and enough to have the three SDM guidelines based on an idea of ‘SDM as a support method.’

1.2.3 Elder Abuse Prevention Law and Relevant Policy

(1) Elder Abuse Prevention Act

a. Law Framework

With the ageing of the population, elder abuse has become prevalent.³³¹ Although elder abuse is recognized as a social problem, the actual situation of abuse is not accurately understood, and effective countermeasures and prevention measures have not been explicitly established.³³² The issue of elder abuse was internationally taken up in the WHO Toronto Declaration on November 17, 2002 for its universal challenges and lack of legal framework.³³³ Japan has responded to abuse of the elderly and persons with disabilities by offering public intervention and legislation aimed at preventing damage. The *Act on the Prevention of Elder Abuse, Support for Caregiver of Elderly Persons and Other Related Matters* (Act No. 124 of 2005, hereinafter referred to as ‘Elder Abuse Prevention Act’) was enacted, and afterward the *Act on the Prevention of Abuse of Persons with Disabilities and Support for Caregivers* (Act No. 79 of 2011, hereinafter referred to as ‘Persons with Disabilities Abuse Prevention Act’) was enacted.³³⁴

³³¹ This part is an updated version of the previously published article in Japanese by the author: Yukio Sakurai, ‘Safeguarding Law for Vulnerable Adults at Risk of Harm: Focusing on Elder Abuse’ (2020)13 *Quarterly Journal of Comparative Guardianship Law* 3, 32. (in Japanese)

³³² Naomi Kanai remarks that it is essential to consider abuse as a human right issue, not just a social problem. Naomi Kanai, ‘Human Rights Violation in Private Area and Legal Regulation: Domestic Abuse and Enactment of Abuse Prevention Act’ (2009) 30 *Journal of Political Science* 17–41, 35–38.

³³³ Yongjie Yon et al, ‘Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-analysis’ (2017) 5(2) *Lancet Global Health* 147, 156.

³³⁴ These abuse prevention laws were enacted, following other two abuse-related laws: *Act on the Prevention, etc. of Child Abuse* (Act No. 82 of 2000) and *Act on the Prevention of Spousal Violence and the Protection of Victims* (Act No. 31 of 2001).

These two abuse prevention laws clarify the purpose of prevention of abuse of the elderly and persons with disabilities (each Article 1) and ensure that ‘caregivers’ and ‘care home staff members’ (social workers) could be held liable for abuse (each Article 2). The elderly refers to persons aged 65 or over (Article 2-1). The laws indicate the responsibilities of public and state authorities, including municipalities, in dealing with abuse by doing detections/responses. Namely, in the provisions of Article 6 (consultation, guidance, and advice) and below of the Elder Abuse Prevention Act, a municipality should provide consultations, guidance, and advice for the elderly and caregivers. When the municipality receives a report from the elderly or other relevant persons that he/she is subjected to elder abuse by a caregiver, the municipality promptly confirm the safety of the elderly (Article 9: measures in case of receipt of a report, etc. of abuse). In addition to taking measures to confirm the facts related to the above, the municipality examine the response with the parties who collaborate with the relevant municipality (i.e., elder abuse response partners) pursuant to the provision of Article 16 (organizational system for collaboration and cooperation).³³⁵

Municipalities are subject to administrative supervision responsibility for the elder abuse, but the response in practice depends on the size of municipality, its financial situation, its personnel scale, presence of relevant institutions and experts related to elder abuse, etc. These laws set out a legal responsibility for relevant institutions to cooperate in dealing with abuse prevention. Both abuse prevention laws include the clause of ‘promotion of adult guardianship system’ (i.e., Article 28 of Elder Abuse Prevention Act and Article 44 of Persons with Disabilities Abuse Prevention Act) that prefectures/municipalities should take necessary supports to promote the adult guardianship system as

³³⁵ Article 26 (research and studies) of the Elder Abuse Prevention Act stipulates that ‘the State is to perform an analysis of elder abuse cases and conduct research and studies on methods for properly handling elder abuse, methods for properly taking care of elderly persons, and any other matters that contribute to the prevention of elder abuse, the protection of elderly persons who have been abused, and to the provision of support for caregivers.’ Based on this Article, the annual survey of the responses to the elder abuse by prefecture/municipality nationwide is published.

one of possible abuse prevention measures.³³⁶ While a regional collaboration network based on the Basic Plan of the adult guardianship is established, it can be positively considered that adult guardians need to familiar with measures based on the abuse prevention laws and refine such tasks as detecting and reporting abuse cases. The adult guardianship and elder abuse prevention will be closer interlinked each other not only on legal basis but also in practice through such activities.

b. Issues of Elder Abuse Prevention Act

It is worthwhile to recognize that Japan has developed abuse prevention legislation, but the issue is its methodology.³³⁷ The associations of law professions have expressed their views on Japan's abuse prevention laws, questioning the effectiveness of the laws, because of the vagueness of legal responsibilities of the public agencies and practitioners, and stressing the need for law reform.³³⁸ It is commonly pointed out that the abuse prevention laws in Japan may limit the definitions of abuse, narrowing the scope of abuse to circumscribed legal aspects. It can be said that this is in part due to

³³⁶ The adult guardianship system is often used by the municipality mayor to lodge a petition to the family court to appoint the adult guardian. This is mainly for the elderly mother who is proved to be a victim of her adult child (normally her son) in order to make the elder mother independently live on her pension away from her son. This is so called a '80/50 problem (or a '90/60 problem),' a typical financial abuse case in Japan, after the fact that a son aged 50s (or 60s) financially depends on his elder mother aged 80s (or 90s) on her pension.' Ichiro Watanabe, 'Limitations of the Adult Guardianship System from the Safety Net Perspective: From Rescue to Preventive Advocacy' (2021) 15 *Quarterly Journal of Comparative Guardianship Law* 36, 63. (in Japanese) *

³³⁷ Atsushi Hirata, 'Issues and Challenges in the Elderly Abuse Prevention Act' (2010) 1411 *Monthly Jurist* 116, 121. (in Japanese); Atsushi Hirata, 'How to Protect the Rights of the Elderly' (2021) October 2021 *Monthly Welfare* 33, 38. (in Japanese)

³³⁸ Refers to the Japan Federation of Bar Associations, 'Opinion on Amendment of the *Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons* and Other Related Matters' (Web Page, September 26, 2010) (in Japanese) * <https://www.nichibenren.or.jp/document/opinion/year/2010/100916_2.html>; Japan Federation of 'Shiho-Shoshi' Lawyer's Associations and Adult Guardian Center Legal Support 'Proposals for Revision of the *Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons* and Other Related Matters' (Web Page, April 15, 2009) (in Japanese) * <https://www.shiho-shoshi.or.jp/association/info_disclosure/opinion/3585/>.

some historical background of abuse research in Japan.³³⁹ The Japan Academy for the Prevention of Elder Abuse, a multidisciplinary society that study elder abuse, has found a tendency of few research articles on ‘abuse intervention and policies’ in that research area while they have many articles on ‘the actual situation of elder abuse prevention activities and the experience of nursing care staff for abuse.’³⁴⁰ In addition, a financial exploitation and self-neglect, which are social issues in developed countries in global scale, are not explicitly defined as abuse in laws. Therefore, the definitions in abuse prevention laws in Japan partly differ from their definitions and scope in other countries/areas as well as the WHO.³⁴¹

In fact, after legislation is passed, there is a tendency for elder abuse to slightly increase or not to so decrease statistically. The number of detected elder abuses by nursing home care workers was 595 in 2020 (vs. 644 in 2019 and 621 in 2018) and the number of detected elder abuses by caregivers was 17,281 in 2020 (vs. 16,928 in 2019 and 17,249 in 2018).³⁴² It can be said that despite the establishment of abuse prevention laws, Japan’s current legal system makes the effective treatment and

³³⁹ Katsuji Yamamoto states, referring to the historical background of abuse research in Japan, that (i) the definition of elder abuse in the U.S. was not so precise to be adopted in legislation, (ii) it was unable to give a precise definition of elder abuse without enough empirical data, and (iii) a large-scale and detailed research survey and analysis of elder abuse has not been performed without a precise definition of elder abuse. Katsuji Yamamoto, ‘Study on the Definition of Elder Person Abuse’ (2014) 50(2) *The Japanese Journal of Law and Political Science* 61, 78. (in Japanese)

³⁴⁰ This research is based on analysis of a total of 72 articles published in the journal of the said society in 2008–2017. Naoko Yamashita and Akemi Nakazawa, ‘Analysis of Research Trends and Prevention of Elderly Abuse Prevention’ (2019) 60 *Bulletin of Wayo Women's University* 153, 161. (in Japanese) *

³⁴¹ Tadashi Wada et al, ‘Detection of Elder Abuse in Japan not Covered by the Elder Abuse Prevention Law in Comparison with WHO Definitions of Elder Abuse’ (2022) 18(1) *Journal of the Japan Academy for the Prevention of Elder Abuse* 72, 86. (in Japanese)

³⁴² Refers to the Ministry of Health, Labour, and Welfare of Japan, *Elder Abuse Annual Survey in FY2020* (Web Page, December 2021) (in Japanese) * <https://www.mhlw.go.jp/stf/houdou/0000196989_00008.html>.

prevention of elder abuse challenges.³⁴³ There is the need for a more accurate understanding of the actual situation of elder abuse, although the summary report of the detected elder abuse becomes available by law.³⁴⁴ Ministry of Health, Labour, and Welfare of Japan reported a total 17,281 of the detected elder abuse cases by caregivers in 2020. Among these abuse cases, the Ministry reported 2,588 cases financial abuse by caregivers, including family members, 5,397 cases economic poverty, including pension exploitation, and 2,713 cases conflict of interest for property and inheritance within family members.³⁴⁵

It can be assumed that there are a lot of undetected but hidden or potential elder abuse cases behind the detected ones, which cannot be grasped in annual statistics. One research project recommends an idea to combine the summary report by law and the research project by local agency, including a ‘gray zoon’ detection.³⁴⁶ In the latter research, the activities for possible elder abuse will be carried out by local agency in a specific area for a certain period at random basis and to make data base in the local government for their response and prevention practices. The methodology of the research must be improved to achieve a more accurate understanding of the actual situation of abuse step by step without violating human rights of people concerned. Another research recommends an idea that the reporting obligation in law should be limited to practitioners working in a position that allows easy detection of abuse by nursing home care workers while imposing certain legal sanctions

³⁴³ The article suggests the possible existence of a ‘gray zoon’ in elder abuse, which hints many suspects of abuse but are not certified. With a strict definition of elder abuse, the scale of elder abuse is underestimated, and thus grey zoon is so important to understand the reality by a local government’s initiative. Kyoko Nakamura, ‘A Study about on the Definition of “Elder Abuse” and the Help of our Country: Suggestion from a British Legal System’ (Doctoral dissertation, Kumamoto Gakuen University, 2014). (in Japanese)

³⁴⁴ Article 26 (research and studies) of the Elder Abuse Prevention Act.

³⁴⁵ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Elder Abuse Annual Survey in FY2020*. (in Japanese)

³⁴⁶ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Research Project on Factor Analysis of Elder Abuse and Establishment of Continuous Utilization and Feedback Methods of Survey Results* (Dementia Care Research Training Center Sendai, Online, March 2017) (in Japanese) * <https://www.mhlw.go.jp/file/06-Seisakujouhou-12300000-Roukenkyoku/53_touhokuhukushikai.pdf>.

for any breach of that duty of practitioners, considering their legal responsibilities.³⁴⁷ This idea may be from the U.S. elder abuse method of adult protection services with strict application of law and regulations.³⁴⁸

Elder abuse has been recognized as a serious problem in the 21st century.³⁴⁹ The mechanism of abuse is complicated, and it can be understood that interdisciplinary studies on abuse is still premature. Conducting an international dialogue and comparative law studies of abuse status surveys among countries/areas is essential, referring to acknowledgements of experience and wisdom of other countries/areas. In this sense, abuse is a global issue.³⁵⁰ On the other hand, abuse is a local issue, where the responses to abuse cases and prevention measures by public agencies must be understood and accepted by people in the jurisdiction. In this regard, like the adult guardianship system, law and policy design and its operation should be considered to meet the mentality and lifestyle of people. It can be assumed necessary to discuss how to organize and effectively utilize the social resources of the jurisdiction, including municipality, core agencies, community-based general support centers and so on. Further discussion under the concept of legal advocacy, not as a mono policy of elder abuse, will be conducted in Chapter 5.³⁵¹

³⁴⁷ Norio Higuchi, 'Elder Abuse and Responsibilities of Professionals' (2018) 8 *Journal of Law and Political Science* 134, 102. (in Japanese) *

³⁴⁸ Refers to '4.4.3 (a) Elder Abuse Legislation in Australia and England.'

³⁴⁹ A shocking incident occurred at *Tsukui Yamayurien*, a facility for people with intellectual disabilities in Kanagawa, on July 26, 2016, where a former caregiver working at the facility killed 19 people with disabilities and injured 27 people with disabilities/3 facility staff. During the trial, many issues were debated even outside the court, including the quality of support, and supported decision-making. Shoichi Sato, 'Social Exclusion for Persons with Disabilities' (2019) 85 *Sociology of Law* 58, 73. (in Japanese) *; Kazumi Ishiwata, 'Tsukui Yamayurien Incident and Supported-Decision Making: Community Life of People with Severe Disabilities' (2021) 17 *Journal of the Graduate of Toyo Eiwa University* 1, 12. (in Japanese)

³⁵⁰ WHO adopted a policy on *Ageing and Healthcare* at the 2016 General Assembly and is working with member countries and related institutions to deal with elder abuse. World Health Organization (WHO), *Elder Abuse* (Web Page, June 6, 2018) <<https://www.who.int/news-room/fact-sheets/detail/elder-abuse>>.

³⁵¹ Refers to '5.2.1 Roles and Legal Status of a Core Agency for Community Support.'

(2) Relevant Policy in Community Support

(a) Monitoring in the Community-based Integrated Care System

Practitioners in community—such as welfare volunteers, aged care manager, helpers, and medical social workers—who regularly see the elderly are usually aware of changes in the elderly.³⁵² Based on the awareness of local welfare and other relevant officers, a system could be set up for reporting elder abuse to the community-based general support center, the municipality, and the police.³⁵³ Through an immediate response system, issues in the local community could be quickly resolved.³⁵⁴ This is however a post-treatment system that responds only after the damage due to elder abuse has happened and would not lead to prevention. Therefore, a step-by-step approach by the practitioners to monitor community people would be considered most effective, particularly if it targets the elderly living alone in the community. In fact, some municipalities already carry out steady

³⁵² ‘Welfare volunteers’ are persons commissioned by the Minister of Health, Labour, and Welfare of Japan, who always stand in the position of residents, provide necessary assistance, and strive to promote social welfare in each region.’ Welfare volunteers are prescribed in the *Commissioned Welfare Volunteers Act* (Act No. 198 of 1948). Ministry of Health, Labour, and Welfare of Japan, *Welfare Volunteers and Child Welfare Volunteers* (Web Page, n/a). (in Japanese) * <https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/hukushi_kaigo/seikatsuhogo/minseiiin/index.html>.

³⁵³ A questionnaire survey in Kyoto finds that approximately thirty per cent of the care manager reports when they convince the existence of elder abuse and approximately forty percent of the care manager hesitates to report as they appreciate the feelings of the users and their family members. Mitsu Haruna, ‘Present Situations on the Responses of Care Managers to the Case of Elder Abuse: Issues Extracted from a Questionnaire Survey at Care Managers and Community General Support Centers’ (2020) 28 *Hanazono University Faculty of Sociology Research Bulletin* 11, 19. (in Japanese) *; According to a questionnaire survey to all the in-home care support agencies conducted in Kyoto city, approximately 80 per cent care managers dealt with cases of abuse or suspected abuse, and approximately 70 per cent felt signs of abuse when visiting the user’s home. Mitsu Haruna, ‘Practice of Abuse Discovery and Report of Care Manager’ (2021) 29 *Hanazono University Faculty of Sociology Research Bulletin* 1, 8. (in Japanese) *

³⁵⁴ This is the common view shared by the administrative officers in charge of elder abuse/the adult guardianship interviewed in August 2016 by the author in Tokyo, Kanagawa, Chiba, and Saitama prefecture offices; In fact, 29.6 per cent reporting of elder abuse at home to municipalities were carried out by aged care managers who regularly visited the elderly at home or in facilities in 2015. Ministry of Health, Labour, and Welfare of Japan, *Research Project on Factor Analysis of Elder Abuse and Establishment of Continuous Utilization and Feedback Methods of Survey Results* 33.

activities with ordinances approved by the local parliament.³⁵⁵ Commercial corporations and shops that regularly contact the elderly in the community, such as a local bank, courier, or merchant, will also watch people and report the event to the support center. This function of commercial corporations and the like in the community is also encouraged by the Expert Commission's deliberation.³⁵⁶

There is a community-based general support center, which is a welfare agency mainly established by a municipality and is required to manage the health of the elderly in the community through a 'team approach' of three kinds of practitioners, namely public health nurses, social workers, and care support specialists.³⁵⁷ The purpose of a community-based general support center is to comprehensively support the health care, aged care and any welfare of the elderly by providing such assistances based on the Paragraph 1, Article 115–46 of the *Long-Term Care Insurance Act 1997*. This center provides general information on the adult guardianship system to people in the community.³⁵⁸

³⁵⁵ For example, the city of Kodaira (Tokyo) and the city of Nagareyama (Chiba) in the suburbs of the greater Tokyo adopted ordinances for watching over elderly in 2019. Setagaya district (Tokyo) enacted on October 1, 2020, *Ordinance for Hope to Live with Dementia in Setagaya District* to deal with elderly people with dementia by medical care, aged care, and community-monitoring, based on deeper understandings of dementia in community; Tokyo Metropolitan Health and Welfare Bureau published a guidebook on *Watching the Elderly*. Arakawa district in Tokyo has been watching over the elderly as a district project since 2011. Tokyo Metropolitan Health and Welfare Bureau, *Guidebook on Watching the Elderly* (Web Page, January 2018). (in Japanese) * <<https://www.fukushihoken.metro.tokyo.lg.jp/kourei/koho/mimamoriguidebook.html>>.

³⁵⁶ Refers to the seventh Expert Commission meeting held on July 30, 2021.

³⁵⁷ A 'community-based general support center' is an agency of the community-based integrated care system. Most centers are operated by corporations or NPOs in a delegation agreement with the municipality. Ministry of Health, Labour, and Welfare of Japan, *Establishing 'The Community-Based Integrated Care System'* (Web Page, n/a) <https://www.mhlw.go.jp/english/policy/care-welfare/care-welfare-elderly/dl/establish_e.pdf>.

³⁵⁸ Keiichiro Harada defines community-based integrated care system as 'a care that can be conceptualized as a bundle of elements, such as medical care, long-term care (aged care), prevention, and life support, on the premise that a "residence" that meets the needs of a place of living is secured.' Keiichiro Harada, 'Legal Evaluation of Community-based Integrated Care System' (Special Feature: Reexamination of Laws and Policies Supporting Social Security: 1st Social Security Law Forum) (2019) 10 *Social Security Law Research* 91–118, 117. (in Japanese) *; Peipei Song and Wei Tang, 'The Community-based Integrated Care System in Japan: Health Care and Nursing Care Challenges Posed by Super-aged Society' (2019) 13(3) *Bioscience Trends* 279, 281.

(b) Subsidies for Expenses Related to the Use of the Adult Guardianship System

After the revision of the *Act on Social Welfare for the Elderly* in 2012, Article 32-2 (improvement of the system related to guardianship, etc.) stipulates that the municipalities should implement ‘training program’ and make ‘recommendations to the family courts of persons who can perform their duties properly and [provide] other necessary measures,’ and prefectures should provide advice and the other assistance’ to the municipalities. Under this law, the municipalities have developed activities to inform people of the adult guardianship system by holding seminars and training program for community guardians while subsidizing the NPO agencies that host them. The number of community guardians appointed was 320 cases (0.8 per cent of the adult guardians) in 2021.³⁵⁹ Some municipalities have set up support agencies, such as ‘adult guardianship center,’ and most municipalities subsidize the petition expenses lodged of the mayors of municipalities and/or remuneration for the adult guardianship.³⁶⁰ There are some local parliaments to issue ordinances to clarify their subsidies and

³⁵⁹ A total of 18,000 have participated in the community guardian training program until April 2021, and a total of 1,577 have been appointed as community guardians by the family courts, 2,199 work for guardianship NPO staff, and 2,820 work for Support Program for Self-reliance in Daily Life (The research by the Ministry of health, labour, and Welfare as of October 1, 2021). There is room to consider how to utilize these trained human resources that are not fully used. The Courts of Japan, *Overview of Adult Guardianship-Related Cases in 2021*. (in Japanese) *; In order to activate community guardians, institutional supports would be important, such as support of the guardian implementing agency, dissemination and enlightenment of the system, guardianship remuneration, support considering the life stage of the community guardian, and protecting community guardians’ privacy. Nobuko Nagano and Atsushi Ozawa, ‘The Situation and Problems of the Guardianship Activities of Citizen Guardians: A Qualitative Analysis of Open-ended Statements in the Questionnaire’ (2021) 62(1) *Japanese Journal of Social Welfare* 52, 68.

³⁶⁰ These are subsidy systems to support low-income elderly people who need to use the adult guardianship system. The subsidy is granted by the municipalities based on a regional support project grant to be shared by the national government and the local governments (i.e., prefectures and designated municipalities). A typical service-receiving aid would be a long-term care insurance service for the elderly who have severe dementia and no relatives to provide support. In such a case, the expenses required for petition for the adult guardianship system (e.g., petition and registration fees, certificate cost) and a part of the remuneration for adult guardians would be subsidized upon approval within the budget. In April 2021, approximately 90 per cent of the municipalities (1,741) offered subsidies to the elderly and persons with disabilities to

support project to the adult guardianship system. The statistics indicate that the number of petitions to the adult guardianship system by municipality mayors are increasing. In 2021, there were 9,185 petition requests by municipal mayors, accounting for 23.3 per cent of the total number of petition requests, an increase of 4.1 per cent compared to the previous year. The petition of municipal mayors is the highest, then the principal's adult child's petition: 20.9 per cent and the principal's petition: 20.8 per cent follow.³⁶¹ The number of elderly people with insufficient mental capacity and living alone without property or close relatives is increasing. Thus, financial assistance should be provided for such economically disadvantaged people using this program, who are assumed to be potential users of the adult guardianship system in personal protection.

(c) Support Program for Self-Reliance in Daily Life

a. Current Status of the Support Program

The previous project, Community Welfare Advocacy was inaugurated in October 1999 based on Article 2-3 (xii) of the *Social Welfare Act*.³⁶² This is a social welfare system that supports people with insufficient mental capacity to use simple welfare services and manage their financial arrangement for daily use. In 2009, the project was renamed Support Program for Self-reliance in Daily Life (hereinafter referred to as 'support program'). The users are usually requested to pay a fee of 1,200 yen (US\$10.4) per service from their pockets twice a month on average unless otherwise decided.³⁶³ The number of users of the support program was 56,761 (National Council of Social Welfare) as of

cover the petition expenses and remuneration of guardians. Ministry of Health, Labour, and Welfare of Japan, *Research Survey on Measures to Promote Adult Guardianship System in 2021* (Web Page, July 2022). <<https://www.mhlw.go.jp/content/000973039.pdf>>.

³⁶¹ Refers to the Courts of Japan, *Overview of Adult Guardianship-Related Cases in 2021*. (in Japanese) *

³⁶² Article 2-3 (xii) of the *Social Welfare Act* stipulates 'the appropriate use of welfare services, free of charge or at low cost.'

³⁶³ Refers to the National Council of Social Welfare of Japan, *For Future Development of the Support Program for Self-Reliance in Daily Life: Fact-Finding Report in the Fiscal Year of 2019* (Web Page, March 2020) (in Japanese) * <https://www.shakyo.or.jp/tsuite/jigy/research/20190419_nichiji.html>.

March 2020. This is based on the national treasury subsidy project financially shared by the national and local governments (i.e., prefectures and designated cities) at a ratio of 50:50. The purpose of the support program is to support adults with insufficient mental capacity by assisting them in use of welfare services or the like so that they may live independent lives in communities. The support program includes assistance, such as help with welfare services, complaint solution systems, administrative procedures for residence renovation or rental, and monetary deposits and withdrawals. The entities in charge of this support program are 1,245 Councils of Social Welfare under the supervision of 47 prefecture-based Councils of Social Welfare over Japan and 3,281 specialists (full-time or part-time) and 15,808 support staff (part-time) work for this support program.³⁶⁴ This support program selects applicants that meet two conditions: (i) persons with insufficient mental capacity; (ii) persons qualified to understand the contract related to the assistance service program. Consequently, the users are limited to persons with mild cognitive impairment (MCI) who can understand the contract. The qualification is verified by each Council of Social Welfare, to which the program fund is granted by the local government.

b. Issues of the Support Program

Regarding the administrative process of making the support program, the empirical analysis on the community welfare advocacy project during the inauguration period, which focuses on the executive documents to clarify the decision-making process in the Ministry, finds conflicting logics between ‘the needs of people with insufficient mental capacity’ and ‘the feasibility to expand the

³⁶⁴ The Social Welfare Councils are regulated by Article 109 of the *Social Welfare Act* to provide welfare service over Japan. Most of expenditures incurred in this program is mainly for human resources who provide assistances; National Council of Social Welfare of Japan, *For Future Development of the Support Program for Self-Reliance in Daily Life: Fact-Finding Report in FY 2018*. (in Japanese) *

support program nationwide.’³⁶⁵ Another policy analysis, which focuses on the provisions of laws and regulations of the program, finds ‘no substantial improvements of relevant program has been made although the necessity of improvement was frequently recalled’ by users and its stakeholders.³⁶⁶ In the welfare administration, it is hard to say that this support program emphasizes on advocacy of vulnerable adults with insufficient mental capacity as a policy.³⁶⁷

Currently, there are positive and negative opinions on the support program. The positive one is mainly expressed by welfare practitioners, who stress that this support program provides a welfare service to meet the needs of adults with insufficient mental capacity, and the support program is easy to access with little personal and financial resistance to the principal or its family. Thus, more grants should be offered to promote the support program on a larger scale of application.³⁶⁸ The negative view is advocated by a civil law scholar, who thinks that persons with mildly insufficient mental capacity should use the ‘assistance’ or ‘curatorship’ type of the adult guardianship system rather than the welfare measures.³⁶⁹ The latter opinion theoretically makes sense but, in fact, 59.0 per cent of the users who newly joined this support program in July 2020 were receiving public financial assistance—i.e., more than half of new users had no choice but to use this program due to their disadvantaged

³⁶⁵ Hiroya Noda, ‘Logics and Issues related to the Design of Community Welfare Advocacy Projects during the Project Formation Period’ (2022) 70 *Bulletin of the Faculty of Education and Welfare, Aichi Prefectural University* 35-48, 47. (in Japanese) *

³⁶⁶ Hiroya Noda, ‘Development and Characteristics of Support Program for Using Welfare Services in Services for Independence in Daily Living Program’ (2022) 13 *Bulletin of the Graduate School of Human Development* 47-59, 58. (in Japanese)

³⁶⁷ Ibid.

³⁶⁸ This comment was stated at the Expert Commission and has been included in the Interim Verification Report. Ministry of Health, Labour, Welfare of Japan, *Interim Verification Report on Basic Plan for Promoting Adult Guardianship System* (Web Page, March 17, 2020) 16. (in Japanese) * <<https://www.mhlw.go.jp/stf/shingi2/0000212875.html>>.

³⁶⁹ This opinion, which is expressed by a civil law scholar at the Commission’s session (October 9, 2019), points out that the border of the scope is vague between the support program and the adult guardianship system. This aspect may happen due to the conflicting logics in the program as Hiroya Noda remarks. Afterward, the civil law scholar has changed mind to accept the support program to see it with the adult guardianship in a reasonable balance (April 21, 2021).

financial eligibility. Due to their disadvantaged financial eligibility, some users who have developed dementia cannot apply for a petition to the adult guardianship system and stay at the support program. The border of both programs is a systemic issue.

Since the growth of the number of the support program users has slowed down for few years, it is understood that this support program has almost reached the limit of institutional capacity, and the appropriate utilization of social resources has become an issue.³⁷⁰ However, if they try to increase the institutional capacity rapidly, they are exposed to the risk of misconducts of the supporters. In fact, the monitoring system at prefecture-based Councils of Social Welfare is also said to be full of capacity, and the issue is to expand the capacity of human resources for monitoring. The support program resources must be properly distributed to those in need of support, on the one hand, and it must be monitored and supervised so that misconducts of the supporter due to deterioration of the support program do not occur, on the other hand. It is understood that the projection of the support program service demands nationwide has not been researched yet, and this support program is practically implemented as much as the grants are available. It can be concluded that this support program needs a drastic review in the respects of the border between this support program and the adult guardianship system, and the scale of subsidies and human resources needed for the support program, including prefecture-based Councils of Social Welfare monitoring capacity.³⁷¹

1.3 Summary: Legal Advocacy to Meet People's Multiple Needs

A systematic review of the adult guardianship system and relevant laws/policies, the theories of

³⁷⁰ Atsushi Hirata, 'Current Status and Issues of Support Program for Self-Reliance in Daily Life Projects from the Perspective of Advocacy' (2021) *Advocacy and Abuse Prevention* 28, 31. (in Japanese) *

³⁷¹ Regarding the border between the support program for self-reliance in daily life and adult guardianship system, the Akashi City, Hyogo prefecture utilizes their own assessment sheet with citizens in the department to deal with both program and system. Yoshinori Kayama, 'About the Usefulness of the Assessment Sheet Devised by Akashi City: To Distinguish between the Adult Guardianship System and the Support Program for Self-Reliance in Daily Life' (2022) 805 *Hougaku Seminar* 61, 67. (in Japanese)

civil law related to the adult guardianship system, the theories of the social security law on advocacy, and the main functions that are needed to support and protect vulnerable adults is done. The author's stance in regard to the civil law and the social security law theories is clarified. Through this arrangement, the scope of the legal and policy system and the main functions of supporting and protecting adults with insufficient mental capacity are clarified. Based on this systematic review, the research framework of this dissertation is stated below.

First, the subject of this dissertation is basically specified for legal acts involving the principal, and interdisciplinary legal studies based on the civil law and the social security law are applied. Legal affairs after the death of the principal are outside the scope of this dissertation. We will develop a legislative theory on the support and protection of vulnerable adults in Japan based on comparative law analysis, particularly the revision of the laws in Australia. Second, the subject of legal and policy systems, such as the adult guardianship system, supported decision-making, elder abuse prevention law, and relevant policies (i.e., the 'support program for self-reliance in daily life' and 'community-based integrated care system') is included in this dissertation. Third, we will proceed with the discussion with the assumption that the civil and relevant laws concerning the adult guardianship system will stay status quo. Focusing on supported decision-making, which will become an independent legal system, and we envision a legislation on supported decision-making to coexist with the adult guardianship system. Supported decision-making is based on existing guidelines set by the Ministry of Health, Labour, and Welfare of Japan. Fourth, Discussions on the effects of the new coronavirus infections are beyond the scope of this dissertation.

Then, the subject of legal and policy systems, such as the adult guardianship system, supported decision-making, elder abuse prevention law, and relevant policies (i.e., the 'support program for self-reliance in daily life' and 'community-based integrated care system') is reviewed. Currently, legal protection for adults with insufficient mental capacity in Japan is mainly provided through the statutory guardianship in the Civil Code. It is a fact, however, that most people prefer to use informal

arrangements. Supported decision-making has been incorporated into some social security laws, and guidelines for nursing home managers, social workers for people with dementia, and adult guardians have been published. Although elder abuse prevention law and policy to protect elderly people from abuse has been adopted, there is no clear linkage between those laws.

With this situation, it is practically difficult for people to understand the entire picture of the legal framework of legal advocacy from users' viewpoint, and it cannot be said that people have multiple options for consumer choice for community support. Another aspect to consider concerns how to establish adult protection law and policy to respond to adults with insufficient mental capacity who have no relatives or close friends to support them, have no financial asset or may be abused by their relatives or close friends. As pointed out as above, Japan has issues to be considered in adult support and protection.

Chapter 2

Vulnerability Approach and Autonomy

2.1 Introduction

The purpose of Chapter 2 is to clarify theoretical foundation of an adult support and protection, focusing on the vulnerability approach and the relevant considerations.³⁷² There will be a conceptual discussion of an alternative law framework based on the vulnerability approach. It is seen as an idea of safeguarding law in common law jurisdictions that vulnerable adults or adults at risk of harm must be protected by law and public policy from abuse. It can be understood that the adult guardianship system, supported decision-making, and safeguards against elder abuse are regarded as one package of legislation, and are embodied in public policy. This one package of legislation is called ‘adult support and protection legislation’ in this dissertation. An adult support and protection legislative system can be assumed to be essential for the state responsibility in an aged society. This is an attempt to conceptualize adult support and protection through the safeguarding laws, which will make it possible for future studies to follow and explore this legal concept.

The following three questions will be examined: (i) how are ageing issues being addressed in the world and Japan, and how should legislative laws and policy deal with ageing?; (ii) what does the vulnerability approach reveal in an alternative legislative policy and laws to fit better with the reality, and how do safeguarding laws protect adults in common law jurisdictions?; and (iii) how do the relevant considerations, such as the capability approach and autonomy, including relational autonomy, affect adult protection, and how essential will an idea of adult support and protection legislation be in Japan?

³⁷² This chapter is an updated version of the previously published article by the author: Yukio Sakurai, ‘Vulnerability Approach and Adult Support and Protection: Based on Safeguarding Law for Adults at Risk’ (2021) 11(1) *The Journal of Aging and Social Change* 19, 34. <doi:10.18848/2576-5310/CGP/v11i01/19-34>.

2.2 Vulnerable Adults

2.2.1 The Ageing of Population

(1) Global Trend

An ageing society refers to one in which the demographic ration of the elderly aged 60 or 65 and over is considerably higher compared to past available records.³⁷³ A definition of explicitly what range of people is the elderly has not been established. According to the UN, the elderly comprise the population aged 60 and over, while in develop countries, including Japan, the World Health Organization (hereinafter referred to as ‘WHO’) consider the elderly to fall within the range of age 65 and over. Nevertheless, the global trend of ageing is apparent.³⁷⁴ By area, Asia and Europe are ageing the most rapidly, while Africa is experiencing far less ageing. The UN understands the global trend of ageing and how ageing will affect countries/areas in the future. The UN predicts that ‘in the coming decades many countries are likely to face fiscal and political pressures in relation to public systems of health care, pensions, and social protections for a growing older population.’³⁷⁵ Each country/area is responsible for coping with the challenges of ageing while the UN have been debating a possible convention on the rights of older persons.³⁷⁶

³⁷³ It is categorized in Japan as an ‘ageing society’ with the ageing ration 7 to 14 per cent, an ‘aged society’ with the ageing ration 14 to 21 per cent, and a ‘super-aged society’ with the ageing ration over 21 per cent. Ageing ratio refers to per centage of population aged 65 and over out of the national population.

³⁷⁴ There were 703 million persons aged 65 years or over in the world in 2019 and the number of older persons is projected to 1.5 billion in 2050. Globally, the share of the population aged 65 years or over will increase from 9 per cent in 2019 to 16 per cent by 2050. By 2050, one in six people in the world will be aged 65 years or over and one in four persons living in Europe and Northern America will be aged 65 or over. UN, *World Population Ageing 2019: Highlights* (Online, 2019) <<https://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2019-Highlights.pdf>>.

³⁷⁵ Refers to the UN, *Ageing* (Web Page, 2019) <<https://www.un.org/en/global-issues/ageing>>.

³⁷⁶ Israel Doron and Itai Apter. ‘The Debate Around the Need for an International Convention on the Rights of Older Persons’ (2010) 50(5) *Gerontologist* 586, 593.

A serious problem faced worldwide is the rapid increase of the elderly with dementia in proportion to the ageing population.³⁷⁷ Dementia is referred to ‘a syndrome in which there is deterioration in memory, thinking, behavior, and the ability to perform everyday activities.’³⁷⁸ According to the WHO, over 50 million people have dementia in the world, and the number of these people will almost triple by 2050.³⁷⁹ Dementia is one of the major causes of disability and dependency among the elderly. It has a physical, psychological, social, and economical impact, not only people with dementia, but also on their caregivers, relatives, and society at large.³⁸⁰ Importance must be given to not only the medical model but also social model of dementia. Namely, it should break down the prejudice against dementia and to foster tolerance to accept people with dementia in the community. For this reason, a movement of people with dementia themselves to express their own opinions about facilities and services has just begun.³⁸¹

(2) Japan Trend

Japan is becoming the most aged society in the world. In fact, the proportion of Japan’s population aged 65 and over was 29.1 per cent in September 2021.³⁸² The breakdown of 29.1 per cent by gender was 26.0 per cent for male and 32.0 per cent for female. It is expected to rise to 38.4 per

³⁷⁷ Refers to the Alzheimer’s Disease International, *World Alzheimer Report 2021* (Web Page, September 21, 2021) <<https://www.alzint.org/resource/world-alzheimer-report-2021/>>.

³⁷⁸ Refers to the WHO, *Dementia* (Web Page, January 27, 2021) <<https://www.who.int/news-room/facts-in-pictures/detail/dementia>>.

³⁷⁹ Ibid.

³⁸⁰ Care ethics of social worker is one of key factors to take care of elderly people with dementia, particularly self-neglect case. Angelika Thelin, ‘Care Ethics for Supported Decision-making. A Narrative Policy Analysis Regarding Social Work in Cases of Dementia and Self-neglect’ (2021) 15(2) *Ethics and Social Welfare* 167, 184.

³⁸¹ Some NPOs or associations in Japan support the elderly with dementia and those who support people with dementia. Yukio Sakurai, ‘Social Design Concepts on Dementia and Japan’s Adult Guardianship System’ (2017) 8 *Social Design Review* 142–47, 143–44.

³⁸² Refers to the Ministry of Internal Affairs and Communications of Japan, *News Release* (Web Page, September 19, 2021) (in Japanese) * <<https://www.stat.go.jp/data/topics/topi1210.html>>.

cent by 2065.³⁸³ Thus, Japan has become a super-aged society,³⁸⁴ and the population is even ageing further. The details are as follows: The number of people with dementia and mild cognitive impairment (hereinafter referred to as ‘MCI’) is increasing in proportion to the ageing population. Out of 36.40 million elderly people in September 2021, 6.00 million had dementia and 4.00 million had MCI. By 2025, the number of the elderly is expected to rise to 36.57 million, and 7.30 million of those are forecast to have dementia and another 5.89 million is expected to be afflicted with MCI.³⁸⁵ The number of elderly people aged 75 and over was 18.80 million (15.0 per cent) and it is expected to rise to 21.80 million in 2025 (17.8 per cent).³⁸⁶ By 2025, the baby boom generation will surpass 75 years of age, and Japan will face an extraordinarily super-aged society just four years later. At that time, Japan is predicted to have approximately 12.6 million people with insufficient mental capacity.³⁸⁷ That would account for one-third of Japan’s elderly population, who would constitute more or less 10 per cent of the total population. This serious issue caused from the demographic change is called ‘the 2025 problem’ in Japan.³⁸⁸

³⁸³ Refers to the Cabinet Office of Japan, *Annual Report on the Ageing Society 2021 [Summary]* (Web Page, 2022) 3. <<https://www8.cao.go.jp/kourei/english/annualreport/2021/pdf/2021.pdf>>.

³⁸⁴ Italy (23.6 per cent ageing ratio), Portugal (23.1 per cent), and Finland (23.0 per cent) follow Japan as the most aged countries in 2021. Ministry of Internal Affairs and Communications of Japan, *News Release* (Web Page, September 19, 2021). (in Japanese) *

³⁸⁵ Refers to the Cabinet Office of Japan, *Estimating the Number of the Elderly with Dementia (Figure 1–2–11), Annual Report on the Ageing Society FY 2018* (Web Page, 2019) (in Japanese) * <https://www8.cao.go.jp/kourei/whitepaper/w-2017/html/gaiyou/s1_2_3.html>.

³⁸⁶ Refers to the Ministry of Internal Affairs and Communications of Japan, *News Release* (Web Page, September 19, 2021). (in Japanese) *

³⁸⁷ Japan’s population is projected to have a total of 12.6 million people with insufficient mental capacity in 2025, comprising 7.3 million elderly people with dementia and 5.3 million people with intellectual/mental impairments and higher brain dysfunction.

³⁸⁸ Takao Komine, ‘Thinking About the 2025 Problem—Part 1: Population Change and the 2025 Problem’ (Online, November 7, 2016) (Speech delivered at the International Institute for Population Sciences held in Tokyo, 2015) <<https://npi.or.jp/en/research/2016/11/07130823.html>>.

Such an extraordinarily aged environment would significantly alter the Japanese society. Mental capacity is required for people to be accorded the right to legally engage day-to-day activities. As the number of the elderly with dementia increases, various incidents related to dementia are expected to increase. Such incidents include aimless wandering by the elderly, sudden disappearance of the elderly,³⁸⁹ increased cases of traffic accidents involving the elderly,³⁹⁰ and elder abuse. Elder abuse is referred to as ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship, where there is an expectation of trust that causes harm or distress to an older person.’³⁹¹ It can be of various forms: physical, psychological/emotional, sexual, financial. Or of a form that simply reflects intentional or unintentional neglect.³⁹²

An extraordinarily aged environment in Japan would have indirect effects on the society in a broader sense. For example, it would lead to change in people’s lifestyle, such as employment, consumption, and community in a 100-year life.³⁹³ It would increase financial burdens on the social welfare systems, including health care, aged care,³⁹⁴ and public pensions. Thus, the social systems,

³⁸⁹ Regarding sudden disappearance of the elderly, 19.2 per cent (i.e., 16,927 out of 87,962) of all missing persons in Japan who were reported to the National Police Agency in 2018 presumably had dementia. National Police Agency, *The Situation of the Missing Citizens in 2018* (Web Page, June 2019) 3. (in Japanese) * <<https://www.npa.go.jp/safetylife/seianki/fumei/H29yukuehumeisha.pdf>>.

³⁹⁰ Refers to the Cabinet Office of Japan, ‘FY2017 Situation of Traffic Accidents and Current Situation of Measures for Traffic Safety: Promotion of Traffic Safety for the Elderly’ in *White Paper on Traffic Safety in Japan 2018* (Web Page, 2019) <https://www8.cao.go.jp/koutu/taisaku/h30kou_haku/english/pdf/1-t1.pdf>.

³⁹¹ Refers to the WHO, *The Toronto Declaration on the Global Prevention of Elder Abuse* (Web Page, November 17, 2002) <https://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf>.

³⁹² Ibid.

³⁹³ The 100-year life planning is advocated by this book: Lynda Gratton and Andrew Scot, *the 100-Year Life: Living and Working in an Age of Longevity* (Bloomsbury Business; Reprint ed. 2017).

³⁹⁴ In this dissertation, the term ‘aged care’ is used, although other words are available, such as ‘elderly care’ and ‘long-term care’ after the name of law, *Long-Term Care Insurance Act* (Act No. 123 of December 17, 1997).

including the law frameworks, will be reconsidered to adjust to the reality.³⁹⁵ Whilst we have an assumption in the Civil Code that humans have capacity and autonomy. It is assumed that humans behave as rationally as possible.³⁹⁶ In this sense, humans without full capacity and autonomy are regarded as an exception, i.e., as those who fall short of mental capacity must be placed under the supervision of others, such as guardians, by law (Article 7, 11 and 15 of the Civil Code). This legal system faces a challenge in an aged society where the number of the elderly with dementia is sharply increasing. Such people will constitute approximately 10 per cent of the total population in 2025 as mentioned before. They should no longer be regarded as a minority and an exception in the Civil Code but should be included as citizen. It can therefore be argued that this is the time that the legal status of adults with insufficient mental capacity and the relevant law system were reconsidered.³⁹⁷ In other words, the legal status of adults with insufficient mental capacity should be explored from a broader perspective than the Civil Code of Japan (hereinafter referred to as ‘Civil Code’) framework and relevant laws.

2.2.2 The Elderly and Vulnerable Adults

(1) Age of the Elderly

The elderly is referred to people aged 65 and over in Japan, but in some countries/area or international agencies, the term refers to people aged 60 and over as mentioned before. There is no

³⁹⁵ The Great East Japan Earthquake in March 2011 highlighted the issues of a super-ageing society in natural disasters, particularly the need for community-based support system. Naoko Muramatsu and Hiroko Akiyama, ‘Japan: Super-Aging Society Preparing for the Future’ (2011) 51(4) *The Gerontologist* 425, 432.

³⁹⁶ Martha Albertson Fineman criticizes that the prototype of the legal subject ignores vulnerability and dependency. Martha Albertson Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4 *Oslo Law Review* 133–49, 148–49.

³⁹⁷ For example, Hiroshi Kobayashi, a welfare practitioner, proposes a conceptual model to consider a vulnerable adult as a human standard rather than a healthy adulthood, that, he assumes, better suites the society. The transformation of human model is said to be a shift of perception from a ‘strong individual’ to a ‘weak individual’ based models. Hiroshi Kobayashi, ‘Creating a Place for Supported Decision-Making through the Transformation of Human Image’ 64 *Adult Guardianship Practices* 21, 28. (in Japanese) *

internationally standardized definition of the elderly.³⁹⁸ In fact, laws that indicate the age of the elderly in Japan are not unified. For example, the age 55 is stipulated in the *Ordinance for Enforcement of the Act on Stabilization of Employment of Elderly Persons* (Article 1, Ordinance of Ministry of Labour of Japan No. 24 of 1971), the age of 60 in the *Act on Securement of Stable Supply of Elderly Persons' Housing* (Article 52, Act No. 26 of 2001), the age of 65 in the *Act on Assurance of Medical care for Elderly People* (Article 32, Act No. 80 of 1982), and the age of 70 in the *Road Traffic Act* (Article 5(4) and 74, Act No. 105 of 1960).

Under such circumstances, a joint working group of the Japan Gerontological Society/the Japan Geriatrics Society decided in 2017 to categorize people aged 65 to 74 as ‘the associate elderly’; people aged 75 to 89 as ‘the elderly’; and people aged 90 and over as ‘the super elderly.’³⁹⁹ The same working group expressed the opinion that the elderly should be people aged 75 and over. In contrast, the *Age Discrimination Act of 1975* indicates in the U.S. that it prohibits discrimination based on age in programs and activities receiving federal financial assistance.⁴⁰⁰ This federal law has had a significant impact on the elimination of age discrimination. The elimination of age discrimination is gradually occurring in Japan. It can be therefore understood that the definition of the elderly is set as a statistical or analytical convenience.

The elderly's health status and property possessions vary widely among individuals, and it is difficult to place the elderly aged 65 and over in one group. The elderly used to refer to those who had reached retirement, but now this retirement term can last 25 to 35 years in 100-year life. For this reason,

³⁹⁸ This is the article to discuss what the legal age is by chronological, biological, and subjective age: Alexander A. Boni-Saenz, ‘Legal Age’ (2022) 63(2/3) *Boston College Law Review* 521, 569. <<https://lawdigitalcommons.bc.edu/bclr/>>.

³⁹⁹ A Joint Working Group of the Japan Gerontological Society and the Japan Geriatrics Society, ‘Recommendations from the Japan Gerontological Society/the Japan Geriatrics Society Definition Study Working Group (Overview) on the definition and classification of the elderly’ (Online, January 5, 2017) (in Japanese) * <https://www.jpn-geriat-soc.or.jp/proposal/pdf/definition_01.pdf>.

⁴⁰⁰ Refers to the U.S. Department of Labor, *Age Discrimination* (Web Page, n/a) <<https://www.dol.gov/general/topic/discrimination/agedisc>>.

Lawrence A. Frolik points out that it is necessary to divide the elderly into three age groups, for example, age 65 to 74, age 75 to 84, and age 85 and over.⁴⁰¹ This is because the lives of the elderly in each group vary, and the required legal actions also differ. This observation generally coincides with the working group's opinion.

(2) Characteristics of the Elderly

Some elderly people may be the victims as well as the perpetrators in crimes. Japan's National Police Agency reported 13,154 cases of 'special fraud'⁴⁰² in 2020, such as remittance fraud and non-remittance fraud, which amounted to a loss of 21,480 million yen (US\$ 186.8 million) by victims. Among these cases, 85.7 per cent of the victims of special fraud were the elderly and the average damage per case was 2.78 million yen (US\$ 24 thousand). These totals comprise only fraud reported to the police, and do not represent the total amount of financial fraud damages that occurred. On the other hand, the ratio of criminal cases in which the elderly are perpetrators or victims has been flat or slightly increasing,⁴⁰³ although the number of crimes in Japan has been decreasing.

Some difference is seen in the elderly's behaviors by country due to unknown reasons.⁴⁰⁴ Ninety per cent of these crimes in which the elderly were perpetrators included shoplifting, stealing food and

⁴⁰¹ Lawrence A. Frolik, 'The Developing Field of Elder Law Redux: Ten Years After' (2002) 10 *The Elder Law Journal* 1, 14.

⁴⁰² The term 'special fraud' is used by the National Police Agency of Japan and are classified into remittance fraud, including the 'hey it's me' fraud, billing fraud, advance-fee loan fraud and refund fraud, and non-remittance fraud, including misuse of electronic money. The amount of special fraud damage recognized in 2020 has become half, comparing with the largest record 56,550 million yen (US\$491.7 million) special fraud damage in 2016. The National Police Agency of Japan, *About Recognition of Special Fraud and Arrest Status FY 2020* (Web Page, 2021) (in Japanese) * <https://www.npa.go.jp/bureau/criminal/souni/tokusyusagi/tokushusagi_toukei2020.pdf>.

⁴⁰³ Refers to the National Police Agency of Japan, 'Crimes by the Elderly' in *The National Police Agency's Crime Situation in 2018* (Web Page, August 2019) (in Japanese) * <<https://www.npa.go.jp/toukei/seianki/H30/h30keihouhantoukeisiryou.pdf>>.

⁴⁰⁴ Japanese researchers pointed out that the increase in elderly crime is a unique situation in Japan and this phenomenon is not seen in any other country. Tatsuya Ota, 'Measures and Prevention of Elderly Crime: Focusing on the Characteristics

drinks, and so on. The motive for the crime is assumed to derive from economic hardship and greed. Among the perpetrators are elderly who repeat crimes. There is the elderly who engage in repeated nuisance behaviors, such as stalking young women or excessively engaging in consumer complaints.⁴⁰⁵ It can be inferred that not only economic distress and greed elicit these behaviors but also psychological factors unique to the elderly. Psychological factors of the elderly have not been well elucidated academically.⁴⁰⁶ Those factors may comprise a social factor, such as community withdrawal, depersonalization, and loneliness, a neurological factor, such as an easy-to-run-away elderly due to stress, and a psychiatric factor, such as failure of the brain inhibitory function.⁴⁰⁷ Multiple factors can be assumed to be mixed and influential.⁴⁰⁸

In recent years, traffic accidents caused by elderly drivers have become problematic in Japan. Mental and physical factors, including dementia and diminished physical capacity, are assumed to be causes of accidents involving elderly driving cars. Some observations indicate that the number of the elderly falling victim to consumer and financial damage is not decreasing.⁴⁰⁹ The life span of people

of Elderly Criminals and Police Responses' (Keynote Speech delivered at Forum on Actual Conditions and Countermeasures for Elderly Crimes, Tokyo, December 2, 2013) (in Japanese) *; Mayu Kawakami, 'Characteristics of Elderly Offenders in Japan: In Comparison with Study on Criminality of Elderly offenders in the United States' (2018) 47 *Graduate School Annual Report* 131, 149. (in Japanese) *

⁴⁰⁵ The statistics show that stalkers age 60 and over account for about 10 per cent of the annual perpetrators. The National Police Agency of Japan, 'Responding to Stalker Cases and Spousal Violence Cases in 2017' (Web Page, March 15, 2018) (in Japanese) * <https://www.npa.go.jp/safetylife/seianki/stalker/H29STDV_taioujoukyou_shousai.pdf>.

⁴⁰⁶ Regarding the change in personality in older people, there are many parts that have not been clarified yet, and it can be said that it is a theme that needs further examination in the future. Hiroaki Enomoto, 'Psychology of the Elderly' (2006) 70 *Japanese Journal of Research on Household Economics* 28–37, 29. (in Japanese) *

⁴⁰⁷ Lut Tamam, Mehtap Bican and Necla Keskin, 'Impulse Control Disorders in Elderly Patients' (2014) 55(4) *Comprehensive Psychiatry* 1022, 1028. <<https://www.ncbi.nlm.nih.gov/pubmed/24405774>>.

⁴⁰⁸ The behavioral patterns of the elderly with dementia need to be clarified by brain science and psychology. From the interviews by the author of the greater Tokyo prefectural offices, such as Tokyo, Kanagawa, Chiba, and Saitama, in August 2015.

⁴⁰⁹ Hikaru Oba et al, 'The Economic Burden of Dementia: Evidence from a Survey of Households of People with Dementia and Their Caregivers' (2021) 18 *International Journal of Environmental Research and Public Health* 2717, 2727.

is stretching to the age of one hundred, and the expansion of the elderly period of life is creating new social issues, including financial fraud and financial exploitation.⁴¹⁰

The definition and scope of financial exploitation is not so clear enough because there are multiple definitions as well as multiple dimensions of financial exploitation in the international context.⁴¹¹ And the opinions of experts are still divided on the definitive scope of financial exploitation.⁴¹² This is mainly due to lack of statistics to grasp financial exploitation details. It is however well known that cognitive decline is a key factor that makes the elderly more susceptible to financial exploitation.⁴¹³ A neurological research shows that mild cognitive impairment patients perform worse than healthy controls in financial decision-making and in several financial ability's domains. Conversely, financial decision-making is relatively preserved in the sample of Parkinson's

⁴¹⁰ Akira Murata suggests that some measures should be introduced to protect interests of the elderly, such as a financial literacy test for the elderly when concluding the contract and a voice/video recording to conclude the contract. Akira Murata, 'Thinking about Mental Capacity: Attention to be paid to Defining Mental Capacity' (2016) 66(3) *Meiji Law Review* 183, 227. (in Japanese) *; Jingjin Shao et al, 'Why are Older Adults Victims of Fraud? Current Knowledge and Prospects regarding Older Adults' Vulnerability to Fraud' (2019) 31(3) *Journal of Elder Abuse and Neglect* 225, 243.

⁴¹¹ Stephen Deane, *Elder Financial Exploitation: Why It is A Concern, What Regulators are Doing about It, and Looking Ahead* (U.S. Securities and Exchange Commission/Office of the Investor Advocate, Online, 2018) 1 and 7–12 <<https://www.sec.gov/files/elder-financial-exploitation.pdf>>; Yukio Sakurai, 'Challenges of Property Management for Older Adults in Japan: Focusing on Financial Exploitation and Informal Arrangement' (2022) 12(2) *The Journal of Aging and Social Change* 1, 18. <doi:10.18848/2576-5310/CGP/v12i02/1-18>.

⁴¹² There is a view that financial exploitation 'may occur in different psychological contexts (no awareness, consent, implied consent) and may co-occur with other types of financial exploitation.' Stacey Wood and Peter A. Lichtenberg, 'Financial Capacity and Financial Exploitation of Older Adults: Research Findings, Policy Recommendations and Clinical Implications' (2017) 40(1) *Clinical Gerontologist* 3–13, 3.

⁴¹³ Stephen Deane, *Elder Financial Exploitation: Why It is A Concern, What Regulators are Doing about It, and Looking Ahead* 2 and 13–15; It is explained that 'we find that decreasing cognition is associated with higher scam susceptibility scores and is predictive of fraud victimization.' Keith Jacks Gamble et al, 'The Causes and Consequences of Financial Fraud Among Older Americans' (Boston College Center for Retirement Research, Online, 2014) <http://crr.bc.edu/wp-content/uploads/2014/11/wp_2014-13.pdf>; It is explained that 'age-related changes in decision-making capacity can directly influence financial competence and financial exploitation risk in older adulthood.' R. Nathan Spreng et al, 'Aging and Financial Exploitation Risk' in Ronan M. Factora (ed), *Aging and Money* (Springer Cham, 2021) 55–73.

disease and stroke patients.⁴¹⁴ Commercial banks and banking industry groups are developing various ideas to deal with the elderly customers. Financial abuse, which is financial exploitation in a narrow sense, covers the exploitation of a principal's property by family members or close friends.⁴¹⁵ The limited scope of the law system makes it difficult for an impartial third party to grasp the facts in relation to protection of the privacy and personal information of the principal.⁴¹⁶

The Characteristics of the elderly have traditionally comprised diminished mental and physical capacity due to ageing, and thus 'protection' for vulnerable elderly who may be easily damaged has become a public policy. The 'autonomy' that respects self-determination of the elderly as an independent personality must be emphasized by the Constitution. It can be assumed that adding 'self-discipline' may be beneficial to control risk for misconducts, crimes, and nuisances by the elderly living as members of the community. The characteristics of the elderly, however, are assumed to vary, according to various factors, such as personality, age, gender, and economy.⁴¹⁷ Diminishing capacity occurs after a certain age or with dementia. In other words, it can be understood that the three values of 'autonomy,' 'protection,' and 'self-discipline' should remain prevalent among the elderly. Balance

⁴¹⁴ Financial ability is defined as 'the capacity to manage money and financial assets in ways that meet a person's needs, and that are consistent with their values and self-interest.' Laura Danesin et al, 'Financial Decision-Making in Neurological Patients' (Online 2022) 12, 529 *Brain Science* <<https://doi.org/10.3390/brainsci12050529>>.

⁴¹⁵ 'The older parent/adult child dynamic is multifaceted and complex, as old resentments and sensitivities about intra-familial fairness mix with new obligations and concerns about parental vulnerability to exploitation and harm (of which adult children may also be a source).' Margaret Isabel Hall, 'Law and dementia: Family context and the experience of dementia in old age' in Beverley Clough and Jonathan Herring (eds), *Disability, Care and Family Law* (Routledge, 2021) 203-229.

⁴¹⁶ Louise Kyle (an Australian NGO, Senior Rights Victoria) points out that '[t]here is no one pathway to reform that will reduce the risk and prevalence of financial abuse in assets for care situations.' Louise Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1-32, 25.

⁴¹⁷ Fusako Seki, 'Human Characteristics of the Elderly' in Norio Higuchi (ed), *Report: The Independence of the Elderly and Japanese Economy* (The 21st Century of Public Policy Institute, 2020). (in Japanese) *; Fusako Seki, 'Overview of the Elder Law' (2019) 35 *Social Security Law* 5, 19. (in Japanese) *; Fusako Seki and Norio Higuchi, *Elder Law: Legal Basics for a Super-Aged Society* (Tokyo University Press, 2019). (in Japanese) *

should be maintained among the three values, though they compete against one another sometimes in accordance with changes with age and mental/physical capacity.

(3) Chief Focus on the Elderly with Dementia

In addition to the elderly, there are other types of vulnerable people than the elderly in society, such as people with intellectual and mental disabilities, physical disabilities, and higher brain dysfunction, as the law of Japan defines persons with disabilities.⁴¹⁸ Each type of vulnerable adults with disabilities has its inherent characteristics in their diagnosis and needs support to meet each type of needs, which is so broad. Thus, it is supposed inappropriate to see vulnerable people as one category of people. Moreover, there is an emerging concept ‘persons ageing with disability’ for a new field of study.⁴¹⁹ This concept, though it is important to acknowledge, makes the research complicated. Considering these factors, vulnerable adults who are subject to this dissertation are not particularly specified, but ‘elderly people living with dementia’ are the chief focus. This is because of considering their growing population and social impacts of this growth.⁴²⁰

According to some Japanese experts of social welfare studies, an adult who is suspected to have dementia tends not to agree to see doctor’s and when the adult is most likely to have dementia, the relatives tend to doubt the diagnosis.⁴²¹ Thus, the practitioner in charge struggles to convince them of seeing doctor’s. The reason for this, according to experts, is that the principal and their relatives have

⁴¹⁸ Article 2 of the *Basic Act for Persons with Disabilities* (Act No. 84 of 1970) defines that (i) Person with disabilities and (ii) Social barriers to meet social model of disabilities. Japan Law Translation, *Basic Act for Persons with Disabilities*.

⁴¹⁹ The term ‘persons ageing with disability’ refers to individuals who experience the onset of disability in early life or mid-life and who continue to experience disability over the life course as ages. Michelle Putnam et al, ‘Understanding Ageing with Disability’ in Michelle Putnam and Christine Bigby (eds), *Handbook on Ageing with Disabilities* (Routledge, 2021).

⁴²⁰ Iracema Leroi et al, ‘Dementia in “Super-aged” Japan: Challenges and Solutions’ (Online, 2018) 8(4) *Neurodegenerative Disease Management* <<https://doi.org/10.2217/nmt-2018-0007>>.

⁴²¹ These are comments expressed by Shinich Okada at the panel session in the 65th Autumn Conference of the Japan Society for the Study of Social Welfare held at Tokyo Metropolitan University on October 21, 2017.

a strong desire for the principal to stay healthy and tend to refuse the fact.⁴²² People will not easily acknowledge the diagnosis of dementia and will not want to undergo dementia tests.⁴²³ In other words, people generally tend to turn a blind eye to help that could be beneficial. To the extent that it may be reasonable to see things from the viewpoint of experts, there is a tendency for people to refuse an unwelcome fact even if there is legal justification. Considering such complexity of elder people with dementia and its stakeholders, how shall we see the legal status of adults with insufficient mental capacity?

2.3 Vulnerability and Safeguarding

2.3.1 Vulnerability

A concept of vulnerability may offer some suggestions on the legal status of adults with insufficient mental capacity. Vulnerability is referred to as ‘the quality of being weak and easily hurt physically or emotionally.’⁴²⁴ The concept of vulnerability is used in various academic fields, including philosophy, ethics, ecology, geography, physics, studies of risk, and social sciences.⁴²⁵

⁴²² Issho Matsumoto (a dementia doctor) addresses that most relatives do not want to acknowledge that his/her family member is dementia because he/she unconsciously see that dementia is a stigma and thus likes to refuse it. Matsumoto suggests that the relatives had better naturally accept dementia, rather than the negative image of dementia. Issho Matsumoto, ‘Psychosomatic Disorder Caused by Refusal of Family Member’s Dementia: Notice the Screams of Mind and Body’ (Column at *Asahi Newspaper* on August 16, 2019) (in Japanese) * <<https://www.asahi.com/articles/ASM837D1VM83UBQU001.html>>.

⁴²³ Yukimichi Imai (a dementia doctor) explains how to take the patient to see doctor’s, based on a tendency that people will not easily acknowledge the diagnosis of dementia. Yukimichi Imai, *Dementia Net Column No. 7: Dementia Patients Refuse to See Doctor’s—How to Take Them to Doctor’s* (Web Page, February 2, 2013) (in Japanese) * <https://info.ninchisho.net/column/psychiatry_007>.

⁴²⁴ Refers to the Oxford Learner’s Dictionaries, *Vulnerability* (Web Page, February 2022) <<https://www.oxfordlearnersdictionaries.com/definition/english/vulnerability>>.

⁴²⁵ In history, the concept of vulnerability stems from philosophical discussion by Hannah Arendt (1958) and Emanuel Levinas (1969), the natural sciences of ecology, geography, and studies of risk etc. in 1970s, and the social sciences of development studies by Amartya Sen (1982). Marja-Liisa Honkasalo, ‘Vulnerability and Inquiring into Relationality’ (2018) 43(3) *Suomen Antropologi (Journal of the Finnish Anthropological Society)* 1–21, 3–4; A study on vulnerability in

There is, however, no interdisciplinary unified concept.⁴²⁶ Each field has its own definition, and it is challenging to explicitly define vulnerability in each academic field.⁴²⁷ According to Jonathan Herring, ‘P is vulnerable if the following three factors are present: 1. P faces a risk of harm. 2. P does not have the resources to be able to avoid the risk of harm materializing. 3. P would not be able to adequately respond to the harm if the risk materialized.’⁴²⁸

Discussion of vulnerability has been explored by Martha Albertson Fineman in social sciences. Fineman’s main points in her publications can be summarized as follows: The vulnerability theory challenges the concept of vulnerability as a dominant, static, and individualized legal subject, and argue for the recognition of the human condition, which is finite and fragile, as well as socially and materially dynamic.⁴²⁹ The term ‘vulnerable’ describes a universal, inevitable, enduring aspect of the human condition that should be at the heart of the concept of social and state responsibility.⁴³⁰ Human beings are vulnerable to inescapable interrelationship and interdependence.⁴³¹ The human vulnerability and dependency across the life-course rely on other individuals, the family, and the state

bioethics: Wendy Rogers, Catriona Mackenzie, and Susan Dodds, ‘Why Bioethics Needs a Concept of Vulnerability’ (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* (Special Issue on Vulnerability, Fall 2012) 11, 38.

⁴²⁶ The term ‘frailty,’ which is similar to vulnerability, is defined as ‘a clinically recognizable state of increased vulnerability resulting from ageing-associated decline in reserve and function across multiple physiologic systems.’ Qian-Lie Xue, ‘The Frailty Syndrome: Definition and Natural History’ (2011) 27(1) *Clinics in Geriatric Medicine* 1, 15.

⁴²⁷ Jeffrey Alwang, Paul B. Siegel, and Steen L. Jorgensen, *Vulnerability: A View from Different Disciplines* (Social Protection Discussion Papers and Notes 23304, The World Bank, 2001); Shitangsu Kumar Paul, ‘Vulnerability Concepts and Its Application in Various Fields: A Review on Geographical Perspective’ (2013) 8 *Journal of Life and Earth Science* 63, 81.

⁴²⁸ Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Publishing: Kindle, 2016) 857/7258.

⁴²⁹ Martha Albertson Fineman, ‘Introducing Vulnerability’ in Martha Albertson Fineman and Jonathan W. Fineman, *Vulnerability and the Legal Organization of Work* (Routledge, 2017).

⁴³⁰ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law & Feminism* 1–23, 8.

⁴³¹ Martha Albertson Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *Elder Law Journal* 71–112, 71.

and its institutions.⁴³² It [vulnerability approach] is ultimately centered on the role and function of the state or governing authority as it uses law to construct and maintain the social institutions and relationships that govern everyday life.⁴³³ The vulnerability approach to social justice recognizes that the relationship between the individual and the society is synergetic and thus, ongoing.⁴³⁴

Fineman's views have been reviewed by scholars in various respects. Some typical comments of scholars on Fineman's views can be categorized as follows:

- (i) Analysis of risk and assets of vulnerable adults: The understanding of social vulnerability is the analysis of risks and assets of vulnerable adults, which brings expectations of social policy and planning gerontology.⁴³⁵
- (ii) Responsibility of the state or the public: Fineman focuses on the social processes that generate vulnerability and the responsibility of the state and its institutions in reducing the risks and consequences of vulnerability.⁴³⁶ A vulnerability analysis emphasizes the interdependency within social institutions and the need for public responsibility for the shared vulnerability.⁴³⁷

⁴³² Martha Albertson Fineman, "“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' 111.

⁴³³ Martha Albertson Fineman, 'Populations, Pandemics, and Politics' (2021) 21(3) *International Journal of Discrimination and the Law* 184, 190.

⁴³⁴ Martha Albertson Fineman, 'Beyond Equality and Discrimination' (2020) 73 *SMU Law Review Forum* 51–62, 61–62.

⁴³⁵ Diego Sanchez-Gonzalez and Carmen Egea-Jimenez, 'Social Vulnerability Approach to Investigate the Social and Environmental Disadvantages: Its Application in the Study of Elderly People' (Online, 2011) 17 (69) *Papeles de Población* <http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-74252011000300006>.

⁴³⁶ Elina Virokannas, Suvi Liuski and Marjo Kuronen, 'The Contested Concept of Vulnerability: A Literature Review' (2018) 23(2) *European Journal of Social Work* 327–39, 337.

⁴³⁷ Titti Mattsson and Mirjam Katzin, 'Vulnerability and Ageing' in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Monograph Book, 2017); Titti Mattsson and Lottie Giertz, 'Vulnerability, Law, and Dementia: An Interdisciplinary Discussion of Legislation and Practice' (2020) 21(1) *Theoretical Inquiries in Law* 139, 159.

- (iii) Unifying aspects to the social model: A vulnerability theory and recognition of universal vulnerability provide an important unifying aspect to the social model of disability and see to it that societal structures and institutions have impact.⁴³⁸
- (iv) Personal responsibility: the interest in the concept of vulnerability is increasing in part because the liberal ethics of bearing personal responsibility for life's vicissitudes is losing salience for increasing numbers of people.⁴³⁹
- (v) Useful in setting broad policy goals: Fineman's observations on vulnerable approach are better appreciated from the perspective of law study in a sense that vulnerability theory can be useful in setting broad policy goals (e.g., ensuring that all people have adequate income or adequate healthcare), but vulnerable approach is less helpful in choosing policy interventions to achieve its goal.⁴⁴⁰

These comments comprise various points of discussion for Fineman's vulnerability approach, including analysis of risk and assets of vulnerable adults, responsibility of the state and the public, unifying aspects to the social model, personal responsibility, and useful in setting broad policy goals. The vulnerability implies principles, such as 'the movement from formal equality to substantive equality, and the role [that] institutions play in mitigating vulnerability through a more active state.'⁴⁴¹ It can be assumed that the remark (v) above addresses the point that may imply the limitation of

⁴³⁸ Tom Shakespeare, 'The Social Model of Disability' in Lennard J. Davis, *The Disability Studies Reader* (Routledge, 2010) 266, 273; Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16(3) *Social Policy and Society* 469, 481.

⁴³⁹ Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *The University of New South Wales Law Journal* 783–817, 784.

⁴⁴⁰ Nina A. Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 *Yale Journal of Law and Feminism* 1–27, 26.

⁴⁴¹ Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements' (Online, 2020) 12(1) *Elder Law Review*

<https://www.westernsydney.edu.au/__data/assets/pdf_file/0003/1633044/JANUARY_2020_SOMES_Family_Agreements.pdf>.

vulnerability in policymaking by virtue of its ambiguous nature, however, this does not negate the importance of vulnerability.⁴⁴² It can be assumed essential to understand the limitation of vulnerability and not to use vulnerability in the area where is beyond the limitation.

The notion of vulnerability is based on the understanding that people are more or less vulnerable. Vulnerability suggests reliance or dependency on others, particularly in cases of the elderly and persons with disability who heavily rely on others. The notion of vulnerability is certainly general but vague. It is a simple and understandable concept that define human nature and ‘the inescapable interrelation and interdependence that mark human existence.’⁴⁴³ Such a general implication may include the idea that humans do not always have full capacity and autonomy. Therefore, humans do not always behave as rationally as possible, regardless of whether they have the relevant mental capacity. It can be assumed that the idea mentioned here may suit better with the reality in an aged society than the Civil Code based on the capacity doctrine.⁴⁴⁴

2.3.2 Vulnerability Approach

From the vulnerability approach, a general view is derived that vulnerable adults at risk of harm must be protected by law and public policy. Jonathan Herring acknowledges that ‘the elderly has a fundamental human right to protection from abuse and the state has an obligation to put in place law and public policy to combat elder abuse.’⁴⁴⁵ This view may clarify people’s perception of the

⁴⁴² Nina A. Kohn states that ‘although Fineman’s theory of vulnerability theory cannot be used as a prescriptive tool, vulnerability may be a useful construct around which to structure social welfare policy.’ Nina A. Kohn, ‘Vulnerability Theory and the Role of Government’ 25–27.

⁴⁴³ Martha Albertson Fineman, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” 71.

⁴⁴⁴ A different interpretation of vulnerability is possible. Davis and Aldieri state that ‘vulnerability, as an existential as opposed to a political description, is a limited rubric under which to organize against neoliberal forces.’ Benjamin P. Davis and Eric Aldieri, ‘Precarity and Resistance: A Critique of Martha Fineman’s Vulnerability Theory’ (Online, 2021) *Hypatia* 1, 17. <<https://doi.org/10.1017/hyp.2021.25>>.

⁴⁴⁵ 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 & Business Media, 2012) 175.

vulnerability approach, based on the fact that ‘vulnerability is a human characteristic, regardless of the relevant mental capacity of the principal.’⁴⁴⁶ It may hint a possible reformation of the relevant mental capacity doctrine in the Civil Code to the vulnerability approach or stay the combination of the mental capacity doctrine and vulnerable approach in the future. This is on a legal foundation based on the combination of civil law (i.e., guardianship on the capacity doctrine) and the social security law (abuse prevention on the vulnerable approach). The vulnerability approach encourages respect for human rights, in particular equality as a universal value, affecting law and public policy. ‘Fineman’s vulnerability theory presents a promising theoretical lens that offer particular concern with the lived experience of each individual, and also preserves universal scope.’⁴⁴⁷ As Fineman points out, ‘vulnerability can be embraced by people wanting to remove stigma from a designated group.’⁴⁴⁸

The notion of vulnerability is general but vague and thus, vulnerability alone is not enough for academic research and the construction of appropriate policy instruments.⁴⁴⁹ Combining vulnerability with a rights-based approach may result in a greater understanding.⁴⁵⁰ One legal concept derived from combination of vulnerability with a rights-based approach is ‘supported decision-making.’ Supported

⁴⁴⁶ The similar argument to vulnerability approach is advocated in Australia. Lise Barry and Susannah Sage-Jacobson, ‘Human Rights, Older People and Decision Making in Australia’ (2015) 9 *Elder Law Review* 1–21, 1.

⁴⁴⁷ Andrew Pilliar, ‘Filling the Normative Hole at the Centre of Access to Justice: Toward a Person-Centred Conception’ (2022) 55(1) *UBC Law Review* 149, 203. <SSRN: <https://ssrn.com/abstract=4100809>>

⁴⁴⁸ Martha Albertson Fineman, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” 112; Daniel Bedford, ‘Vulnerability Refigured’ in Daniel Bedford and Jonathan Herring (eds), *Embracing Vulnerability, The Challenges, and Implications for Law* (Routledge, 2020).

⁴⁴⁹ Nina A. Kohn, ‘Vulnerability Theory and the Role of Government.’ 26; Margaret Hall points out a similar view that ‘theorizing, and then identifying vulnerability allows us to focus explicitly, and therefore carefully, on the identification of situations or contexts in which vulnerability justifies a social response.’ Margaret Isabel Hall ‘Mental Capacity in the (Civil) Law: Capacity, Autonomy and Vulnerability’ (2012) 58(1) *McGill Law Journal* 1–35, 33.

⁴⁵⁰ A ‘rights-based approach’ refers to ‘a framework that integrates the norms, principles, standards and goals of the international human rights system into the plans and processes of development.’ Boesen Jakob Kirkemann and Tomas Martin, *Applying a Rights-based Approach: An Inspirational Guide for Civil Society* (The Danish Institute for Human Rights, 2007) 9.

decision-making is an effective method by which vulnerable adults can decide to live their own lives with third party support. It is ‘the provision of support which enables people with cognitive disabilities to exercise their legal decision-making rights (also called legal capacity).’⁴⁵¹ Supported decision-making is not just a method of providing welfare to vulnerable adults but can be defined and organized as a legal instrument based on a rights-based approach.⁴⁵²

Responding to the needs of vulnerable adults can be challenging. The legal system on the adult guardianship has come to be considered as lacking in flexibility. Thus, the adult guardianship system has become undervalued for vulnerable adults with insufficient mental capacity. For this critique, there is the role of Article 12 (equal recognition before the law) of the *Convention on the Rights of Persons with Disabilities* (hereinafter referred to as ‘CRPD’) adopted by the UN in 2006. The CRPD is ratified by 185 UN member countries/areas as of May 2022. According to this Article 12 and its General Comment No.1 (adopted April 11, 2014) of the UN CRPD Committee, people are encouraged to use supported decision-making rather than substituted decision-making. Because supported decision-making is supposed to respect the will and preferences of the principal. In other words, the autonomy and right to self-determination of the principal should be respected.⁴⁵³ This is based on a human rights

⁴⁵¹ Refers to the Victorian Office of Public Advocacy (Victorian OPA), *Supported Decision-Making in Victoria* (Victorian OPA Report, Online, October 2020) 6. <<https://www.publicadvocate.vic.gov.au/your-rights/your-healthcare/your-supported-medical-decisions>>.

⁴⁵² Refers to ‘1.2.2 (4) Developments and Challenges of the SDM Guidelines’ and ‘5.2.3 (1) Legal Status of SDM’; Robert M. Gordon, ‘The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making’ (2000) 23(1) *International Journal of Law and Psychiatry* 61, 77. <[https://doi.org/10.1016/S0160-2527\(99\)00034-5](https://doi.org/10.1016/S0160-2527(99)00034-5)>.

⁴⁵³ The CRPD is the human rights treaty to have a comprehensive national surveillance mechanism and the treaty to systematize a human rights model for disability. Thresia Degener, ‘A Human Rights Model of Disability’ in *Handbook of Disability Law and Human Rights* (Routledge, 2014).

model. Autonomy and rights to self-determination are at the center of human rights and have been regarded as a universal value in international human rights law.⁴⁵⁴

This UN CRPD Committee's view was assumed to be difficult to accept when it was made public due to wide discrepancies between the UN CRPD Committee's view and the legislation of member countries/areas. It is however gradually being accepted. Some UN member countries have accepted this idea and have even partly amended their civil code or relevant laws or enacted new legislation. Namely, the civil code was partly amended in Switzerland (2013), Austria (2017), Peru (2018), and Germany (2021) and the new act was legislated in Ireland (2015) and the State of Victoria (2019) in Australia. In addition, the U.S., which has signed but not ratified the CRPD, has accepted the proposition of this Article 12.⁴⁵⁵ Some U.S. states have taken relevant actions, including the States of Texas (2015) and Delaware (2016). The American Bar Association (hereinafter referred to as 'ABA') made an institutional resolution in August 2017⁴⁵⁶ recommending the introduction of supported decision-making system into state laws and some states followed the recommendations.⁴⁵⁷ It is understood that the move to legislate supported decision-making into the statute is in progress in developed countries under the influence of the CRPD. In this sense, it can be assumed that supported decision-making is an example of the combination of the concept of vulnerability with a rights-based approach in a general trend.

⁴⁵⁴ Maria Isolina Dabove, 'Autonomy, Self-determination, and Human Rights: Legal Safeguards in Argentina to Prevent Elder Abuse and Neglect' (2018) 32 *International Journal of Law, Policy and The Family* 80, 92; Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri. *Human Rights Futures* (Cambridge University Press, Reprint, 2018).

⁴⁵⁵ Arlene S. Kanter, 'Let us Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities' (2019) 35 *Touro Law Review* 301, 343.

⁴⁵⁶ Refers to the American Bar Association (ABA), *Resolution 113: American Bar Association Adopted by The House of Delegates* (Web Page, August 14–15, 2017) <<https://health.ucdavis.edu/mindinstitute/centers/cedd/pdf/sdm-aba-resolution.pdf>>.

⁴⁵⁷ Refers to '3.2 (5) U.S. Supported Decision-Making Acts.'

2.3.3. Safeguarding Laws for Adult at Risk

With supported decision-making, the risk may arise of the supporter unduly influencing the principal's intention consciously or unconsciously.⁴⁵⁸ Since a person's mind is not visible, the question is how a third party can perceive the existence of harm that would be difficult for people other than the relevant parties to understand. Therefore, supported decision-making requires safeguarding measures in its nature, which should be monitored by third parties. In legislation, safeguarding provisions to eliminate the risk of manipulation must be incorporated into the law.⁴⁵⁹ Safeguards provisions may protect persons by promptly intervening to the extent required by the public authorities if the persons are in danger of harm.⁴⁶⁰ Safeguards are not only subject to supported decision-making but also to any protection of vulnerable adults that is based on the vulnerability approach. With regard to safeguards or safeguarding, it is seen as an idea of safeguarding law or policy that vulnerable adults or adults at risk of harm must be protected by law and public policy from abuse.⁴⁶¹ This idea consists in the fact that 'the elderly have fundamental human rights to protection from abuse' and 'the state has an obligation to put in place law and public policy to combat abuse.'⁴⁶²

In general, vulnerability, adults at risk of harm, and safeguarding law or policy are seen in common law jurisdictions, and they are, in fact, differently made into legislation or policy by each

⁴⁵⁸ Mary Joy Quinn, 'Undue Influence and Elder Abuse' (2002) 23 (1) *Geriatric Nursing* 11, 17.

⁴⁵⁹ Refers to '1.2.2 (4) Developments and Challenges of the SDM Guidelines.' This is because safeguards on guidelines are not enforceable to any party, and it can be assumed to be powerless and not useful for protection of principals' interests. This comment is applicable to the 'SDM guidelines for adult guardians.'

⁴⁶⁰ Gerard Quinn, 'Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD' (Conference Paper, Conference on Disability and Legal Capacity under the CRPD held in Harvard Law School, February 20, 2010).

⁴⁶¹ Safeguard guidelines of social workers for people with dementia in England and Wales based on laws and policies: Jeremy Dixon et al, 'Safeguarding People Living with Dementia: How Social Workers Can Use Supported Decision-Making Strategies to Support the Human Rights of Individuals during Adult Safeguarding Enquiries' (2021) 00 *The British Journal of Social Work* 1, 18; Michael Mandelstam, *Safeguarding Vulnerable Adults and the Law* (Jessica Kingsley Publishers, 2008).

⁴⁶² Jonathan Herring, 'Elder Abuse: A Human Rights Agenda for the Future' 175.

individual country. Previous studies on comparative law analysis in common law jurisdictions were focused on adult safeguarding laws in England, Scotland, Ireland, the U.S., Canada (the province of British Columbia), and Australia (the State of Victoria).⁴⁶³ The definitions of ‘vulnerable adult,’ ‘at-risk adult,’ or ‘adult at risk’ in safeguarding law or policy report of the adult protection systems have a certain diversity according to country. Those are summarized in Table 5.

Table 5: Definitions of ‘Vulnerable Adults’ or ‘Adults at Risk’ by Country

STATE/ACT	DEFINITIONS
ENGLAND CARE ACT 2014	Section 42(1) Enquiry by local authority in Safeguarding adults at risk of abuse or neglect: This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—(a) has needs for care and support (whether or not the authority is meeting any of those needs), (b) is experiencing, or is at risk of, abuse or neglect, and (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.
WALES SOCIAL SERVICES AND WELL-BEING (WALES) ACT 2014	Section 126(1) Adults at risk: An “adult at risk”, for the purposes of this Part, is an adult who—(a) is experiencing or is at risk of abuse or neglect, (b) has needs for care and support (whether the authority is meeting any of those needs), and (c) because of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.
SCOTLAND ADULT SUPPORT AND PROTECTION (SCOTLAND) ACT 2007	Section 3(1) Adults at risk: “Adults at risk” are adults who—(a) are unable to safeguard their own well-being, property, rights or other interests, (b) are at risk of harm, and (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.
IRELAND SAFEGUARDING VULNERABLE	National Policy and Procedures Page 10: People with disabilities and older people may be particularly vulnerable due to: diminished social skills; dependence on others for personal and intimate care; capacity to report; sensory difficulties; isolation; power differentials.

⁴⁶³ Lorna Montgomery et al, ‘Implications of Divergences in Adult Protection Legislation’ (2016) 18 (3) *Journal of Adult Protection* 1, 16; Wayne Michael Martin et al, ‘Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK’ (The Essex Autonomy Project -Three Jurisdictions Report, 2016); Sarah Donnelly et al, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Health Service Executive, National Safeguarding Office and Trigraph Limited, 2017); Sarah Donnelly and Marita O’Brien, ‘Adult Safeguarding Legislation—The Key to Addressing Dualism of Agency and Structure? An Exploration of how Irish Social Workers Protect Adults at Risk in the Absence of Adult Safeguarding Legislation’ (Online, 2022) *The British Journal of Social Work* bcac003 <<https://doi.org/10.1093/bjsw/bcac003>>.

<i>PERSONS AT RISK OF ABUSE</i>⁴⁶⁴	
<i>SINGAPORE VULNERABLE ADULTS ACT 2018</i>⁴⁶⁵	Section 2: “vulnerable adult” means an individual who—(a) is 18 years of age or older; and (b) is, by reason of mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect, or self-neglect.
<i>CANADA, THE PROVINCE OF BRITISH COLUMBIA, ADULT GUARDIANSHIP ACT 1996 CHAPTER 6</i>	Section 44: The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of (a) physical restraint, (b) a physical handicap that limits their ability to seek help, or (c) an illness, disease, injury, or other condition that affects their ability to make decisions about the abuse or neglect.
<i>USA, TEXAS HUMAN RESOURCES CODE CHAPTER 48, 2005. INVESTIGATIONS AND PROTECTIVE SERVICES FOR ELDERLY AND DISABLED PERSON</i>	§ 48.002. Definitions: (5) “Protective services” means the services furnished by the department or by a protective services agency to an elderly or disabled person who has been determined to be in a state of abuse, neglect, or exploitation. (1) “Elderly person” means a person 65 years of age or older. (8) “Disabled person” means a person with a mental, physical, or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection and who is: (A) 18 years of age or older.
<i>AUSTRALIA ELDER ABUSE—A NATIONAL LEGAL RESPONSE (ALRC REPORT 131)</i>⁴⁶⁶	Recommendation 14–3: Adult safeguarding laws should define ‘at-risk adults’ to mean people aged 18 years and 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.

Source: Made by the Author

In contrast, some common principles are seen in the adult protection system in common law jurisdictions, namely, the adult guardianship and elder abuse legislations are closely related like the two sides of a coin. For example, in England, the same national judicial and administrative agencies—i.e., the Court of Protection and the Office of the Public Guardian—that administer the adult

⁴⁶⁴ Refers to the Health Service Executive, *Safeguarding Vulnerable Persons at Risk of Abuse* (National Policy and Procedures, December 2014); Department of Social Protection, *Safeguarding Vulnerable Adults* (Web Page, 30 May 2022) <<https://www.gov.ie/en/publication/3f6bc5-safeguarding-vulnerable-adults/>>.

⁴⁶⁵ Wing-Cheong Chan, ‘Holding the Therapeutic State at Bay? Balancing Autonomy and Protection in Singapore’s Vulnerable Adults Act’ (Online, 2020) 12(1) *Elder Law Review* <https://www.westernsydney.edu.au/_data/assets/pdf_file/0019/1633033/JANUARY_20_2020_WING_CHAN_SINGAPORES_VAA_Article_for_Elder_Law_Review.pdf>.

⁴⁶⁶ Refers to the ALRC, *Elder Abuse—A National Legal Response* (ALRC Report 131, 2017).

guardianship under the *Mental Capacity Act 2005* (hereinafter referred to as ‘MCA 2005’) are responsible for ‘care and support’ for adults at risk of harm. This is based on the Section 42(1)(a) of the *Care Act 2014*.⁴⁶⁷

In Australia, guardianship law reform in the states and special territories, including elder abuse legislation, are in progress.⁴⁶⁸ In the State of South Australia, elder abuse is dealt with by a neighboring agency of guardianship, i.e., the Adult Safeguarding Unit. The State of New South Wales (NSW) newly established an Ageing and Disability Commissioner and launched a similar public policy to combat elder abuse. Which public agency is responsible for both guardianship and elder abuse is subject to the relevant state and special territory in Australia, and it should be noted that guardianship is regarded as one of the legal instruments for dealing with elder abuse. Based on the values of the CRPD, the international tendency is to restrict the use of the guardianship system and encourage the use of supported decision-making.

From these perspectives, it can be understood that the guardianship system, supported decision-making, and safeguards against elder abuse are regarded as one package of legislation, and are embodied in public policy. This is, in fact, because the victims of elder abuse are vulnerable adults that include some people with mental capacity and others with insufficient mental capacity. Adults with insufficient mental capacity are at higher risk of becoming victims of elder abuse. In addition, in cases of financial exploitation, the victim of the abuse is apt to hide the damage and events from relevant agencies, including the police, because the perpetrator is perhaps a relative or a close acquaintance of

⁴⁶⁷ The MCA 2005 stipulates that ‘incapacity’ to make a particular decision must meet two requirements: (i) the principal is unable to understand, retain or use the information relevant to the decision; (ii) their inability to do so is ‘because of an impairment of the mind.’ Jonathan Herring and Jesse Wall, ‘Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the *Mental Capacity Act*’ (2015) 35(4) *Legal Studies* 698–719, 701; Peter Bartlett, ‘At the Interface Between Paradigms: English Mental Capacity Law and the CRPD’ (2020) 11 *Frontiers in Psychiatry* 881, 894.

⁴⁶⁸ Refers to ‘4.4.3 Discussion on Elder Abuse Legislation.’

the principal.⁴⁶⁹ It is estimated that the elder abuse rate is higher than the official report because there are many cases where the victims do not have the physical or mental capacity to report the abuse to the relevant authority, or psychologically hesitate to report it due to a complicated mental characteristic unique to vulnerable adults even though they have the physical or mental capacity.⁴⁷⁰

2.4 Adult Support and Protection

2.4.1 Capability Approach and Autonomy

(1) Capability Approach

The vulnerability approach and safeguarding law or policy have been discussed. The balancing of competing values and principles is essential, but it is difficult to implement in practice. Based on such balancing with vulnerability, two more ideas will be discussed. One is the capability approach, and the other is autonomy. Amartya Sen's capability approach is basically different from vulnerability approach on a basic level.⁴⁷¹

Sen's main points in his publications can be summarized as follows: The capability approach is based on the needs for welfare.⁴⁷² It refers to different needs of an individual, and what potentially can be done and what is being done by the person is regarded as a 'function.' Sen states that capabilities of humans are defined derivatively on the 'functionings,' which include inter alia all the information on the functioning combinations that a person can choose.⁴⁷³ 'Functionings' represent parts of the state

⁴⁶⁹ From the interview of Victorian State Trustees Limited (VCAT satellite office) by the author on March 3, 2017; Lewis Melanie, 'Financial Elder Abuse in a Victorian Context: Now and into the Future' (Conference Paper at the fourth National Conference on Elder Abuse held in Melbourne on February 24-25, 2016).

⁴⁷⁰ Yukio Sakurai, 'Challenges of Property Management for Older Adults in Japan: Focusing on Financial Exploitation and Informal Arrangement' (2022) 12(2) *The Journal of Aging and Social Change* 1, 18.

⁴⁷¹ Abraham H. Khan states that Sen's capability approach is based on an Indian religion and philosophy '*dharma*' (a spiritualized secularism rendered in English as "religion"). Abraham H. Khan, 'Postulating an Affinity: Amartya Sen on Capability and Tagore' (2012) 19(1) *Annals of Neurosciences* 3-7, 6.

⁴⁷² Amartya K. Sen, 'Human Rights and Capabilities' (2005) 6 (2) *Journal of Human Development* 151, 166.

⁴⁷³ Amartya K. Sen, *The Idea of Justice* (Penguin Books Ltd, 2009) 236.

of a person—in particular the various things that he or she manages to do or be leading a life.⁴⁷⁴ There is a variety of ‘functionings’ that is very elementary one, such as being in good health, and may be more complex, such as being socially integrated.⁴⁷⁵ The capability of a person depends on a variety of factors, including personal characteristics and social arrangements.⁴⁷⁶ The capability of a person represents the alternative combination of ‘functionings’ that he or she can achieve, from which he or she can choose one collection.⁴⁷⁷ It is possible to characterize well-being and freedom in terms of capability to achieve ‘functionings’ that we have reason to value. In that approach, poverty can be assessed as deprivation of some elementary capabilities.⁴⁷⁸

What can be done and what is being done may vary individually, and it is regarded natural that such a difference arises from person to person. A way of life that suits a person is important for them. For example, it is a person’s ability to do what they can do and what is being done with the support of a third party, in case of a person with disability. A person’s well-being is to be measured by the achievements accomplished by his or her ability to do so, in addition to the combination of what can be done and what is being done, and the freedom to act and to choose the process up to that outcome as well as the freedom to question and reassess.

Le Galès and Bungener state that ‘adopting the capability approach directs attention not to who gives care and why or for what result, in the sense of what final result, but on how one gives care, according to what ways things are done, what specific modes of accompaniment are used and for what

⁴⁷⁴ Amartya K. Sen, ‘Capability and Well-Being’ in Martha C. Nussbaum and Amartya Sen (eds), *Quality of Life* (Oxford University Press, 1992) 30–53, 31.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid 33.

⁴⁷⁷ Amartya K. Sen, ‘Capability and Well-Being’ 31.

⁴⁷⁸ Amartya K. Sen, ‘Well-Being, Capability, and Public Policy’ (1994) 53(7/9) *Journal of Economists and Annals of Economics* 333–347, 334.

reasons or motivations.’⁴⁷⁹ There is emphasis on the person having an opportunity and choosing a way of life and practicing an appropriate process to reach the desired way of life. The capability approach is thus valued for its emphasis on individual autonomy, self-determination, and freedom to choose a process. It can be said that this notion respects the diversity of people and gives them the opportunity and a process to think about a way of life that suits their individual characteristics.

The capability approach has been discussed by many researchers in a broader sense,⁴⁸⁰ including Martha C. Nussbaum,⁴⁸¹ and discussion is still ongoing and application of the capability approach is attempted to a broad area.⁴⁸² For example, in the recent discussion on Article 19 (living independently and being included in the community) of the CRPD, it is advocated that ‘we have sought to ground the right to live independently in the community in the capability approach as it can serve as the ethical framework and foundations that can justify such a right.’⁴⁸³

⁴⁷⁹ Catherine Le Galès and Martine Bungener, ‘The Family Accompaniment of Persons with Dementia Seen Through the Lens of the Capability Approach’ (2019) 18(1) *Dementia* 55–79, 74.

⁴⁸⁰ An overview article regarding the capability approach: Ryuhei Yoshida, ‘Review of Capability Approach: For Limitation and the Future’ (2020) 57 *Hokusei Review, the School of Social Welfare* 13, 23. (in Japanese); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach*. (The Belknap Press of Harvard University Press, 2013).

⁴⁸¹ Martha Nussbaum argues political philosophy in a broad sense and shows her list of central human capabilities, which includes 10 items. The approach in her discussion differs from that of Sen. Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006).

⁴⁸² For example, a survey to analyze the diversification of welfare service users in Japan, referring to Sen’s capability approach: Akimoto, Miyo, *Social Welfare Users and Human Rights: Diversification of User Image and Guarantee of Human Rights* in Japanese (Yuhikaku Publishing Co., Ltd., 2010). (in Japanese) *

⁴⁸³ Mary Donnelly states that ‘the CRPD has a good deal in common with the capabilities approach which broadens the lens of engagement and recognises that external factors can impede or enhance individual agency.’ Mary Donnelly, ‘Dementia: A Legal Overview’ in Charles Foster, Jonathan Herring, and Israel Doron (eds), *The Law and Ethics of Dementia* (Hart Publishing, 2014) 271–283, 277; This right was conceptualized as a capability, and it was shown that it is grounded in the two values of freedom and dignity. Emma Wynne Bannistera and Sridhar Venkatapuram, ‘Grounding the Right to Live in the Community (CRPD Article 19) in the Capabilities Approach to Social Justice’ (2020) 69 *International Journal of Law and Psychiatry* 6.

Capabilities are formed through the combination of internal and external conditions.⁴⁸⁴ Namely, the internal conditions encompass individual, often biological characteristics while the external factors encompass both the physical and social environments. It can be assumed that this discussion may correspond to a human-rights model and a social model in people with disabilities. It could therefore be understood that the notion of capability may provide some answer to the question of what freedom is like or what human rights are like.⁴⁸⁵ This implies a sense that each person seeks an autonomous way of life, based on the notion of capability, with individual freedom and human rights, even the person has various constraints, such as social, physical, mental, and financial. In this sense, capability approach may give us some ethical guidelines in a contemporary society.

(2) Autonomy

a. Individual Autonomy

Autonomy is close to right to self-determination. Self-determination is said to identify ‘external, structural (social and political) conditions for individual autonomy, specifically in freedom conditions and opportunity conditions.’⁴⁸⁶ Catriona Mackenzie defines that self-determination is to have ‘the freedom and opportunity to make and enact choices of practical import to one’s life, that is, choices of what to value, who to be, and what to do.’⁴⁸⁷ Some psychologists state that the notion of autonomy is ‘regulation by the self.’⁴⁸⁸ Gerald Dworkin asserts that individual autonomy is ‘a second-order

⁴⁸⁴ Deneulin Séverine and Lila Shahani, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (Earthscan, 2009).

⁴⁸⁵ This is the paper on the capability approach and human rights: Polly Vizard, Sakiko Fukuda-Parr, and Diane Elson, ‘Introduction: The Capability Approach and Human Rights’ (2011) 12(1) *Journal of Human Development and Capabilities* 1, 12.

⁴⁸⁶ Catriona Mackenzie, ‘Three Dimensions of Autonomy: A Relational Analysis’ in Andrea Veltman and Mark Piper (eds), *Autonomy, Oppression, and Gender* (Oxford University Press, 2014) 15-41, 25.

⁴⁸⁷ Ibid. Catrina MacKenzie remarks that ‘the promotion of autonomy is a matter of social justice.’ Catriona Mackenzie, ‘Relational Autonomy, Normative Authority and Perfectionism’ (2008) 39 *Journal of Social Philosophy* 512–533. 530.

⁴⁸⁸ Richard M. Ryan and Edward L. Deci, ‘Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?’ (2006) 74(6) *Journal of Personality* 1557–1585, 1557.

capacity of person to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values.⁴⁸⁹ Koji Sato argues, in part citing Robert Young (1986),⁴⁹⁰ that individual autonomy implies two aspects: the freedom to act without external constraints and individual self-determination in accordance with a chosen plan of life.⁴⁹¹ Considering these views on individual autonomy, it can be seen that the scope of autonomy may be broader than that of self-determination, and both autonomy and self-determination are regarded as universal values.⁴⁹²

In history, the notion of individual autonomy has been argued and developed by Immanuel Kant and Kantian scholars, including John Rawls,⁴⁹³ on the one hand, by John Stuart Mill and utilitarian liberal philosophy scholars, on the other hand. Kantian scholars emphasize on the moral and ethics of internal motives of human being based on a human-centered approach,⁴⁹⁴ whilst Mill does not use the term autonomy but respects ‘the principle of individual liberty on the utilitarian bias that it is through

⁴⁸⁹ Gerald Dworkin, ‘The Nature of Autonomy’ in *The Theory and Practice of Autonomy* (Cambridge University Press, 1988) 3–20, 20; Gerald Dworkin, ‘The Nature of Autonomy’ 2 *Nordic Journal of Studies in Educational Policy* (2015, an unchanged republishing) Article: 28479.

⁴⁹⁰ Robert Young, *Personal Autonomy: Beyond Negative and Positive Liberty* (Routledge, 1986).

⁴⁹¹ Koji Sato, ‘The Meaning of “Self-Determination” in the Constitutional Studies’ (1990) [1989] *Legal Philosophy Annual Report* 76–99, 86–87. (in Japanese) *

⁴⁹² Hirohide Takikawa remarks that self-determination comprises three values, namely (i) an instrumental value: self-determination, which entrusts the decision to the individual, is the most efficient means and tool for achieving the well-being of each individual; (ii) a growth value: a person can grow by self-determination; and (iii) a symbolic value: there are occasions when it makes sense that the decision is made by the person by himself/herself. Self-determination does not always demand self-responsibility because of exemptional cases, such as incapacity and no intention/negligence. Hirohide Takikawa, ‘Between Self-Decision and Self-Responsibility: A Philosophy of Law Consideration’ (2001) September 2001 *Law Seminar* 32, 35. (in Japanese) *

⁴⁹³ John Rawls, *A Theory Justice* (Translated by Takashi Kawamoto et al.) (Kinokuniya Bookstore, 2nd ed, 2010). (in Japanese)

⁴⁹⁴ For example, Hiroyuki Hasuo, ‘The Structure of <Autonomy> in Kant's Moral Philosophy: New Possibilities through Practice of "Duty of Love"’ (2010) 6 *Civilization Structure Theory* 15, 34. (in Japanese) *

liberty that human individuality develop.’⁴⁹⁵ Mary Donnelly remarks, based on Mill’s insight, that ‘a view of autonomy as empowerment provides a better way of thinking about autonomy than the traditional liberal view of autonomy as non-interference.’⁴⁹⁶

From feminist point of view, there are some arguments by Fineman against individual autonomy.⁴⁹⁷ Fineman criticizes the autonomy myth, which she believes has caused the U.S. to fail in effective public policymaking.⁴⁹⁸ Thus, Fineman wants to introduce the U.S. public debate the alternative term of ‘dependency’ and ‘substantive equality.’ Fineman raises an argument on ‘vulnerability’ to ask for state responsibility to protect vulnerable people. In this regard, it can be understood that vulnerability is used as a conflicting concept against individual autonomy, since the ‘vulnerable theory [as an universal one] asserts that agency or [individual] autonomy should always be understood as particular, partial, and contextual.’⁴⁹⁹ Daniel Bedford comments that vulnerability has been positioned as ‘the other of the ideal of autonomy.’⁵⁰⁰ Christine Straehle states that the ‘normative and moral question behind vulnerability-based theories is a concern for individual autonomy and the conditions of individual agency.’⁵⁰¹

Considering views above, it can be understood that individual autonomy is no doubt valuable, and sometimes may conflict with other values, including vulnerability. As Sato remarks, the idea of individual autonomy closely relates to the value of community and thus is reasonably restricted by the

⁴⁹⁵ Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press (Kindle), 2010) 914 and 1484.

⁴⁹⁶ Ibid 1485. Mary Donnelly also states that the MCA 2005 is based on the traditional liberal view as non-interference.

⁴⁹⁷ Other viewpoints than feminist can be seen as ‘receptivity, dependency, and social and clinical psychology.’ Tom O’shea, ‘Critics of Autonomy’ (Essex Autonomy Project: Green Paper Report, 2012) 1, 26.

⁴⁹⁸ Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004).

⁴⁹⁹ Martha Albertson Fineman, ‘Introducing Vulnerability’ 8.

⁵⁰⁰ Daniel Bedford, ‘Introduction: Vulnerability Refigured’ in Daniel Bedford and Jonathan Herring (eds), *Embracing Vulnerability, The Challenges and Implications for Law* (Routledge, 2020).

⁵⁰¹ Christine Straehle, ‘Introduction: Vulnerability, Autonomy, and Applied Ethics’ in Christine Straehle (ed), *Vulnerability, Autonomy and Applied Ethics* (Routledge, 2017).

public welfare.⁵⁰² The question then is what the public welfare is like. Here, it can be said that the public welfare is ‘a device that coordinates conflicts between rights and conflicts between the public interest and rights’⁵⁰³ or ‘the ultimate philosophy of domestic law’⁵⁰⁴ that people in the community must respect and it should be deliberately clarified case by case in a democratic process.

b. Relational Autonomy

The notion of autonomy includes a different approach—relational autonomy.⁵⁰⁵ Relational autonomy is often advocated in the field of bioethics, specifically with the principal’s family members or relatives when medical treatment or serious physical operations are determined to be necessary.⁵⁰⁶ Relational autonomy however is not limited to bioethics; it can be applied to a general field.⁵⁰⁷ In fact, Jonathan Herring states that ‘to be autonomous is not to be isolated and free of responsibility, but to

⁵⁰² Koji Sato, ‘The Meaning of “Self-Determination” in the Constitutional Studies.’ 90–92.

⁵⁰³ Keigo Obayashi remarks that ‘Public welfare can function in various ways according to the situation, and it may function as a basis for restricting rights, or it may also serve as a criterion for judgment to the constitution.’ Keigo Obayashi, ‘What is Public Welfare: Public Welfare as the Standard’ (2022) 807 *Hougaku Seminar* 39–44, 44. (in Japanese) *

⁵⁰⁴ Tomoo Odaka, *The Ultimate in Law* (Yuhikaku Publishing Co., Ltd., 2nd ed. 1965) 228. (in Japanese) *

⁵⁰⁵ Hisao Ikeya states that ‘A view of universal vulnerability prompts us to change the mainstream view of “individual autonomy” into one of “relative autonomy.”’ Hisao Ikeya, ‘Bioethics and Vulnerability.’ (2016) 10 *The Bulletin of Ryotokuji University* 105, 128. (in Japanese).

⁵⁰⁶ Catriona McKenzie remarks that ‘Relational theories of autonomy seem to have had greatest traction outside the discipline, or in sub-discipline, such as bioethics, applied ethics, and political philosophy where there is a (relatively) larger proportion of women.’ Catriona McKenzie, ‘Feminist Innovation in Philosophy: Relational Autonomy and Social Justice’ (2019) 72 *Women's Studies International Forum* <<https://doi.org/10.1016/j.wsif.2018.05.003>>; Carlos Gómez-Vírseda et al review 50 articles regarding ‘relational autonomy’ in the bioethics. C. Gómez-Vírseda et al, ‘Relational Autonomy: What Does it Mean and How Is It Used in End-of-life Care? A Systematic Review of Argument-based Ethics Literature’ (2019) *BMC Medical Ethics* 76, 91.

⁵⁰⁷ Shotarou Tahara remarks that individual autonomy is often criticized in contemporary debates, because it underestimates or denies such things as love, friendship, and interdependence, which most people consider valuable.’ Then, the concept of relational autonomy is discussed. Shotaro Tahara, ‘What Should Autonomous Agents Be Like? From the Individualistic to the Substantive Conception’ (2017) 5 *Waseda Rilas Journal* 193, 203. (in Japanese)

be in a network of relationship, with their dependant responsibilities.’⁵⁰⁸ Jonathan Herring also states that ‘our decisions are rarely “ours,” but are the results of consultation and discussion. They are made in the context of our relationships, reflecting the obligations we owe to those around us. This does not require us to abandon autonomy, but to rethink it in a deeply relational way.’⁵⁰⁹

The notion of relational autonomy may imply a greater understanding of human relationship involving the principal, including healthcare and aged care.⁵¹⁰ Jonathan Herring states that ‘dependency on others is an aspect of humanity’⁵¹¹ and ‘vulnerabilities, care and identities become mutual and interdependent’⁵¹² with the notion of relational autonomy. ‘The emphasis on caring relationships acknowledge that it is a huge simplification to separate people into carers and those cared for. In the caring relationships we are all in there merging of interests and selves.’⁵¹³ In relation to people with dementia, Terry Carney states that ‘[i]t is here that richer concepts of relational autonomy and vulnerability prove their worth in helping to understand the ethical, social and legal issues in

⁵⁰⁸ Jonathan Herring, ‘Relational Autonomy and Rape’ in S. Day Sclater, F. Ebtehaj, E. Jackson and M. Richards (eds), in Hart, *Regulating Autonomy* (Oxford Legal Studies Research Paper No. 12, 2010) 13.

⁵⁰⁹ Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press (Kindle), 2016) 1998.

⁵¹⁰ Healthcare decision-making is one of issues often discussed with relational autonomy, as addressed in ‘Introduction.’ Sumytra Menon et al, ‘Some Unresolved Ethical Challenges in Healthcare Decision-making: Navigating Family Involvement’ (2020) 12(1) *Asian Bioethics Review* 27, 36; Tatsuya Morita et al, ‘Relational Autonomy in Advanced Care Planning’ (2020) 30(5) *Palliative Care* 399, 402. (in Japanese) *

⁵¹¹ Jonathan Herring, ‘The Disability Critique of Care’ (2014) 8 *Elder Law Review*, Article 2. 12; Jonathan Herring states that ‘people are understood as relational, interconnected, and interdependent. The law’s job is to uphold and maintain relationships and protect people from the abuses that can occur within them.’ Jonathan Herring, *Relational Autonomy and Family Law* (Springer Science & Business Media, 2014) 13.

⁵¹² Jonathan Herring, ‘The Disability Critique of Care’ 15.

⁵¹³ Jonathan Herring, ‘Ethics of Care and Disability Rights: Complementary or Contradictory?’ in Loraine Gelsthorpe, Perveez Mody, and Brian Sloan (eds), *Spaces of Care* (Hart Publishing, 2020) 180; From action theory of philosophy viewpoint, an interactive uncontrollability of care is discussed, which implies that the matter is not so simple. Seisuke Hayakawa, ‘Caring and Vulnerable Agency’ (2014) 3 *Studies on Action Theory* 1, 10; Jun Nishimura, ‘Ethics of Care and Social Security Law: for the Conversion from the Benefit-centered Law to the Support-centered Law’ (2021) 18(1) *Journal of Kanagawa University of Human Services* 9, 18. (in Japanese)

dementia care—searching out and promoting relational harmonies while remaining vigilant to correct disharmonies such as abuse and neglect, or even the “pathogenic” vulnerability manufactured by poor legal processes.⁵¹⁴ The notion of relational autonomy may imply why people are motivated to care for other people in need. This may be because people recognize their mutual vulnerability and need for care for others.⁵¹⁵

Relational autonomy is rooted in feminist studies and is proposed with the purpose of criticizing the concept of individualist autonomy and proposing a different approach. Considering independent relationship of human in family, community, and society, the notion of relational autonomy is assumed to be crucial in practice. This is because one’s pattern of human conduct and decision-making is largely influenced by family, community, and society.⁵¹⁶ This general tendency illustrates one characteristic of humans living in a community.⁵¹⁷ This relational autonomy however does not refer to a strictly defined concept of autonomy in theory, but to a loosely organized research trend that shares a research policy of incorporating relationships with others into autonomous research.⁵¹⁸ It is assumed that this

⁵¹⁴ Terry Carney, ‘People with Dementia and Other Cognitive Disabilities: Relationally Vulnerable or a Source of Agency and Care?’ (Sydney Law School Research Paper No. 20/17) (Online, 2020) 12(1) *Elder Law Review* <<https://ssrn.com/abstract=3561294>>.

⁵¹⁵ Refers to ‘4.3.3.(3) What are the Common Values in Australian Law Reforms?’ and ‘4.5.1 (3) e. Empowerment Dimension.’ Regarding autonomy, Paragraph 1.37 of the ALRC Report 124 states that ‘This Inquiry has been informed by autonomy in the sense of “empowerment”, not just “non-interference”. This involves seeing an individual in relation to others, in a “relational” or “social” sense and understanding that connects with respect for the family as the “natural and fundamental group unit of society” that is entitled to protection by State Parties.’ It can be assumed that ALRC Report 124 is based on the notion of relational autonomy.

⁵¹⁶ Joan Braun, ‘Legal Interventions to Protect Vulnerable Adults: Can Relational Autonomy Provide a New Way Forward?’ (Online, 2020) 12(2) *Elder Law Review* <https://www.westernsydney.edu.au/_data/assets/pdf_file/0017/1714220/PEER_REVIEWED_BRAUN_Article.pdf>.

⁵¹⁷ Refers to ‘2.2.2 (2) Characteristics of the Elderly.’ We have discussed self-discipline, in addition to autonomy and protection as the values of the elderly.

⁵¹⁸ Shotaro Tahara, ‘“Substantive Conceptions of Autonomy: An Approach Based on Shared Characteristics’ (2022) 1 *Bulletin of the Faculty of Humanities, Ibaraki University. Studies in Social Sciences* 55–76. 63. (in Japanese)

tendency may hint that the notion of relational autonomy has something imperfect to be a general theory.

The point of discussion is how to demonstrate the notion of relational autonomy in a legal framework.⁵¹⁹ The important decision-making areas that the principal should be able to freely execute without excessive interference must be considered, namely, voting, marriage, life or death decisions, and matters of creed or belief. The principal's own decision must be respected as an individual autonomous decision, which is a basic principle as human rights. If the principal has little ability to decide on an important issue for some reason, then relational autonomy as support approach should prevail as an alternative to individual autonomy.⁵²⁰ Even in such a case, relational autonomy needs to be carefully examined by a third party as a witness to determine whether or not it is unduly affected from others.⁵²¹ In the other important decision-making areas besides the above-mentioned ones, relational autonomy can be utilized according to some ethical guidelines to safeguard the principal's interests. This is because human relationships with others, including relatives, are not always as good as the principal likes but may be harmful to the principal in the worst case.⁵²² It can be said that the weak point in relational autonomy must be ambiguity whether having risk for undue or harmful influence of the principal for some reason, and the principal with intellectual/mental disability may not identify risk by himself/herself.

⁵¹⁹ Hiroshi Ohe, 'Rights and Relationships' (1999) 53 *St. Paul's Review of Law and Politics* 149, 178. (in Japanese)

⁵²⁰ Megan S. Wright, 'Dementia, Autonomy, and Supported Healthcare Decision Making' (Pennsylvania State Law Research Paper No. 05-2019) (2020) 79 *Maryland Law Review* 257, 324.

⁵²¹ Lucy Series remarks that 'the MCA 2005 was built upon two conflicting premises: one is that autonomy is a function of a person's individual psychological makeup, the other is that the idea of autonomy sometimes can be affected by their external circumstances. A narrow "support" approach is taken as necessary in the MCA, whilst the CRPD offers refreshing ways of thinking how relationships can foster relational autonomy in the legal capacity.' Lucy Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 *International Journal of Law and Psychiatry* 80, 91.

⁵²² Jaime Tabitha Lindsey, 'Protecting and Empowering Vulnerable Adults: Mental Capacity Law in Practice' (doctoral dissertation. University of Birmingham, 2018) 1–341, 41.

Catriona Mackenzie remarks that ‘autonomy and capabilities must be central to an ethics of vulnerability,’ which is ‘both universal and context specific, both inherent to the human condition yet always already shaped by social and political relationship and institutions.’⁵²³ This understanding leads her to further state that ‘non-paternalistic forms of protection recognize vulnerable persons or social groups as equal citizens, but as citizens who may need targeted forms of assistance to convert resources into functionings and hence (...) reach the threshold level of capabilities to enable them to full equal citizenship. Such forms of assistance thus foster and promote autonomy.’⁵²⁴ In other words, it can be assumed that paternalistic interventions would amplify relationships of domination and inequality among citizens of a community or a relationship between a community and citizens, without considering the individual circumstances of the targeted citizens.

Theoretically, it is essential to seek a balance between ‘autonomy’ and ‘vulnerability’ as far as most people, including vulnerable adults, will agree. Indeed, how to seek a balance between ‘autonomy’ and ‘vulnerability’ may differ by law and policy, according to numerous factors, including what types of vulnerable adults are the subject, their lifestyle, and culture. By understanding autonomy *relationally*, it could be understood ‘why the obligation to promote autonomy is not only consistent with but also central to the normative obligations involved in responding to vulnerability.’⁵²⁵ In such an understanding, a good balance between ‘autonomy’ and ‘vulnerability’ could be achieved and it might be possible that ‘autonomy’ and ‘vulnerability’ no longer conflict each other. Janet Delgado states that

⁵²³ Catriona Mackenzie remarks that ‘the notion of situational vulnerability focuses attention on aspects of a person’s interpersonal, social, political, economic, or environmental situation. The notion of pathogenic vulnerability draws attention to the way that situational vulnerabilities can give rise to compounded capability deficits or corrosive disadvantage and (...) to the way that badly designed social policy responses to vulnerability can cause or compound major capability failure.’ Catriona Mackenzie, ‘The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability’ in Mackenzie, Catriona, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy (Studies in Feminist Philosophy)* (Oxford University Press USA, 2013) 54–56.

⁵²⁴ Ibid 55.

⁵²⁵ Ibid 56.

‘relational autonomy is the capacity to make decision as a person constituted and embedded in the social relationships.’⁵²⁶ This may be occurring because human relationships and mutual trust of a principal with relatives, close friends, or a cultural or a regional community that the principal belongs to are established.⁵²⁷ However, such a good balance can be achieved in limited cases and it cannot be always guaranteed to have such a balance between ‘autonomy’ and ‘vulnerability.’ Relational autonomy is a notion to consider nuanced human self and human relationships between people and between people and society, which are variable factors according to the surrounding environments. It can be concluded here that the notion of relational autonomy has some positive or negative implications to complement the area where individual autonomy falls short of, but relational autonomy is not an established general theory at this moment.⁵²⁸

⁵²⁶ Janet Delgado, ‘Re-thinking Relational Autonomy: Challenging the Triumph of Autonomy through Vulnerability’ (2019) 5 *BIOETHICS UPDATE* 50–65, 60–61 and 63; Margaret Isabel Hall sets out her approach of vulnerability and relational autonomy as legal concepts for guardianship and advanced planning. Margaret Isabel Hall, ‘Relational Autonomy, Vulnerability theory, Older Adults and the Law: Making it Real’ (2020) 12 *Elder Law Review* <https://www.westernsydney.edu.au/__data/assets/pdf_file/0003/1633026/January_2020_Elder_Law_Review_MI_Hall_ESSAY.pdf>.

⁵²⁷ Refers to ‘4.3.4 (1) d. Non-Remuneration Policy’ and ‘4.5.1 (1) d. What Needs Further Research on SDM.’ This may be part of the reasons why Australian guardianship and supported decision-making largely rely on relatives or close friends of principals, or public guardians/advocates as guardians/administrators and supporters without remuneration; The article analyzes what and how guardians take the processes to understanding the will and preferences of principals, focusing on their personal factors. Alice L. Holmes et al, ‘Integrity in Guardianship Decision Making: Applying the Will and Preferences Paradigm’ (Online, 2022) *Journal of the American Medical Directors Association* 1, 8. <doi:10.1016/j.jamda.2022.01.050>.

⁵²⁸ Any complicated conceptual argument, such as one related to vulnerability and autonomy, is able to be sorted out in simplicity, but it might have risk for unconsciously deviating from the reality. For example, Paul Skowron raises a question about ‘Judges in England and Wales tell[ing] three contradictory stories about the relationship between autonomy and mental capacity.’ Paul Skowron states that ‘any reform attempting to remake the law around that one concept can be expected to fail.’ He argues on how logically judges in England and Wales utilize the terms ‘autonomy’ and ‘mental capacity’ in a specific case, which resulted in the three contradictory stories related to the same terms. Therefore, he analogically opines that one concept cannot unify the law and people must accept ‘complexity.’ Paul Skowron, ‘The

2.4.2. Notion of Adult Support and Protection

Since human rights awareness has become prevalent and human rights are embodied in Article 12 (equal recognition before the law) in the CRPD, discrimination against people with disabilities is no longer tolerated. Mary Donnelly addresses that ‘The legal communications explored show that (...) it was only with the advent of human rights that the normative focus shifted to the legal system.’⁵²⁹ Furthermore, equality is required of legislation aimed at adults with insufficient mental capacity, including the elderly with dementia. It is hoped that adults with insufficient mental capacity cohabit with others in society, and anyone may not suffer from insufficient mental capacity in the future. Legislation that addresses such serious social problems as dementia, the adult guardianship system, supported decision-making, and safeguards against elder abuse could be treated as a complementary legal package rather than each individual instrument of law.

In common law jurisdictions, elder abuse policy is called different legislative terms, such as ‘safeguarding’⁵³⁰ in England, Wales, Ireland, and Australian states, ‘adult support and protection’⁵³¹ in Scotland, ‘adult protection’⁵³² in Canada provinces, and ‘adult protection services (APS)’⁵³³ in the

Relationship between Autonomy and Adult Mental Capacity in the Law of England and Wales’ (2019) 27(1) *Medical Law Review* 32, 58.

⁵²⁹ Mary Donnelly, ‘Changing Values and Growing Expectations’ (2017) 70(1) *Current Legal Problems*, 305–336, 335.

⁵³⁰ Safeguarding is ‘a term we use to describe how we protect adults or children from abuse or neglect.’ UK Gov., *Policy Paper SD8: Office of the Public Guardian Safeguarding Policy* (Web Page, January 11, 2022) <<https://www.gov.uk/government/publications/safeguarding-policy-protecting-vulnerable-adults/sd8-opgs-safeguarding-policy>>.

⁵³¹ ‘All adults at risk of harm have right to be safe and protected.’ Scottish Government, *Social Care: Adult Support and Protection* (Web Page, n/a) <<https://www.gov.scot/policies/social-care/adult-support-and-protection/>>.

⁵³² Robert M. Gordon, ‘Adult Protection Legislation in Canada: Models, Issues, and Problems’ (2001) 24(2-3) *International Journal of Law and Psychiatry* 117, 134.

⁵³³ Holly Ramsey-Klawnsnik, ‘Understanding and Working with Adult Protective Services’ (Online, May 2018) <http://eldermistreatment.usc.edu/wp-content/uploads/2018/05/Understanding-and-Working-with-APS_May2018.pdf>; Adult Protective Services (APS), Law Enforcement, and the Courts are the systems charged with addressing the abuse, but

U.S. states and local governments. European countries, such as Switzerland and Austria, partly amended their civil code in 2013 and 2017, abolished the name of guardian/guardianship in their civil code, and renamed the amended part of the civil code as ‘adult protection law.’⁵³⁴ This was because the traditional guardian/guardianship system have been abolished and the new name adult protection law serves to explicitly highlight the purpose of the law. The Austrian civil code also positions ‘adult protection law’ (*Erwachsenenschutz*)⁵³⁵ as a legal instrument to prevent elder abuse, which is similar to common law jurisdictions. Countries with different legal systems, either common law jurisdiction or civil law jurisdiction, coincidentally use similar legislative terms of ‘adult protection.’

Considering these common legal developments toward adult protection as well as legal advocacy as a foundation of the study established in Chapter 1,⁵³⁶ the legal system for the adult guardianship system, supported decision-making, and safeguards against elder abuse can be grouped together as having a complementary relationship for adult protection. In this dissertation, this collective legal system is called ‘adult support and protection legislation.’ It is emphasized that adult support and protection legislation is based on legislative instruments mainly created in common law jurisdictions: a human-rights approach to safeguarding laws for vulnerable adults.⁵³⁷ It can be observed that the legal transformation in some developed countries is a move from traditional guardianship law to develop adult support and protection legislation. This observation was addressed by Teruaki Tayama

there is no uniformity in their roles and little coordination between the system providers. Georgia J. Anetzberger and Morgan R. Thurston, ‘Addressing Guardianship Abuse: The Roles of Adult Protective Services, Law Enforcement, and the Courts’ (Conference paper at the Fourth National Guardianship Summit in New York on May 10-14, 2021).

⁵³⁴ Refers to ‘3.2 (2) Switzerland Adult Protection Law, and (3) Austrian Adult Protection Law.’

⁵³⁵ Refers to the Austrian Federal Ministry of Justice, *The New Adult Protection Law* (Brochure in English, 2018) <<https://www.justiz.gv.at/web2013/home/justiz/erwachsenenschutz/informationsbroschuerenzum-download~41.de.html>>.

⁵³⁶ Refers to ‘1.1.3 Research Framework.’

⁵³⁷ Shih-Ning Then, ‘Evolution and Innovation in Guardianship Laws: Assisted Decision-Making’ (2013) 35 *Sydney Law Review* 133–66, 145–47; Lise Barry and Susannah Sage-Jacobson, ‘Human Rights, Older People and Decision Making in Australia’ (2015) 9 *Elder Law Review* 1– 21, 1.

in Chapter 1⁵³⁸ such that a possible transformation of the guardianship law to adult protection law system will be an idea as a future civil law development in the Japanese context. Thus, we will review country-wise legal development next chapter, focusing on adult support and protection concept.

2.5 Summary: A Good Balance of Vulnerability and Autonomy

As the national population ages, the number of adults with insufficient mental capacity, including the elderly with dementia, increases. Such people will constitute approximately 10 per cent of the total population in Japan in 2025. They should no longer be regarded as a minority and an exception in the Civil Code but should be included as citizen.

A concept of vulnerability may offer some suggestions on the legal status of adults with insufficient mental capacity. From the vulnerability approach, a general view could be derived that vulnerable adults at risk of harm must be protected by law and policy from abuse. In this respect, the vulnerability approach would lead to a universal view to provide protection to vulnerable adults. The general view may clarify people's perceptions of the vulnerability approach as a criterion in adult support and protection. It is seen as an idea of safeguarding law that vulnerable adults or adults at risk of harm must be protected. This idea consists in the fact that elderly people have fundamental human rights to protection from abuse and the country/state has an obligation to put in place law and public policy to combat abuse.

The capability approach focuses on the capability of individuals and encourages respect for their diversity. Capability approach is valued for its emphasis on individual autonomy through the freedom and ability of the principal to choose their process by themselves. In this sense, individual autonomy is to be respected in a modern society. Autonomy is however to be reasonably restricted by public interests as is deliberately argued in a democratic process. In serious cases, such as terminal care, the notion of relational autonomy may be important for a principal who has relatives and close friends.

⁵³⁸ Refers to '1.1.1 (1) g. Future Developments.'

Each approach ultimately respects human rights but in a different way. It can therefore be understood that the vulnerability approach and the capability approach are useful, from a universal and an individual value viewpoint, for explaining key issues related to dealing with vulnerable people at risk of harm. Theoretically, it is essential to seek a balance between ‘autonomy’ and ‘vulnerability’ as far as most people, including vulnerable adults, will agree. By understanding autonomy *relationally*, a good balance between ‘autonomy’ and ‘vulnerability’ could be achieved. It can be concluded that the notion of relational autonomy has implications to complement the area where individual autonomy falls short of, although it is not an established theory.

Based on the value and requirements of the CRPD, the international tendency is to restrict the use of the guardianship system and encourage the use of supported decision-making. European countries with different legal systems, either common law jurisdiction or civil law jurisdiction, coincidentally use similar legislative terms of ‘adult protection.’ Considering these common legal developments, the adult guardianship system, supported decision-making, and safeguards against elder abuse should be treated as a complementary legal package rather than an individual instrument of law as legislation that addresses such serious problems as dementia.

In this dissertation, this legal system is called ‘adult support and protection legislation.’ Vulnerability, adult at risk of harm, and safeguarding law are seen in common law jurisdictions. It is emphasized that adult support and protection legislation is based on legislative instruments mainly created in common law jurisdictions: a human-rights approach to safeguarding laws for vulnerable adults. It can be observed that the legal transformation in some developed countries is a move to develop adult support and protection legislation. Thus, we will review country-wise legal transformation next chapter.

Chapter 3

Adult Support and Protection in the International Context

3.1 Introduction

Chapter 3 reviews adult support and protection legislation in the international context.⁵³⁹ For this purpose, the chapter examines the research question: ‘How do developed countries/areas cope with the adult guardianship system, supported decision-making, and safeguards against elder abuse, and what are the implications of a legal concept of adult support and protection legislation?’ There is a Japanese civil law scholar’s unique view that, referring to the German and the Switzerland civil laws, adult protection law is defined as ‘the collective legal regulations, including the protection and care of adults with health problems or disabilities that prevent them from engaging in legal transactions without the assistance of a third party.’⁵⁴⁰ There is seen as no clear legal definition of adult support and protection.⁵⁴¹ To clarify the definition of adult support and protection, adult support and protection related reform of laws and legislation will be reviewed.

It can be assumed that adult support and protection related legislation being developed in Europe, Australia, Canada, and the U.S. may share some common characteristics that constitute the legal

⁵³⁹ This chapter is an updated version of the previously published article by the author: ‘The Ageing and Adult Protection Legislative System: A Comparative Law Study’ (2019) 9(1) *The International Journal of aging and Social Change* 53, 69. <<https://doi.org/10.18848/2576-5310/CGP/v09i01/53-69>>.

⁵⁴⁰ Teruaki Tayama, ‘History, Current Status, and Future of the Adult Guardianship System in Japan’ (2020) (Keynote Speech at the 17th Annual Academic Conference of Japan Adult Guardianship Law Corporate Association (JAGA) held in Tokyo on November 14, 2020) 18 *Adult Guardianship Study* 18, 27. (in Japanese) *

⁵⁴¹ No common methods nor definition of the terms regarding ‘adult safeguarding’ are established among countries, such as Scotland, England, Northern Ireland, Canada, and Australia. This implication can be applied to the adult support and protection. Sarah Donnelly et al, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Health Service Executive, National Safeguarding Office and Trigraph Limited, 2017) 176; Lorna Montgomery et al, ‘Implications of Divergences in Adult Protection Legislation’ (2016) 18 (3) *Journal of Adult Protection* 1, 16.

framework. In this chapter, such common characteristics will be clarified through reviewing legislations concerned. The scope of countries/areas to be examined is considered in a following manner. Japan is regarded as having the most advanced adult guardianship system and responses to abuse and abuse prevention legislation in Asia; for this reason, other Asian countries are not referenced. Developed countries outside Asia are cited, however, considering the geographic balance of the countries in question, Canada has not been included, but the U.S. and Australia have been included in this chapter. Below, comparative law studies of the 2000 Protection of Adults Convention and the following developments and the relevant policies and reforms to adult support and protection legislation in developed countries, such as Switzerland, Austria, Scotland, the U.S., and Australia will be reviewed.

3.2 A Comparative Law Study in the International Context

(1) 2000 Protection of Adults Convention and the Following Developments

a. 2000 Protection of Adults Convention

The Convention on International Protection of Adults, now called *The Hague Convention of 13 January 2000 on the International Protection of Adults* (hereinafter referred to as ‘2000 Protection of Adults Convention’), was adopted in 2000 by the Hague Conference on Private International Law.⁵⁴² This Conference was based on the recent tendency for mobility, particularly of the elderly to live in foreign countries. The 2000 Protection of Adults Convention ‘applies to the protection in international situation of adults who, by reason of an impairment or insufficiency of their personal faculties, are not able to protect their interests’ (Paragraph 1, Article 1). It regulates the judicial or administrative authorities of the contracting state in which the adults, i.e., those who have reached age eighteen (Paragraph 1, Article 2), have their habitual residence, regulates jurisdiction over the protection of the

⁵⁴² Refers to the Hague Conference on International Private Law (HCCH), *The Hague Convention of 13 January 2000 on the International Protection of Adults* (Web Page, January 13, 2000) <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>>.

adult person and property (Paragraph 1, Article 5), regulates subordinate jurisdiction to the state of which the adult is a national (Article 7), and further regulates subordinate jurisdiction over where property of the adult is situated (Article 9).

It is understood that EU countries, which have eliminated border restrictions, have largely set the provisions of international private law within the EU, where citizens can freely mobilize and choose their residences. There are concerns about gaps in the protection of vulnerable adults in Europe, particularly for person and property due to the diversity of legal systems and limited accessions to the key international instrument.⁵⁴³ The 2000 Protection of Adults Convention was adopted to adjust those gaps in the protection of vulnerable adults in Europe, particularly in cross-border situations.⁵⁴⁴ However, the Convention has entered into force in fourteen European countries.⁵⁴⁵ Therefore, this convention is accepted in a limited area.

b. Policies in Europe

In Europe, there are developments related to the protection of vulnerable adults. The *Convention for the Protection of Human Rights and Fundamental Freedoms* was adopted by the Council of Europe (1950). The judicial function of the European Court of Human Rights (ECHR) is centered around human rights protection. Under this umbrella, the Recommendation Rec (1999) 4 on Principles concerning the Legal Protection of Incapable Adults was adopted by the Council of Europe (the

⁵⁴³ Refers to the European Parliament, *Legislative Train-Protection of Vulnerable Adults* (Web Page, November 20, 2019) <<https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-protection-of-vulnerable-adults>>.

⁵⁴⁴ The European Notarial Network open website with support from the European Commission for citizens on protective measures for the vulnerable and minors in twenty-two European countries that have civil law notarial system. European Notarial Network, *The Vulnerable in Europe* (Web Page, August 2022) <<http://www.the-vulnerable.eu/>>.

⁵⁴⁵ The fourteen European countries are: Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Monaco, Portugal, Switzerland, and the U.K. Other five countries who have signed but have not ratified: Ireland, Italy, Luxembourg, the Netherlands, and Poland. Overheid.nl, *Verdrag inzake de Internationale Bescherming van Volwassenen (Convention on the International Protection of Adults)* (Web Page, August 2022) <<https://verdragenbank.overheid.nl/en/Verdrag/Details/009250>>.

Committee of Ministers on 23 February 1999, at the 660th meeting of the Ministers' Deputies).⁵⁴⁶ This is the recommendations on principles concerning the legal protection of incapable adults. The recommendation includes key principles, such as ‘*Principle 5—Necessity and subsidiarity*,’⁵⁴⁷ and indicates that ‘any legislation addressing the problem of incapable adults should give a prominent place to these principles.’ Then, the Recommendation CM/Rec (2009)11 of the Committee of Ministers to Member States on Principles concerning Continuing Power of Attorney and Advance Directives for Incapacity was adopted by the Council of Europe (the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers’ Deputies).⁵⁴⁸ This is the recommendations of voluntary measures with respect to the principle of self-determination. Further studies regarding the principles of continuing powers of attorney, advance directives, and so on are ongoing. For example, a Scottish researcher Adrian D. Ward issued *Enabling Citizens to Plan for Incapacity*⁵⁴⁹ in the Council of Europe.

In the EU, Article 25 (the rights of the elderly) and Article 26 (integration of persons with disabilities) of the *Charter of Fundamental Rights of the European Union (2000/C 364/01)* recognize and respect human rights of the elderly and persons with disabilities. In addition, the European Parliament under the EU created the research project ‘Protect Vulnerable Adults—European Added

⁵⁴⁶ Refers to the Council of Europe, *Explanatory Memorandum/Recommendation Rec (1999) 4 on Principles concerning the Legal Protection of Incapable Adults* (Web Page, February 23, 1999) <<https://rm.coe.int/09000016805e302a>>.

⁵⁴⁷ The ‘principle of subsidiarity’ ensures that in deciding whether a measure is necessary, account should be taken of any less-formal arrangements that might be made or used, and of any assistance that might be provided by family members, public authorities, or other means. The principle of subsidiarity can be said to refer to the least restrictive alternative. Council of Europe, *Principles Concerning the Legal Protection of Incapable Adults* (Web Page, February 23, 1999) <<https://rm.coe.int/09000016805e302a>>; Teruaki Tayama, *Commentary on Adult Guardianship System* (Sanseido, 2nd ed, 2016) (in Japanese) * 57 and 136.

⁵⁴⁸ Refers to the Council of Europe, *Recommendation CM/Rec (2009) 11 and explanatory memorandum: Principles concerning Continuing Powers of Attorney and Advance Directives for Incapacity* (Web Page, December 9, 2009) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168070965f>>.

⁵⁴⁹ Adrian D. Ward, *Enabling Citizens to Plan for Incapacity* (Council of Europe, Online, 2017) <<https://rm.coe.int/cdcj-2017-2e-final-rapport-vs-21-06-2018/16808b64ae>>.

Value Assessment’⁵⁵⁰ and is considering the development of adult protection policies for vulnerable adults.⁵⁵¹ In December 2020, a European NGO, Alzheimer Europe published a report entitled *Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia*⁵⁵² of a study funded under an operating grant from the EU’s Health Program (2014–2020).⁵⁵³

Some content of the report is cited as follows:⁵⁵⁴ ‘We believe that such a [effective and fair] system should also incorporate substitute decision-making to the extent that this is necessary, proportionate, and carry out in an ethical manner. We therefore promote the combined supported decision-making model developed by Scholten and Gather.’⁵⁵⁵ This incorporates substitute decision-making, if deemed necessary.’ This model combines supported decision-making with competence

⁵⁵⁰ Refers to the European Parliamentary Research Service (EPRS), *Protection of Vulnerable Adults—European Added Value Assessment* (EPRS, Online, November 11, 2016) <doi:10.2861/664256>.

⁵⁵¹ A vulnerable adult is defined ‘a person who has reached the age of 18 years and who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interests (personal affairs and/or personal property, whether temporarily or permanently)’ in the resolution of European Parliament. European Parliament, *Resolution of 1 June 2017 with Recommendations to the Commission on the Protection of Vulnerable Adults* (Web Page, June 1, 2017) <https://www.europarl.europa.eu/doceo/document/TA-8-2017-0235_EN.html?redirect>.

⁵⁵² Refers to the Alzheimer Europe, *Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia* (Dementia in Europe Ethics Report 2000) (Alzheimer Europe, December 2020) <<https://www.alzheimer-europe.org/resources/publications/2020-alzheimer-europe-report-legal-capacity-and-decision-making-ethical>>.

⁵⁵³ Alzheimer Europe is ‘a non-profit non-governmental organization (NGO) that aims to be a voice of people with dementia and their carers, make dementia a European priority, promote a rights-based approach to dementia, support dementia research, and strengthen the European dementia movement.’ Alzheimer Europe (Web Page, February 2022) <<https://www.alzheimer-europe.org/>>.

⁵⁵⁴ Refers to the Alzheimer Europe, *Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia* 22–23.

⁵⁵⁵ Scholten and Gather predict ‘adverse consequences of CRPD Article 12 for the persons with mental disabilities’ and propose the combined supported decision-making model. Matthé Scholten and J. Gather, ‘Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward (2018) 44 *Journal of Medical Ethics* 226, 233.

assessment, which will be discussed further in Chapter 5.⁵⁵⁶ Below, individual countries' legislation is reviewed, bearing the European regional legislative and policy frameworks in mind.

(2) Switzerland Adult Protection Law

The CRPD was adopted in 2006 and, as of January 2022, 164 state parties have signed, and 185 state parties have ratified or accepted it.⁵⁵⁷ There has been a move to amend domestic law to establish an effective relationship between the CRPD and the adult guardianship system. The enactment of the *Law on the Protection of Adults*, based on Switzerland's amendments to its civil code in January 2013, could be taken as a case of adult protection legislation. Switzerland's adult protection law provides the following six main points:⁵⁵⁸ (i) Make decisions using tailor-made measures for an adult who needs assistance; (ii) As much as possible, do not limit the human rights of the individual; (iii) Prohibit the use of negative terms such as 'adult guardianship'; (iv) Establish the Child and Adult Protection Authority (CAPA) in the cantons; (v) Recognize the right of a proxy for a spouse or a registered partner to consult with a doctor about medical treatment for the principal; and (vi) Approve advance directive of terminal medical care and the preparation of a living will in advance, before mental capacity becomes insufficient, to respect right to self-determination of an adult by himself/herself. Amendments to the civil code in Switzerland abolished the framework of the traditional adult guardianship system that restricted the principal's ability.⁵⁵⁹ The current adult protection system in Switzerland can be assumed to be an advanced legislative system that theoretically respects autonomy,

⁵⁵⁶ Refers to '5.2.2 (2) Comparison of Combined Models of Guardianship and Supported Decision-Making.'

⁵⁵⁷ Refers to the UN, *Convention on the Rights of Persons with Disabilities (CRPD)* (Web Page, May 6, 2022) <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#:~:text=Ratifications%2FAccessions%3A%20184https://>>.

⁵⁵⁸ Ingeborg Schwenzer and Tomie Keller, 'A New Law for the Protection of Adults' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing Limited, 2013) 375, 386.

⁵⁵⁹ Ibid.

right to self-determination, and normalization.⁵⁶⁰ In practice, it is essential for the public agencies, Child and Adult Protection Authority (‘CAPA’) in the cantons to carefully implement measures to protect vulnerable people to reflect the aim of the law in a more professional and interdisciplinary way.⁵⁶¹

(3) Austrian Adult Protection Law

a. Adult Protection Law

A move to establish a part of adult protection legislation that theoretically respects autonomy, right to self-determination and support rather than representation is also seen in Austria.⁵⁶² Austria amended its civil code and enacted the Adult Protection Law in March 2017, which came into force in July 2018. Four types of legal measures defined by the Adult Protection Law are as follows:⁵⁶³

⁵⁶⁰ Philippe Meier, ‘The Swiss 2013 Guardianship Law Reform—A Presentation and A First Assessment in the Light of the Convention on the Rights of Persons with Disabilities’ 10 *Elder Law Review* (Online, 2016) <https://www.westernsydney.edu.au/_data/assets/pdf_file/0018/1161513/The_Swiss_2013_Guardianship_Law_Reform_-_Philippe_Meier.pdf>.

⁵⁶¹ A critical view on the CAPA operation for minors in Zurich: Martina Koch, Esteban Piñeiro and Nathalie Pasche, “‘Wir sind ein Dienst, keine Behörde.’ Multiple institutionelle Logiken in einem Schweizer Jugendamt—Ein ethnografisches Fallbeispiel aus der street-level bureaucracy’ (‘We Are a Service, Not an Authority’: Multiple Institutional Logics in a Swiss Youth Welfare Office. An Ethnographic Case Study from Street-Level Bureaucracy) (2019) 20(2) *Forum: Qualitative Sozialforschung* Article 21.

⁵⁶² Hitomi Aoki summarizes the principles of the Austrian Adult Protection Law: (i) respect of autonomy and priority on support (ii) support rather than representation, (iii) maintenance of representation, (iv) impact of personal intention on the appointment of an agency, and (v) duties of the Adult Protection Association. Hitomi Aoki, ‘From Representation to Support: A Consideration of Austrian Law Reform (1)’ (2019) 26(1) *Toin Law Review* 53–81, 58–61. (in Japanese)

⁵⁶³ Refers to the Austrian Federal Ministry of Justice, *The New Adult Protection Law* (Brochure in English, 2018) <<https://www.justiz.gv.at/web2013/home/justiz/erwachsenenschutz/informationsbroschuerenzum-download-41.de.html>>; Michael Ludwig Ganner, ‘Austrian Guardianship Law—Status 2016 and Upcoming Reform’ (Conference paper, WCAG2016 held in Berlin, September 14–17, 2016); Tomoko Fukuda, ‘Implications of Austrian New Adult Guardianship System’ in Akihisa Shibuya et al (eds), *Practice and Promotion of Adult Guardianship and Civil Trust* (NIHON KAJO Publishing Co., Ltd., 2021) 465–477.

- (i) Enduring Power of Attorney⁵⁶⁴ (hereinafter referred to as ‘EPA’; *Vorsorgevollmacht*): It is necessary for an adult to have full capacity to conclude an EPA with or without the involvement of an adult protection association and to register it at the Central Austrian Representation Register (*Österreichisches Zentrales Vertretungsregister*, ÖZVV). An EPA takes effect when an adult cannot decide by himself/herself, and this fact is registered in the Central Austrian Representation Register. The court can only be involved in limited cases: (1) the adult and the attorney disagree regarding medical treatment, (2) the residence of the adult shall be relocated abroad, and (3) the adult ordered in the EPA that the court has to approve the attorneys’ decisions about important economic matters.
- (ii) Elective Representation of Adults (*Gewählte Erwachsenenvertretung*, newly introduced as a special form of EPA): Even if an adult has no longer full capacity, he/she can conclude an elective representation agreement to appoint a representative out of his/her relatives or close friends. It is necessary for an adult to understand the consequences of appointing a representative, at least in broad terms, and act accordingly. This scheme requires entry in the register and is subject to supervision of the courts. The adoption of this scheme results is based on a decision taken by the individual represented, and it is valid indefinitely. This scheme is considered after the Representation Agreement available in the British Columbia province of Canada.⁵⁶⁵
- (iii) Statutory Representation of Adults (*Gesetzliche Erwachsenenvertretung*, newly introduced due to abolition of EPA of relatives): Statutory representation of adults should be applied to all matters

⁵⁶⁴ An enduring power of attorney (EPA) is a legal document that lets the donor appoint one or more people, known as attorneys, in register to help make decisions or to make decisions on their behalf about their property or money.

⁵⁶⁵ The *Representation Agreement Act 1996* is the first Canadian legislation in the British Columbia province to establish a comprehensive framework for supported decision-making. See British Columbia, *Incapacity Planning* (Web Page, n/a) <<https://www2.gov.bc.ca/gov/content/health/managing-your-health/incapacity-planning>>; Canadian Centre for Elder Law (CCEL), Study Paper on Inclusive Investing: *Respecting the Rights of Vulnerable Investors through Supported Decision-Making* (Canadian Centre for Elder Law, May 5, 2021) 73–77 <<https://ssrn.com/abstract=3855139>>.

that an adult cannot handle by himself/herself, particularly all medical and nursing care matters as well as financial matters. This scheme requires entry in the register and is subject to supervision of the courts. The representation authority is reviewed after three years when in principle it expires unless otherwise necessary.

- (iv) Court-Appointed Representation of Adults (*Gerichtliche Erwachsenenvertretung*, newly introduced due to abolition of the guardianship system): Court-appointed representation of adult is supposed to govern adult representation by a third party as a last resort for some specific matters, such as important property management as well as for all medical and nursing care matters. The law does not permit a court-appointed representative to manage all a person's affairs. The representation scheme ceases to apply when the specific matter has been dealt with, or after three years, whichever is sooner.

b. Clearing and Registration

Under the adult protection law, some administrative procedures have been implemented by Adult Protection Associations (*VertretungsNetz*),⁵⁶⁶ a group of NPOs that mainly provide a mandatory 'clearing' function ordered by the Federal Ministry of Justice of Austria. Adult Protection Associations (*VertretungsNetz*) are associations in Austria which advocate the federal rights of people with mental illness or intellectual impairment.⁵⁶⁷ The 'clearing' function offers several benefits for the Ministry of

⁵⁶⁶ The Adult Protection Associations (*VertretungsNetz*) operate 29 offices in Austrian federal states except Vorarlberg. Approximately 700 employees work for the Associations and 295 employees work for court-appointed representatives or carry out clearing for adult protection. The Associations, as a not-for-profit entity, provide public services to people. The Federal Ministry of Justice provides subsidy equivalent to 90 per cent of the administrative expenses of the Associations. A manager of the Adult Protection Associations has contributed to the law reform study group as a member, which was organized by Peter Barth, the Federal Ministry of Justice (i.e., Peter Barth, 'Reform of the Austrian Sachwalter Law' (Conference material at the 4th WCAG2016 held in Berlin on September 14–17, 2016)). From the interview of the Adult Protection Associations by the author in Vienna on September 17, 2019.

⁵⁶⁷ Hitomi Aoki, 'Function of the Subsidiarity Principle in the Adult Guardianship System' (2016) 8 *Bulletin of Waseda University Institute of Advanced Study* 5–25, 19–21. (in Japanese) *

Justice and the users.⁵⁶⁸ First, the applicants may consult with the Adult Protection Associations more informally than with the courts. Second, the ‘clearing’ function led to a six-per cent decrease in number of court-appointed representation petitions in 2018/19 compared to the previous year. Third, ‘clearing’ has replaced court-appointed representation with less restrictive measures i.e., elective representation or statutory representation. The statistics shows that 47 per cent of the applicants replaced measures in the first year 2018/19. Fourth, the replacement by ‘clearing’ may contribute to administrative and financial rationalization of the courts. The brochure *The New Adult Protection Law* indicates the background of the Law reform is due to some systemic problems in the previous system that an increase of guardianship cases leads to the shortage of quality guardians and no attractive alternative measures available than guardianship.⁵⁶⁹

Any of the above four legal measures must be recorded in the Central Austrian Representation Register that is in the custody of the civil law notaries. The total number of Austrian adult protection registrations as in August 2019 was 177,162, which was equivalent to 2.0 per cent of the national population of Austria (i.e., approximately 8.6 million) and could be assumed to be so high.⁵⁷⁰ According to an empirical research analysis, carried out using a questionnaire survey in 2019, both ‘clearing’ and the national register system were appreciated by the stakeholders, such as courts, associations, lawyers/notaries, and adult guardians.⁵⁷¹ Thus, those outsourcing methods to the Adult Protection Associations and the Notaries by law can contribute to positive results of the adult protection law. As a rule, lawyers or the Notaries can act as representatives for a maximum of 15 principals with

⁵⁶⁸ From the interview of Michael Ludwig Ganner by the author in Innsbruck on September 18, 2019.

⁵⁶⁹ Refers to the Austrian Federal Ministry of Justice, *The New Adult Protection Law* (Brochure in English, 2018) 2–3.

⁵⁷⁰ According to the Austrian Chamber of Civil Law Notaries as of August 31, 2019, the breakdown of the 177, 162 Austrian adult protection registers was as follows: EPA (142,937), Elective Representation (1,812), Statutory Representation (9,114), Court-Appoint Representation (6,374), Interim Representation (2,642), Positive Adult Representative available (13,528), Negative Adult Representative available (224), and Preliminary Objection (531).

⁵⁷¹ Michael Ludwig Ganner, *Umfrage zum Erwachsenenschutzgesetzin* (Adult Protection Law Survey) (University of Innsbruck, Online, December 2, 2019) (in German) <<https://www.uibk.ac.at/rtf/>>.

mental or intellectual disabilities. The idea of the Austrian adult protection law can be considered reasonable for meeting the value of the CRPD, involving in the Adult Protection Associations and the Notaries. The issue is how other persons than experts of adult protection will understand the adult protection law scheme, including medical practitioners, schoolteachers, church officials, local politicians, who may influence people in a daily life.⁵⁷²

(4) Scottish Mental Health Law Review

a. Independent Review of Mental Health Law

Scotland is in the process of reviewing the laws and policies related to mental health, capacity, and adult protection under the name ‘Independent Review of Mental Health Law’ (hereinafter referred to as ‘Independent Review’).⁵⁷³ On March 19, 2019, the Scottish Government announced an overarching review of the mental health legislative framework and commissioned the Scottish Mental Health Law Review (hereinafter referred to as ‘Scottish Review’).⁵⁷⁴ The intention of the Government of Scotland is mentioned in the ‘terms of reference’ to the Scottish Review.⁵⁷⁵ The work of the Scottish Review is due in September 2022, with a final report and recommendations to be submitted to the Minister for Mental Wellbeing and Social Care (Scotland).

The principal aim of the review is ‘to improve the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder and remove barriers to those caring for their health and welfare.’⁵⁷⁶ For this principal aim, comprehensive reform is necessitated by the decision

⁵⁷² From the interview of Michael Ludwig Ganner by the author in Innsbruck on September 18, 2019.

⁵⁷³ Scottish Parliament, *Mental Health and Adults with Incapacity Law in Scotland – What Next?* (Web Page, June 13, 2021) <<https://spice-spotlight.scot/2021/06/23/mental-health-and-adults-with-incapacity-law-in-scotland-what-next/>>.

⁵⁷⁴ The Scottish Mental Health Law Review, *About Us* (Web Page, n/a) <<https://www.mentalhealthlawreview.scot/about>>.

⁵⁷⁵ Refers to the Scottish Government, *Mental Health Legislation Review: Terms of Reference* (Web Page, September 11, 2019) <<https://www.gov.scot/publications/mental-health-legislation-review-terms-of-reference/>>.

⁵⁷⁶ Ibid.

of the Cabinet of Scotland that deliberations are important to renovate the current system and come up with a more comprehensive package that will include such measures as mental health care, aged care, advance directives, and medical decision-making in intensive care situations.⁵⁷⁷ Two review processes are ongoing under an umbrella of the Independent Review, namely the one is that the Government of Scotland reviews ‘aspects of mental health legislation to strengthen rights and protections of people who are impacted by the legislation and to ensure it reflects people’s rights under the UN CRPD and the European Convention on Human Rights,’⁵⁷⁸ and the other is that a Joint Working Group of the Law Society of Scotland reviews law reform proposals.⁵⁷⁹

The scope of mental health law as an umbrella term refers to the key legislation to be reviewed, namely the *Mental Health (Care and Treatment) (Scotland) Act 2003* (hereinafter referred to as ‘2003 Act’), the *Adults with Incapacity (Scotland) Act 2000*⁵⁸⁰ (hereinafter referred to as ‘AWIA’), and the *Adult Support and Protection (Scotland) Act 2007* (hereinafter referred to as ‘ASPA’). In Scotland, the safeguarding of vulnerable adults at risk is established by these three legislations.⁵⁸¹ The purpose of

⁵⁷⁷ Refers to the Scottish Government, *Mental Health Strategy: 2017–2027* (Web Page, March 30, 2017) <<https://www.gov.scot/publications/mental-health-strategy-2017-2027/>>.

⁵⁷⁸ Scottish Parliament, *Mental Health and Adults with Incapacity Law in Scotland – What Next?*

⁵⁷⁹ From email correspondence between Adrian D. Ward and the author on July 27, 2021; Law Society of Scotland, ‘Reforms must Ensure that the Law does not Discriminate against People who do not Have a Diagnosed Mental Illness’ (Web Page, June 6, 2022) <<https://www.lawscot.org.uk/news-and-events/law-society-news/mental-health-law-review-response/>>.

⁵⁸⁰ Section 1(6) of the AWI stipulates ‘incapable’ means incapable of — (a)acting; or (b)making decisions; or (c)communicating decisions; or (d)understanding decisions; or (e)retaining the memory of decisions, as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within definition by reason only of a lack of deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretive nature or otherwise); and ‘incapacity’ shall be constructed accordingly.

⁵⁸¹ The British Association for Counselling and Psychotherapy (BACP) report states that ‘there are several pieces of legislation [in Scotland], which are particularly relevant to people who may be vulnerable by reason of mental illness, incapacity, infirmity, or disability.’ Adrian D. Ward et al, *Safeguarding Vulnerable Adults in Scotland* (British Association for Counselling and Psychotherapy (BACP), 2018) 7.

each law is summarized as follows:⁵⁸² (a) the purpose of the 2003 Act has historically been (at least since 1960) to authorize and regulate compulsory care and treatment for mental disorder, where the person's ability to make a treatment decision is compromised by the mental disorder; (b) the purpose of the AWIA is to allow people whose impairments mean they cannot safely take actions or make decisions involving their finance, welfare or medical treatment to have this done for them; (c) the purpose of the ASPA is to provide a set of short-term measures to protect people who, because of impairment or circumstances, may be vulnerable to abuse.⁵⁸³

The Scottish Review is chaired by John Scott QC who was appointed by the Government of Scotland in May 2019. The chair John Scott states in the Interim Report July 2021 that '[t]he human rights-based approach we have adopted means that mental health law should in future have a significantly wide scope, and that has an important impact on the principles which should govern the legislation.'⁵⁸⁴ The Health and Social Care Alliance (hereinafter referred to as 'the ALLIANCE') is established as the national third sector intermediary for a range of health and social care organizations.⁵⁸⁵ The ALLIANCE have a member of over 3,000 various types of health and social care organizations and is a working partner of the Government of Scotland under the Memorandum of Understanding. This partnership between the Government and Scotland and the ALLIANCE means that the Scottish Review is based on the participation of the civil society at large.

⁵⁸² Refers to the Scottish Mental Health Law Review, *Interim Report July 2021*, 15–16.

⁵⁸³ Ailsa Stewart remarks that the intervention orders of the ASPA have been used 'sparingly and only where serious harm has been perpetrated.' Ailsa E. Stewart, 'The Implementation of *Adult Support and Protection (Scotland) Act (2007)*' (Doctoral dissertation, University of Glasgow, 2016).

⁵⁸⁴ Refers to the Scottish Mental Health Law Review, *Interim Report July 2021*, 13; The author confirmed with John Scott at the panel of the WCAC2022 in Edinburgh (June 6, 2022) that it has not been decided whether the mental health law review would lead to a unified legislation, gradual revision of individual laws, or simultaneous revision of multiple laws.

⁵⁸⁵ Refers to the ALLIANCE, *ALLIANCE* (Web Page, February 2022) <<https://www.alliance-scotland.org.uk/>>.

The Scottish Review issued a consultation report in March 2022 to invite public comments until May 2022.⁵⁸⁶ Then, the Scottish Review asked for public comments until July 2022 toward the specific issues of ‘advance statements, independent advocacy and how criminal law and mental health law work together (forensic proposals).’⁵⁸⁷ These consultations were set out some of the proposals for change to mental health and incapacity law to publish the final report in September 2022. After the submission to the Government of Scotland, the process of the law reform and/or legislation will commence at the Parliament of Scotland.

b. Review of the *Adults with Incapacity (Scotland) Act 2000* (AWIA)

Before the Mental Health Independent Review, there was a review of the AWIA conducted by the Government of Scotland in 2018.⁵⁸⁸ The amendments to the AWIA considered the new social demands that arose after the implementation of the AWIA in 2000, including the CRPD and the European Court of Human Rights (ECHR) cases. The amendments to the AWIA strived to realize overarching support that respects the will and preferences of adults over sixteen years old without discriminating against human rights.

The main AWIA reform proposals⁵⁸⁹ shown in January 2018 were indicated as follow: (i) Enhance principles within the legislation to reflect the need for an adult to have support for the exercise of legal capacity; (ii) Use of powers of attorney; (iii) Creation of graded guardianship with grade 1 to

⁵⁸⁶ Refers to the Scottish Mental Health Law Review (SMHLR), *Consultation* (Web Page, March 2022) <<https://www.mentalhealthlawreview.scot/workstreams/scottish-mental-health-law-review-consultation/>>.

⁵⁸⁷ Refers to the Scottish Mental Health Law Review, *Consultation June 2022 – Additional Proposals* (Web Page, 2022) <<https://www.mentalhealthlawreview.scot/>>.

⁵⁸⁸ Refers to the Government of Scotland, *Adults with Incapacity (Scotland) Act 2000: Proposals for Reform* (Web Page, January 13, 2018) <<https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-proposals-reform/pages/2/>>.

⁵⁸⁹ Ibid.

3;⁵⁹⁰ (iv) Judicial forum for cases under AWIA legislation; (v) Creation of a short-term placement order; (vi) Creation of a right of appeal against residential placement or restrictions within placement; and (vii) Changes to authorization for medical treatment. The Scottish Government invited public comments on the law reform proposals from January to April 2018 and received 317 written opinions (253 available online) from citizens and institutions.⁵⁹¹ The opinions and the survey findings have been reviewed at the working committee, and it was concluded that further deliberations were planned, aiming at a comprehensive law reform.⁵⁹² This is a political decision. Thus, the review of the AWIA has been integrated into the Independent Review.

Currently, adult protection in Scotland has a provision that allows public intervention for an adult at risk of harm rather than as just a rescue model to protect himself/herself.⁵⁹³ There are three types of protection order, viz.: assessment, removal, and banning. Protection orders are granted by a sheriff at a court hearing and the level of proof required is the balance of the probabilities. The discussion is expected to focus on how to secure the balance between state responsibility and citizen

⁵⁹⁰ Refers to the Government of Scotland, *Adults with Incapacity (Scotland) Act 2000: Proposals for Reform* 27. The proposal in legal revision ‘graded guardianship,’ which aims to classify guardianship into grades 1–3, was originally proposed by the Office of the Public Guardian. Grade 1–3 seems to be similar to the statutory guardianship types in Japan i.e., assistance, curatorship, and guardianship.

⁵⁹¹ Laura Gilman, *Adults with Incapacity* (The Scottish Parliament, SPICe Briefing, January 2022) 22–25.

⁵⁹² Adrian D. Ward comments that a review of the 2003 Act will substantially broaden the scope of review and is likely to have some delay for completion. Adrian D. Ward, ‘Scottish Government Review Extended and Delayed’ (39 Essex Chamber, *Mental Capacity Report: Scotland Issue 93*, April 2019) <<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/Mental-Capacity-Report-April-2019-Scotland.pdf>>.

⁵⁹³ Kathryn Jane Mackay, ‘*Adult Support and Protection (Scotland) Act 2007*: Reflections on Developing Practice and Present-Day Challenges’ (2017) 19 (4) *Journal of Adult Protection* 187–98, 193; Fiona Sherwood-Johnson, ‘Constructions of Vulnerability in Comparative Perspective: Scottish Protection Policies and the Trouble with “Adults at Risk”’ (2013) 28(7) *Disability and Society* 908, 921; Jill Stavert, ‘Supported Decision-Making and Paradigm Shifts: Word Play or Real Change?’ (2021) 11 *Frontier in Psychiatry* 1, 9.

rights through the improvement plan 2019–2022 and the next review of the ASPA.⁵⁹⁴ It can be understood that the Scottish Review recognizes that the mental health act will be positioned at the center, regulating the principles with a wide scope and linking closely to the AWIA and ASPA to structure comprehensive adult support and protection legislation. Therefore, it can be said that the fusion of the adult guardianship system, SDM and adult protection is presumably projected under the name of the Scottish Review.⁵⁹⁵

(5) U.S. Guardianship and Supported Decision-Making Acts

a. Guardianship Law

In the U.S., adult guardianship and supported decision-making are legislated in the states. This is in part because the Uniform Law Commission (hereinafter referred to as ‘ULC’), which is known as the National Conference of Commissioners on Uniform State Laws and was established in 1892, drafted and released the *Uniform Guardianship and Protective Proceedings Act* (hereinafter referred to as ‘UGPPA’) in 1997. The UGPPA was updated to the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* (hereinafter referred to as ‘UAGPPJA’) in 2007 and to the *Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act*⁵⁹⁶ (hereinafter referred to as ‘UGCOPAA’) in 2017. These uniform acts have been endorsed by the National Guardianship Association (hereinafter referred to as ‘NGA’)⁵⁹⁷ and the American Bar Association (hereinafter

⁵⁹⁴ Refers to the Government of Scotland, *Adult Support and Protection: Improvement Plan 2019–2022* (Web Page, October 2, 2019) <<https://www.gov.scot/publications/adult-support-protection-improvement-plan-2019-2022/pages/7/>>.

⁵⁹⁵ Details of the law reform proposals will be disclosed in end/September 2022; Adrian D. Ward states that ‘human rights must be translated into law, and law into practice.’ Adrian D. Ward, ‘Adult Incapacity Law: Visions for the Future Drawn from the Unfinished Story of a New Subject with A Long History’ (2020) 26 *International Journal of Mental Health and Capacity Law* 13–34, 13.

⁵⁹⁶ Refers to the Uniform Law Commission (ULC), *Guardianship, Conservatorship, and Other Protective Arrangements Act* (Web Page, n/a) <<https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c>>.

⁵⁹⁷ Refers to the National Guardianship Association (NGA), *Homepage* (Web Page, n/a) <<https://www.guardianship.org/>>.

referred to as ‘ABA’). Thus, each state lagging in legal development of adult guardianship law needed to address this issue. Since the release of the UGPPA, fifty states have completed legislation of the adult guardianship laws and are currently in the process of reforming the guardianship laws to meet the needs of citizens. Some seven states enacted the guardianship laws, following the UGPPA.⁵⁹⁸ All but four states adopted the UAGPPJA, the four states that have not adopted the UAGPPJA are Florida, Kansas, Michigan, and Texas.⁵⁹⁹ Two states, the State of Maine (2018) and the State of Washington (2019), enacted the guardianship laws, following the UGCOPAA.⁶⁰⁰ The unification of the guardianship law in the U.S. cannot work as intended but is moving forward.

Guardianship system however has been criticized by researchers in the U.S. mainly due to a paternalistic characteristic of the guardianship law system.⁶⁰¹ The guardianship law has been progressed by technical solutions, such as the procedural safeguards at a guardianship hearing and the least restrictive alternative principle that was advocated in 1980s.⁶⁰² The alternatives to avoid

⁵⁹⁸ Refers to the ULC, *Guardianship, Conservatorship, and Other Protective Arrangements Act*.

⁵⁹⁹ Refers to the ABA, ‘2021 Adult Guardianship Legislation Summary’ (Online, December 2021) <https://www.americanbar.org/content/dam/aba/administrative/law_aging/2021-guardianship-leg-summry.pdf>.

⁶⁰⁰ Weisbord and Horton states that disparity is seen in law development between the guardianship/SDM, as is modernized, and testamentary capacity, as is behind time, in the State of California, focusing on legal system’s treatment of individuals with disabilities in testamentary capacity claims. Reid K. Weisbord and David Horton, ‘The Future of Testamentary Capacity’ (Online, 2021) Washington and Lee Law Review, Forthcoming, Rutgers Law School Research Paper <<https://ssrn.com/abstract=3964342>>.

⁶⁰¹ ‘The fourteenth century English law principle, *parens patriae*, which existed in the colonial time that the state played a role as a parent of the state, grew unexamined into the state law. By this principle, the state is allowed by law to protect through the court people who do not protect their interests by themselves. The state courts delegate this responsibility to guardians and supervise their activities. This mechanism may function paternalistic to principles.’ Erica Wood, ‘Recharging Adult Guardianship Reform: Six Current Paths Forward’ (2016) 1(1) *Journal of Aging, Longevity, Law, and Policy* 8–53, 8–9 and 23; Nobuhito Yoshinaka, ‘Origins of the Thought of Parens Patriae’ (2006) 30(1) *Hiroshima Law Review* 29, 51. (in Japanese) *.

⁶⁰² Roger B. Sherman, ‘Guardianship: Time for a Reassessment’ (1980) 49(3) *Fordham Law Review* 350, 378; Shirli Werner and Rachel Chabany, ‘Guardianship Law Versus Supported Decision-Making Policies: Perceptions of Persons with Intellectual or Psychiatric Disabilities and Parents’ (2015) 86(5) *The American Journal of Orthopsychiatry* 486, 499.

guardianship has also developed, such as durable power of attorney, trust, direct deposit and automatic payment, and system of representative payees to receive pension.⁶⁰³ In fact, the guardianship activities have been dealt with by the state courts and it is unknown for the public what happens in the guardianship on site. In few years, considering events related to misconducts of adult guardians and excessive interventions by guardianship became known through media,⁶⁰⁴ voices are raised to request that a court improvement program in the guardianship or reform of the guardianship law is needed, particularly to prevent misconducts of adult guardians.⁶⁰⁵

A bill for the *Guardianship Accountability Act of 2021* was tabled on the federal congress of senate in September 2021 to require ‘the Elder Justice Coordinating Council to create a National Online Resource Center on guardianship for the publication of resources and data relating to court-determined adult guardianships’ and ‘the state programs related to overseeing the administration of court-appointed guardian arrangements.’⁶⁰⁶ These measures are to facilitate access to resources and data related to the adult guardianship determined by the court as well as administrative monitoring of adult

⁶⁰³ Alternatives to full guardianship are summarized in Table 1 of the article: Zietlow, Kahli et al, ‘Guardianship: A Medicolegal Review for Clinicians’ (Online, 2022) *Journal of the American Geriatrics Society* <doi:10.1111/jgs.17797>; Lawrence A. Frolik, ‘How to Avoid Guardianship for Your Clients and Yourself!’ (Social Science Research Network Electronic Paper Collection, Online, 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314589>; David Godfrey, ‘Using Alternatives to Guardianship to Defend Against or Terminate Guardianship’ (Online, 2021) <https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/>.

⁶⁰⁴ For example, a film ‘I Care a Lot’ features crime cases of adult guardians and received a lot of attention in 2020; Nina A. Kohn, ‘Britney Spears’ Case Has Shown Why Guardianship Laws Need to Change’ (*The Guardian*, August 18, 2021) <<https://www.theguardian.com/commentisfree/2021/aug/18/britney-spears-case-guardianship-laws>>; Lisa Zammiello, ‘Don’t You Know That Your Law Is Toxic? Britney Spears and Abusive Guardianship: A Revisionary Approach to the Uniform Probate Code, California Probate Code, and Texas Estates Code to Ensure Equitable Outcomes’ (2021) 13(2) *Estate Planning & Community Property Law Journal* 587, 631.

⁶⁰⁵ David Godfrey states that ‘a Court Improvement Program is needed in the adult guardianship as the Child Welfare Court did in 1993.’ David Godfrey, ‘Challenges in Guardianship and Guardianship Abuse’ (2021) 42(4) *Bifocal* 84, 86.

⁶⁰⁶ Refers to the Congress Gov, ‘S.2881— Guardianship Accountability Act of 2021’ (Web Page, September 28, 2021) <<https://www.congress.gov/bill/117th-congress/senate-bill/2881/actions>>.

guardians in order to strengthen supervision toward adult guardians. The ABA adopted an institutional resolution to invest in a court improvement program on August 3, 2020.⁶⁰⁷ Some other proposals appear in academic research, such as a uniform guidance to court judges on ‘incapacitated’ and a mandatory review process of the adult guardianship. At the Fourth National Guardianship Summit in May 2021, the 22 recommendations to improve and reform the adult guardianship system in the U.S. were adopted.⁶⁰⁸ This summit conference is held every ten years, which is sponsored by the National Guardianship Network (NGN) that comprises 13 national guardianship related organizations. The recommendations include rights-based guardianships, supported decision-making, limited guardianship and protective arrangements (in the UGCOPAA), rethinking guardianship monitoring and addressing abuse, addressing fiduciary responsibilities and tensions, and guardianship court improvement programs.⁶⁰⁹ These issues require states to reconsider legislative and administrative improvements in guardianship to properly protect principals’ interests.⁶¹⁰

b. Supported Decision-Making Legislation

Supported decision-making on the mutual agreement between the principal and the supporter is encouraged as an alternative to guardianship from the value of autonomy.⁶¹¹ There was a case law

⁶⁰⁷ Refers to the ABA, *Annual Meeting 2020— House of Delegates Resolution 105* (Web Page, August 3, 2020) <https://www.americanbar.org/news/reporter_resources/annual-meeting-2020/house-of-delegates-resolutions/105/>.

⁶⁰⁸ Refers to the Syracuse University, College of Law, *The Fourth National Guardianship Summit/2021: Maximizing Autonomy and Ensuring Accountability* (Web Page, May 10–14, 2021) <<http://law.syr.edu/academics/conferences-symposia/the-fourth-national-guardianship-summit-autonomy-and-accountability>>.

⁶⁰⁹ Nina A. Kohn and David English, ‘Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship’ (Conference paper at the Fourth National Guardianship Summit 2021 in New York, May 10–14, 2021).

⁶¹⁰ Annemarie M. Kelly et al states that the U.S. guardianship system is ‘rife with fairness and inefficiencies,’ reviewing 50-State guardianship laws. Annemarie M. Kelly et al, ‘A 50-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning’ (2021) 75(1) *Journal of Financial Service Professionals* 59, 79.

⁶¹¹ Leslie Salzman, ‘Rethinking Guardianship (again): Substituted Decision-making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act’ (2009) 282 *Cardozo Working Paper* 156, 220; Leslie Salzman, ‘Guardianship for Persons with Mental Illness — A Legal and Appropriate Alternative?’ (2011) 4(2) *St. Louis University*

Ross v. Hatch, Circuit Court for the City of Newport News, Aug. 2, 2013, which was a symbolic court decision for the value of supported decision-making.⁶¹² The move has progressed to include supported decision-making in legislation in the U.S. Two U.S. states have enacted laws on supported decision-making at the earlier stage. The first was the *Supported Decision-Making Agreement Act* (Texas State Act, Chapter 1357), which came into effect in September 2015.⁶¹³ The Texas State law is a law on supported decision-making agreement, and the Delaware State law is a law concerning the overall supported decision-making framework, including supported decision-making agreement.⁶¹⁴

The second was *Title 16, Health and Safety, Individuals with Disabilities, Chapter 94A. Supported Decision-Making* (Delaware State Act, Chapter 94A), which was enacted in Delaware in 2016.⁶¹⁵ Article 9402A(a) (1) of the Delaware State act states that the purpose of the act is to ‘provide an assistance in gathering and assessing information, making informed decisions, and communicating

Journal of Health Law & Policy 279, 330; Nina A. Kohn, Jeremy A. Blumenthal and Amy T. Campbell, ‘Supported Decision-Making: A Viable Alternative to Guardianship?’ (2013) 117(4) *Penn State Law Review* 1111, 1157; ABA, Commission on Law and Aging, ‘Supporting Decision Making Across the Age Spectrum’ (Online, 2020) <https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/>.

⁶¹² This is the case that the court decided to accept supported decision-making treatment (as an alternative of the guardianship) to Margaret Jenny Hatch, a woman with Down syndrome, respecting her wishes to do so. Jonathan Martinis, Jason Harris, Dean Fox and Peter Blanck, ‘State Guardianship Laws and Supported Decision-Making in the United States After Ross and Ross v. Hatch: Analysis and Implications for Research, Policy, Education, and Advocacy’ July 2021 *Journal of Disability Policy Studies* (Online, 2021) <<https://doi.org/10.1177/10442073211028586>>; Takeshi Shimura, ‘Underlying the Self-Decision Support Principle as an Alternative to the Adult Guardianship System in the United States (1): Seeking Suggestions from American Case Law, Enactment, and Theory to Japanese Law’ (2021) 93 *Adult Guardianship Practices* 88, 96. (in Japanese) *

⁶¹³ Gabrielle Bechyne, ‘Supported Decision-Making Agreements in Texas’ (2020) 13(31) *Estate Planning and Community Property Law Journal* 311, 351.

⁶¹⁴ There is a publication that synthesizes the published literature on the use of SDM in the U.S., describing the policy, procedure, and practice approaches of SDM. L. VanPuymbrouck, *Supported Decision-Making in the United States: A White Paper* (The Council on Quality and Leadership Report, 2017).

⁶¹⁵ This paragraph refers to the previously published article: Yukio Sakurai, ‘An Essay on the Adult Protection System in Japan: Referring to Delaware State Law and the Revision of European Law’ (2018) 8 *Quarterly Journal of Comparative Guardianship Law* 3, 21. (in Japanese)

decisions to adults who do not require a guardian or substituted decision maker for such activities, but who would benefit from decision-making assistance.’ In other words, the Delaware State law does not regard supported decision-making as an instrument to completely replace the adult guardianship system but can accept the co-use of an EPA or many adults in the preliminary stage of petition to the adult guardianship system. If the legal capacity of the principal is insufficient, then either an EPA or the adult guardianship system would be adopted instead of supported decision-making. For this reason, it was inferred that a legislation could be made in 2016 when a uniform method of supported decision-making was not yet fully established in detail. Article 9404 stipulates that adults are presumed to have the capacity to be self-sustaining and prescribes that the mental capacity of an adult should not be determined solely through a method of communication. Article 9406 prohibits the unjust intimidation of principles by supporters and decision-making by supporters without the principals’ consent.

In August 2017, the ABA introduced an institutional resolution recommending that each state incorporate the provisions on supported decision-making in the state law and that the courts consider supported decision-making as a less restrictive alternative to guardianship.⁶¹⁶ The National Center of State Courts, with cooperation of ABA, provides the online training program of supported decision-making with free of charge.⁶¹⁷ For this reason, supported decision-making legislation has developed and is expected to develop even more in the U.S. states.⁶¹⁸ In fact, the following twelve states,

⁶¹⁶ Refers to the ABA, *Resolution 113: American Bar Association Adopted by The House of Delegates* (Web Page, August 14–15, 2017) <<https://health.ucdavis.edu/mindinstitute/centers/cedd/pdf/sdm-aba-resolution.pdf>>; ABA, *Least Restrictive Alternative References in State Guardianship Statutes* (Web Page, June 23, 2018) <https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf>.

⁶¹⁷ The presentation indicates that ‘there is no one-size-fits-all approach to supported decision-making. (...) every person’s supported decision-making should be tailor-made to address the specific wants and needs of the person.’ The National Center for State Courts, *Finding the Right Fit: Decision-Making Supports and Guardianship* (Web Page, 2019) 25. <<http://www.supporteddecisionmaking.org/legal-resource/finding-right-fit-decision-making-supports-and-guardianship-online-course>>.

⁶¹⁸ Rachel Mattingly Phillips, ‘Model Language for Supported Decision-Making Statutes’ (2020) 98 *Washington University Law Review* 615, 644.

Columbia (2018), Wisconsin (2018), Alaska (2018), Indiana (2019), Nevada (2019), North Dakota (2019), Rhode Island (2019), Louisiana (2020), Colorado (2021), Oklahoma (2021), Virginia (2021), and Montana (2012) have statutorily recognized supported decision-making.⁶¹⁹ In addition, other five states, such as Missouri, Tennessee, Utah, and Washington have recognized supported decision-making in other ways, including as a less restrictive option than guardianship and affirming the rights of people to continue to make their decisions whenever possible.⁶²⁰

Recently, critical views appeared against the development of legislation on supported decision-making. Nina A. Kohn pointed out that the U.S. supported decision-making found ‘the wide gap between the concept of supported decision-making and its actual implementation in the state legislation.’⁶²¹ This opinion requests states to reconsider the legislative and administrative improvements in supported decision-making and its safeguard measures, in addition to the guardianship law and administration as mentioned before.⁶²² On the other hand, Andrew Peterson et al propose a ‘three-step model’ that specifies the necessary conditions of supported decision-making

⁶¹⁹ Refers to the ABA, ‘2021 Adult Guardianship Legislation Summary’ (Online, December 2021) 14.

⁶²⁰ Ibid. The Arc of Northern Virginia conducted the pilot project of supported decision-making and issued the report (2021). The Arc of Northern Virginia and The Burton Blatt Institute at Syracuse University (BBI), ‘*I Learned that I Have a Voice in My Future*’ Summary, Findings, and Recommendations of The Virginia Supported Decision-Making Pilot Project (The Arc of Northern Virginia and The Burton Blatt Institute at Syracuse University (BBI), Online, January 31, 2021) <http://www.supporteddecisionmaking.org/sites/default/files/2021_virginia_SDM_pilot_project.pdf>.

⁶²¹ Nina A. Kohn points out her observations of the ‘wide gap between the U.S. SDM legislations and its actual implementations, and proposes four measures, including to construct[ion] of public system for support, as an alternative, person-centered approach to SDM.’ Nina A. Kohn, ‘Legislating Supported Decision-Making’ (2021) 7 *Harvard Journal on Legislation* 313–356, 353–355.

⁶²² Kristin Booth Glen states ‘Supported decision-making (SDM) for persons with intellectual and developmental disabilities (I/DD) has been part of legal scholarly discourse for more than a decade, but has, at least in the United States, entered the “real world” of practice only recently.’ This remark demonstrates that the SDM practice has not been done enough in the U.S. This article addresses the experience and lessons of the SDM pilot project conducted in New York. Kristin Booth Glen, ‘Supported Decision Making from Theory to Practice: Further Reflections on An Intentional Pilot Project’ (2020) 13(1) *Albany Government Law Review* 24018.

for individuals with dynamic impairments: identifying domains for support; identifying kinds of support; and reaching a mutually acceptable and formal agreement.⁶²³ Such a model and its code of conduct for supported decision-making will be of help for a supporter to better deal with an individual's needs for impairment.

c. Adult Protective Services (APS)

Adult protective services (hereinafter referred to as 'APS') have developed in legislation in each state of the U.S. as a safeguard against abuse.⁶²⁴ APS programs are established based on the reform of welfare state law, such as Senate Bill (SB) 2199 that was enforced in January 1999 in the State of California, and APS funding that has been annually budgeted.⁶²⁵ The elderly aged 65 and over and dependent adults aged 18 to 64 are protected in APS program. APS is usually located in country welfare agencies.⁶²⁶ With the implementation of SB 2199 in California state, the definition of mandatory

⁶²³ Andrew Peterson, Jason Karlawish and Emily Largent, 'Supported Decision-Making with People at the Margins of Autonomy' (Online, 2020) *The American Journal of Bioethics* 1, 15. <doi:10.1080/15265161.2020.1863507>.

⁶²⁴ Refers to the National Adult Protective Services Association (NAPSA), *Adult Protective Services Recommended Minimum Program Standards* (NAPSA, Online, 2013) <<http://www.napsa-now.org/wp-content/uploads/2014/04/Recommended-Program-Standards.pdf>>; National Adult Protective Services Association (NAPSA), *National Policy and Advocacy* (Web Page, n/a) <<https://www.napsa-now.org/policy-advocacy/national-policy/>>; Jason Burnett et al, 'Addressing Senior Financial Abuse: Adult Protective Services and Other Community Resources' in Ronan M. Factora (ed), *Aging and Money: Reducing Risk of Financial Exploitation and Protecting Financial Resources* (Springer, 2nd ed. 2021); This is an empirical APS analysis in the State of Ohio: Kenneth J. Steinman and Georgia J. Anetzberger, 'Measuring the Diverse Characteristics of County Adult Protective Services Programs' (2022) 34(3) *Journal of Elder Abuse & Neglect* 153, 173.

⁶²⁵ Refers to the APS, Research and Development Division, 'Early Impact of SB 2199 on the Adult Protective Services Program' (Online, 2000) <<https://www.cdss.ca.gov/research/res/pdf/dapreports/APS-SB2199.pdf>>; Nina Santo, 'Breaking the Silence: Strategies for Combating Elder Abuse in California' (Online, 2000) 31 *McGeorge Law Review* 801–838, 818. <<https://scholarlycommons.pacific.edu/mlr/vol31/iss3/11>>.

⁶²⁶ There is a difference of philosophy of service and community responsiveness between APS and Public Guardian Offices in most countries of states in the U.S. Diane Kaljian, 'Public Guardian and Collaboration in Three Countries: Models of Adult Protective Services' (Online, 2016) <<https://mackcenter.berkeley.edu/sites/default/files/aas-2016-05-06/AAS/TOC-AAS-3.pdf>>; Stephanie Chamberlain et al, 'Going it Alone: A Scoping Review of Unbefriended Older

reporting in APS program has expanded, and APS agencies are requested to operate a 24-hour response system. APS programs are established over the U.S. states to combat elder abuse by law; however, elder abuse has not been resolved yet. The North American Securities Administrators Association (NASAA) adopted the *NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation* in 2016, and 33 states adopted this model Act, in whole or in part, as of February 2022.⁶²⁷

In October 2017, the Federal government adopted the *Elder Abuse Prevention and Prosecution Act*, which governs investigations into elder abuse, including financial exploitation, and encourages positive judicial responses.⁶²⁸ This federal legislation is part of the APS advocated by the U.S., although it is said that enormous financial exploitation damages have been occurring, it is still not possible to grasp the actual damage amounts involving the elderly.⁶²⁹ This law was implemented against the fact that responses to elder abuse by the courts were not as positive as responses by the police and other public agencies. The *Financial Exploitation Prevention Act* came into effect in September 2021 in the State of Michigan.⁶³⁰

In order to secure the interests of the ageing population with insufficient mental capacity in the U.S., multiple potential benefits for special needs planning, including financial planning, are

Adults' (2018) 37(1) *Canadian Journal on Aging (La Vevue Canadienne du Vieillissement)* 1, 11. <doi:10.1017/S0714980817000563>.

⁶²⁷ NASAA (organized in 1919) is the international organization works for investor protection. NASAA's membership consists of the securities administrators in the 50 states, Canada, Mexico, and some others. NASAA, *NASAA Model Legislation to Protect Vulnerable Adults from Financial Exploitation* (Web Page, 2022) <<https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>>.

⁶²⁸ Atsuko Harada (the National Diet Library of Japan), 'American Law on the Prevention of Elderly Abuse: Elderly Abuse Prevention and Prosecution Law 2017' (June 2018) 276 *Foreign Legislation* 1, 20. (in Japanese) *

⁶²⁹ Kevin Hansen et al, Hansen, Kevin et al, 'Criminal and Adult Protection Financial Exploitation Laws in the United States: How Do the Statutes Measure Up to Existing Research?' (2016) 42(3) *Mitchell Hamline Law Review*, Article 3.

⁶³⁰ Refers to the Department of Attorney General, Government of Michigan, *New Protections in Place for Vulnerable Adults as Financial Exploitation Prevention Act Goes into Effect Sunday* (Web Page September 25, 2021) <https://www.michigan.gov/ag/0,4534,7-359-92297_47203-569109--,00.html>.

emphasized to implement when they are healthy. It is recommended that U.S. courts and legislatures should have an urgent interest in analyzing guardianship matters, leveraging other less restrictive types of estate planning tools to serve persons with special needs.⁶³¹ The method to promote supported decision-making and elder abuse legislation in parallel is seemingly similar to Australia's public policy, which is discussed next.

(6) Changes to Victoria and NSW State Acts in Australia

a. State Level

In the State of Victoria, the *Guardianship and Administration Act 2019* was enacted in May 2019 and came into force in March 2020. This is the first replacement of the *Guardianship and Administration Act 1986* in thirty-three years. This legislation was in response to the request of the Attorney-General of Victoria in May 2009 that the Victorian Law Reform Commission⁶³² (hereinafter referred to as 'VLRC') amend the Victorian Act 1986. After deliberations by experts, the VLRC submitted a report, *Guardianship: Final Report No. 24*⁶³³ (hereinafter referred to as 'VLRC Report 24'), to the state Attorney-General in April 2012. The VLRC Report 24 proposed reform proposals that included 440 items. Some proposals have been incorporated into the two other laws, the *Powers of Attorney Act 2014* and the *Victoria Medical Treatment Planning and Decision Act 2016*. The main changes of the Victorian 2019 Act to the 1986 Act are as follows:

⁶³¹ Annemarie M. Kelly et al, 'Implementing Guardianship Policies in Special Needs Planning: Five Potential Positives' (2020) 74(5) *Journal of Financial Service Professionals* 49, 63; Emily S. Taylor Poppe, 'Surprised by the Inevitable: A National Survey of Estate Planning Utilization' (2020) 53 *University of California Davis Law Review* 2511, 2560.

⁶³² The Victorian Law Reform Commission (VLRC) is 'a central law reform agency in Victoria,' which was established by the *Victorian Law Reform Commission Act 2000*. 'The Attorney-General said in May 2000 that the charter of the VLRC would be "to facilitate community-wide debate of law reform issues and to assist members of Parliament in identifying key areas of law reform. The aim is to place Victoria at the cutting edge in law reform in Australia."' Victorian Law Reform Commission (VLRC), *Our Story* (Web Page, n/a) <<https://www.lawreform.vic.gov.au/about-us/our-story/>>.

⁶³³ Refers to the VLRC Report 24 and 'Project Timeline' starting from the announcement of the guardianship review (June 19, 2009) till the VLRC Report 24 publication date (April 12, 2012). VLRC, *Guardianship* (Web Page, April 12, 2012) <<https://www.lawreform.vic.gov.au/project/guardianship/>>.

- (i) The primary objective is to protect and promote the human rights and dignity of persons with disability by adhering to the CRPD and recognizing the need to support persons with disability to make, participate in and implement decisions that affect their lives (section 7: primary object, Victorian 2019 Act).
- (ii) A person is presumed to have decision-making capacity unless there is evidence to the contrary (section 5(2): meaning of decision-making capacity). Supported decision-making is incorporated into the law system to respect the will and preferences of the principal, and supportive guardians and supportive administrators are appointed by the tribunal (part 4: supportive guardianship orders and supportive administration orders).
- (iii) The appointment of adult guardians by the tribunal is only a last resort (section 30: VCAT may make a guardianship order or administration order), and in principle, a hearing of all candidates for the roles of supportive guardians and supportive administrators is conducted to set up tailor-made assistance in response to the request of the principal (section 85).

In the State of New South Wales (NSW), an amendment project of the Adult Guardianship Act 1987 is underway. The NSW Law Reform Commission⁶³⁴ (hereinafter referred to as ‘NSW LRC’) consulted with the Attorney-General of NSW in 2016 about undertaking a review of the 1987 Act. A report, *Report 145: Review of the Guardianship Act 1987*⁶³⁵ (hereinafter referred to as ‘NSW LRC Report 145’), was submitted in February 2018. Afterward, the NSW LRC Report 145 was partially revised to reflect public comments, and the final report was tabled to the state parliaments in August 2018. The main points of possible amendment proposals regarding this report as follows:

⁶³⁴ ‘The NSW Law Reform Commission is an independent statutory body constituted under the Law Reform Commission Act 1967 (NSW). We provide expert law reform advice to Government on matters that the Attorney General refers to us.’ NSW Law Reform Commission, *About Us* (Web Page, n/a) <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_aboutus/lrc_aboutus.aspx>.

⁶³⁵ NSW Law Reform Commission, *NSW LRC Report 145: Review of the Guardianship Act 1987* (Web Page, February 2018) <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Report/Report%20145.pdf>>.

- (i) The revised law will be renamed *Assisted Decision-making Act*. If the principal is aged eighteen or older and desires assisted decision-making by an appropriate supporter, the principal may make a personal support agreement with the supporter.
- (ii) The tribunal may appoint a supporter by a tribunal support order as a last resort, and the supporter can assist the principal in decision-making. The Act cannot enforce change to any informal arrangements if they are made with the consent of the principal and the supporter.
- (iii) Supporters carry out decision-making support in accordance with decision support agreements or tribunal orders, and when providing an assistance, supporters are obliged to observe the general principles of the Act.

It can be understood that the NSW LRC Report 145 proposes a more advanced institutional design in line with the CRPD than the VLRC Report 24. That is, the paternalistic aspect of the adult guardianship is undesirable, and a policy has been introduced to prioritize respect for autonomy and right to self-determination.

b. National Level

In the national level, the Australian Law Reform Commission⁶³⁶ (hereinafter referred to as ‘ALRC’) report, *Equality, Capacity and Disability in Commonwealth Laws: Final Report No. 124*’ (hereinafter referred to as ‘ALRC report 124’) was published and tabled on the national parliament in 2014.⁶³⁷ This is a national guardianship law reform report, which has mainly examined the ‘ability to exercise legal capacity’ and ‘equal recognition before the law of people with disability’ in the CRPD,

⁶³⁶ The Australian Law Reform Commission (ALRC) is ‘an advisory body to the Attorney-General by law and is regarded as an independent organization with the mission of professional deliberations on law amendments.’ Rosalind F. Croucher, ‘Law Reform Agencies and Government—Independence, Survival and Effective Law Reform’ (2018) 43(1) *University of Western Australia Law Review* 78, 91.

⁶³⁷ The ‘terms of reference’ of ALRC Report 124 includes ‘how maximizing individual autonomy and independence could be modelled in Commonwealth laws and legal frameworks.’ Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/>>.

and provides the four National Decision-Making Principles.⁶³⁸ In addition, the ALRC also published the report, *Elder Abuse—A National Legal Response Final Report*⁶³⁹ (hereinafter referred to as ‘ALRC Report 131’) in June 2017 to ensure that the national statutory policy on prevention of elder abuse is observed. Then, the National Disability Advocacy Program Decision Support Pilot was launched in 2018, funded by the Commonwealth Department of Social Service.⁶⁴⁰ The Serious Incident Response Scheme (hereinafter referred to as ‘SIRS’) was implemented on April 1, 2022, as an initiative to help prevent and reduce the risk and occurrence of incidents of abuse and neglect in residential aged care services subsidized by the Australian Government.⁶⁴¹ It can be said that Australia has promoted legislation or law reform project regarding the guardianship, supported decision-making, and abuse prevention in state level, particularly in the States of Victoria and NSW, and national level.

(7) Other Statutory Developments

Three countries of Ireland, Peru, and Germany have advanced statutory developments in adult protection, of which developments are sketched as follows:

⁶³⁸ Bruce Alston, a member of ALRC then, examines how the National Decision-Making Principles may be used by communities, policymakers, and governments to promote legal changes to ensure that individuals with disability have an equal right to make decisions for themselves. Bruce Alston, ‘Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform’ (2017) 35 *Law in Context* 21, 43.

⁶³⁹ ALRC, *Elder Abuse—A National Legal Response (ALRC Report 131)* (Web Page, June 14, 2017) <<https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>>.

⁶⁴⁰ Refers to the Australian Government, Department of Social Services, *National Disability Advocacy Program* (Web Page, September 29, 2020) <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap>>; John Chesterman and Lois Bedson, *Decision Time: Activating the Rights of Adults with Cognitive Disability* (Victorian OPA Report, March 1, 2021) 22. <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/141-decision-time>>.

⁶⁴¹ Refers to the Department of Health and Aged Care (Australian Government), *Serious Incident Response Scheme (SIRS)* (Web Page, May 31, 2022) <<https://www.health.gov.au/initiatives-and-programs/serious-incident-response-scheme-sirs>>; The article states that ‘the SIRS may lead to the prioritization of reporting over action.’ Lise Barry and Patrick Hughes, ‘The New Serious Incident Response Scheme and the Responsive Regulation of Abuse in Aged Care’ (2022) 29(1) *Journal of Law and Medicine* 465–480, 480.

(a) In **Ireland**, the *Assisted Decision-Making (Capacity) Act* (2015) replaced the Ward of Court system for adults. The Irish adult protection system is that (i) assisted decision-making by the mutual agreement is used under the supervision of the Office of the Public Guardian (OPG), (ii) a co-decision-making option is introduced, (iii) a decision-making representative, which replaced the adult guardian, is appointed by the court as a last resort under the supervision of the OPG, and (iv) an EPA is available. This project is called the ‘Decision Support Service’ (DDS) conducted by the DDS (director: Áine Flynn) under the supervision of the Mental Health Commission (MHC).⁶⁴² The new framework of (i) to (iv) above will be implemented in Autumn 2022 after the Assisted Decision-Making (Capacity) (Amendment) Bill 2022 passes through the parliament. It is expected that ‘the commencement of assisted decision-making provides an opportunity to redefine the provision, practices, and priorities of healthcare in Ireland to enable improved patient-centered care.’⁶⁴³ Monitoring its operation on site is important after the implementation of the systems in Autumn 2022.

⁶⁴² Refers to the Mental Health Commission (MHC), *The Decision Support Service* (Web Page, n/a) <<https://decisionsupportservice.ie/>>; The MHC, *MHC 2019 – 2022 Strategy: ‘Protecting People’s Rights’* <https://www.mhcirl.ie/sites/default/files/2021-01/MHC_Strategy_2019-2022.pdf>.

⁶⁴³ Relevant articles regarding the law: Ní Shé, Éidín et al. ‘What Bothers Me Most Is the Disparity between the Choices that People Have or Don’t Have: A Qualitative Study on the Health Systems Responsiveness to Implementing the Assisted Decision-Making (Capacity) Act in Ireland’ (2020) 17(9) *International Journal of Environmental Research and Public Health* 3294, 3307; A different view is seen in the article: Mary Donnelly, ‘Deciding in Dementia: The Possibilities and Limits of Supported Decision-Making’ (Online, 2019) 66 *International Journal of Law and Psychiatry* 101466 <<https://doi.org/10.1016/j.ijlp.2019.101466>>; Ruth Uster and Tadhg Stapleton, ‘Overview of the Assisted Decision-Making (Capacity) Act (2015): Implications and opportunities for occupational therapy’ (2018) 46(2) *Irish Journal of Occupational Therapy* 130, 140; Satoshi Taniguchi, ‘A Study on An “Advance Healthcare Directive” in Ireland’s Assisted Decision-Making (Capacity) Act 2015’ (2020) 63(1) *The Economic Journal of Takasaki City University of Economics* 41, 71. (in Japanese); John Lombard and Hope Davidson, ‘The Older Person’s Experience of Autonomy in Healthcare Decision-Making in Ireland: The Relationship between Law, Policy, and Practice’ (2022) 00(0) *Medical Law International* 1, 25. <<https://doi.org/10.1177/09685332221109239>>.

- (b) In **Peru**, the Peruvian Civil Code was partially amended in September 2018. Article 3(2) of the Peruvian Civil Code states that ‘persons with disabilities have equal ability to act in all aspects of life,’ following the values of Article 12 of the CRPD. The amendment added a new term ‘support (*apoyo*)’ provision (Article 659B of the Peruvian Civil Code) that is largely used for vulnerable adults, while maintaining the substituted decision-making for those in a coma. In principle, the ‘support’ does not have any power of representation in a legal sense and is regarded as an assistance to vulnerable adults.⁶⁴⁴ The ‘safeguards (*salvaguardias*)’ (Article 45B of the Peruvian Civil Code) should cope with an abuse of law or an undue influence, but its measures are not addressed clearly.⁶⁴⁵ The amendment to Peruvian civil code shows a possibility to incorporate the concept of support in the civil code, although the support does not have any power of legal representation. Monitoring is important as to how the support functions in practice. The Peruvian Civil Code reform may impact Latin American countries’ legislation that has adapted to a stricter interpretation according to the mandates derived from the CRPD in Argentina (2014), Costa Rica (2016), and Colombia (2019).⁶⁴⁶
- (c) In **Germany**, there are two systems for support and protect vulnerable adults. One is the statutory care law (*Betreuung*) system, and the other is enduring power of attorney. The current guardianship and care law was enacted in September 1990 and enforced in 1992, which separated ‘the

⁶⁴⁴ Antonio Martínez-Pujalte, ‘Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms’ (Online, 2019) 8(1) *Laws* <<https://doi.org/10.3390/laws8010004>>; Renato Constantino, ‘The Flag of Imagination: Peru’s New Reform on Legal Capacity for Persons with Intellectual and Psychosocial Disabilities and the Need for New Understandings in Private Law’ (2020) 14 *The Age of Human Rights Journal* 155,180; Vásquez Encalada, Alberto, Kimber Bialik, and Kaitlin Stober, ‘Supported Decision Making in South America: Analysis of Three Countries’ Experiences’ 18(10) *International Journal of Environmental Research and Public Health* 5204.

⁶⁴⁵ Keisuke Shimizu, ‘Can the New Peruvian Law Protect the Rights of Persons with Disabilities? Based on the Trend of New Support System’ (2021) 91 *Adult Guardianship Practices* 74–80, 77. (in Japanese) *

⁶⁴⁶ Nicolás Espejo Yaksic, ‘Legal Capacity, Disability and Human Rights: Changes and Challenges’ (Oxford Human Rights Hub Blog, Online, July 9, 2020) <<https://ohrh.law.ox.ac.uk/legal-capacity-disability-and-human-rights-changes-and-challenges/>>.

guardianship law system for minors’ and ‘the care law system for adults.’ The care law was implemented in parallel with the Aged (Long-Term) Care Insurance Law (1994), reviewing the adult protection in the German Civil Code.⁶⁴⁷ The care law was designed to consider self-determination of the principal and to avoid restrictions of human rights of the principal without necessity, and establishes the legal principles, such as the principles of necessity and of subsidiarity. Considering the requirements of the CRPD, the German federal government established the research project, the ‘Court-appointed Legal representatives/*Betreuer* in Germany: Quality in Legal Care’ (2015–2017).⁶⁴⁸ The intention of the German federal government was to review the care law system and its practices and to prepare the reform of the care law to meet the requirements of the CRPD and relevant case law in Germany and Europe.

The new law was prepared based on this research project and the bill on the reform of guardianship and care law passed the federal parliament on May 4, 2021. The new law in the German Civil Code will come into force in January 2023.⁶⁴⁹ Some new provisions are seen in the new law, namely, the mutual representation of spouses in health care affairs; this is a proxy right which is limited to emergency representation and no obligation to exercise (Article 1858), a

⁶⁴⁷ Kazuichiro Iwashi, ‘Autonomy and Protection of the Elderly in Germany’ (2013) 85(7) [1061] *The Horitsu Jiho* 26, 32. (in Japanese) *

⁶⁴⁸ In 2015, the Federal Ministry of Justice and Consumer Protection commissioned a research project regarding the CRPD Committee’s criticism to the German Law of the care law based on Article 12, the CRPD. The research project was concerned with questions: how the Law of the care law is implemented in practice; what the guiding principles for quality standards are; whether structural quality deficits exist, and if so, what the possible causes for these deficits are. Dagmar Brosey, ‘Court-appointed Legal representatives (*Betreuer*) in Germany: Quality Requirements and their Implementation’ (Conference paper at the fifth WCAG2018 held in Seoul on October 23–25, 2018).

⁶⁴⁹ Das Bundesjustizministerium (BMJV), *das Vormundschafts- und Betreuungsrecht Reformieren* (The Federal Ministry of Justice (BMJV), the guardianship and care law reform) (Web Page, May 21, 2021) (in German) <https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/DE/Reform_Betreuungsrecht_Vormundschaft.html>; Deutscher Bundestag, *Reform des Vormundschafts- und Betreuungsrechts* (German Federal Parliament, *Reform of Guardianship and Care Law*) (Web Page, March 2021) (in German) <<https://www.bundestag.de/dokumente/textarchiv/2020/kw48-de-vormundschaftsrecht-807788>>.

detailed catalog of acts with the court permission obligations (Articles 1848–1854); the scope of the court involvement and control becomes broader and more roles of assistance of the Care Associations to principals are organized (Article 10 etc. of the Care Organization Law).⁶⁵⁰ More contribution of the carers and the relevant associations to principals in personal affairs support is also required in the new law.

3.3 Analysis of Adult Support and Protection Legislation

3.3.1 Difference

The way to develop a statutory system to support and protect vulnerable adults may vary by country or state. The European continental countries, in general, have amended their civil codes to incorporate the concept of adult support and protection into the revised provisions. This has been done in Switzerland, Ireland, and Austria. In these countries, the leading players in legal reform are the parliaments, which are supported by the governments. Particularly in Austria, the Federal Ministry of Justice held the law reform study team meetings, which included persons with disabilities and practitioners, for three and a half years before concluding a report.⁶⁵¹

Australia have developed their own unique adult guardianship legislations. Australian states have adopted their own system that splits adult guardianship roles between the guardian and the administrator or financial manager (hereinafter referred to as ‘administrator’). Each Australian state has established a tribunal, the Office of the Public Advocate or the Public Guardian, and a public trustee or a state trustees company limited. With amendments to the guardianship law for the first time over

⁶⁵⁰ Michael Ludwig Ganner [translated by Teruaki Tayama], ‘Annotation of the German New Care Act’ (2021) 15 *Quarterly Journal of Comparative Guardianship Law* 3, 12. (in Japanese); Dagmar Brosey, ‘Aspects of the Reform of the German Legislation of Betreuung: Support and representation of adults regarding to legal capacity in the German Law Reform’ (American Bar Association (ABA), *Voice of Experience*, October 27, 2021) <https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2021/voice-of-experience-october-2021/reform-aspects-of-betreuung/>.

⁶⁵¹ From the interview of the Adult Protection Associations by the author in Vienna on September 17, 2019.

thirty years, the Australian States of Victoria and NSW have legislated or will legislate supported decision-making. Australia will consider legislation of elder abuse in the national or state level to develop its own adult protection system. Scotland aims to come up with a comprehensive mental health law package that will include such measures as mental health care, aged care, advance directives, and medical decision-making in intensive care situations. The legislative reforms of both Australia and Scotland, like those of European continental countries, are implemented by parliaments and supported by the Law Reform Commission or Mental Health Law Review, which is an independent law expert group.

In the U.S., the States of Texas and Delaware have legislated supported decision-making. The ULC updated the uniform act (UGCOPAA) in 2017, and the ABA made an institutional resolution to recommend to each state to incorporate supported decision-making into the state law. Some states have followed this recommendation.⁶⁵² Since the 1980s, lawyers' associations in the U.S. have created a field of law known as elder law. In addition to property management for the elderly and protection of their personal affairs, elder law has some overlap with adult protection service law.⁶⁵³ The main public opinion leaders of the reform of the adult guardianship system in the U.S. are mainly lawyers' associations over the states represented by the ULC, NGA, ABA, and the like, and the state parliaments referred to the views of these associations. One characteristic of the U.S. is that lawyers' associations play a significant role in the transformation of the legal system in this field, and the courts use cases to provide direction.

The adoption of reformed law or legislation differs by country, and how close to the requirements of the General Comments No.1 and Article 12 the CRPD the said reformed law or legislation is placed

⁶⁵² Refers to '3.2 (5) U.S. Guardianship and Supported Decision-Making Acts.'

⁶⁵³ Nina A. Kohn, 'Elder Rights: The Next Civil Rights Movement' (2012) 21(2) *Temple Political and Civil Rights Law Review* 321, 328; Nina A. Kohn, 'A Civil Rights Approach to Elder Law' in Israel Doron and Ann Soden (eds), *Beyond Elder Law* (Springer, 2012) 19-34.

also differs by country. Namely, reform of the civil code has been achieved in Switzerland, Austria, Peru, and Germany while legislation was made in some states of U.S. and Australia, and Ireland. The CRPD Committee reviews each state party's report to examine how the state meet the requirements of the CRPD and comments on it. The Victorian Act 2019 in Australia may be the closest to the CRPD's requirements in a sense that the law includes supported decision-making and prioritizes supported decision-making rather than substituted decision-making. Guardianship state law reform such as the Victorian Act 2019 and the national elder abuse prevention policy are being carried out in parallel in Australia. This legislation and policy are expected to provide a unique adult support and protection system that will expand within Australia. For this reason, the development concerning adult guardianship, supported decision-making, and elder abuse prevention in Australia will be reviewed next chapter in greater detail, with focus on legislative framework and values of the law and policy.

3.3.2 Commonality

From a legal system viewpoint, the continental Europe and Japan share the civil code jurisdictions, while the U.S. and Australia share common law jurisdictions. Even though no two legal systems are exactly same, comparing one country's law with another will be possible to some extent from a legal perspective. Referring to legislative developments of the above countries and states, some commonality can be found as below.

First, the respect for human rights, particularly a principal's autonomy and right to self-determination, is found in all the legislation or reform policy reports.⁶⁵⁴ This is indicated in each country or state's comments mentioned in this chapter. The phrase, *nothing about us without us*, emphasizing autonomy and right to self-determination of persons with disability, is a principle

⁶⁵⁴ Australian Attorney-General's Office shows that 'rights to self-determination entail the entitlement of peoples to have control over their destiny and to be treated respectfully, which include peoples being free to pursue their economic, social, and cultural development.' Attorney-General's Office, *Rights to Self-Determination* (Web Page, n/a) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

embodied in the CRPD.⁶⁵⁵ In this sense, it is a symbolic change that the term ‘guardianship’ has been abolished, and the name, Adult Protection Law, is used in Switzerland and Austria. The NSW Law Reform Commission (Australia) proposes the same renaming *Assisted Decision-making Act*. It can be assumed that those legislations were influenced by the CRPD’s human-rights approach.⁶⁵⁶

Second, legal developments are found to some extent in legislations of the above countries or states. Article 12 of the CRPD—equal recognition before the law—mentions that ‘[p]arties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ A UN General Comment No.1 (2014)⁶⁵⁷ acknowledges that the Article 12 implies a possible paradigm shift from substituted decision-making to supported decision-making. This shift ensures that the principal’s will and preferences are understood, and their wishes implemented. No country or state has reached a perfect paradigm shift as recommended by the UN. The above countries and states, however, have developed their own legislative systems or reform policy reports, which were considered in light of their own sociocultural background to balance the systems with the existing law systems.

Third, some common principles can be found in the legislations and reform reports of the above countries and states as follows: (i) an offer of necessary support, according to individual characteristics, to minimize restriction of a principal’s human rights. *The principle of necessity* ensures that ‘no measure of protection should be established unless it is necessary, considering the circumstances of the particular case’; (ii) it should be considered to take *less restrictive alternative measures*.

⁶⁵⁵ The phrase, *nothing about us without us* was used to show the common thoughts of all persons with disabilities in the process to formulate the CRPD in the UN. UN, *International Day of Disabled Persons 2004* (Web Page, December 3, 2004) <<https://www.un.org/development/desa/disabilities/international-day-of-persons-with-disabilities-3-december/international-day-of-disabled-persons-2004-nothing-about-us-without-us.html>>.

⁶⁵⁶ Shih-Ning Then, ‘Evolution and Innovation in Guardianship Laws: Assisted Decision-Making’ (2013) 35 *Sydney Law Review* 133–66, 145–47.

⁶⁵⁷ Refers to the UN, the CRPD Committee, *General Comment No. 1* (Web Page, April 11, 2014) 6–8. <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>>.

‘Guardianship legislation requires that any person exercising powers under that legislation promotes the outcome which is *least restrictive alternative* of the abilities of the person with a disability to enjoy freedom of decision and action.’ Point (i) may follow the *principle of necessity* which was adopted in the Council of Europe.⁶⁵⁸ It is, for example, indicated in the Scottish reform report, which states that ‘enhanced principles within the legislation [are] to reflect the *need* for an adult to have support for the exercise of legal capacity.’⁶⁵⁹ The Victorian 2019 Act explicitly states, in section 38 (power of guardian), that ‘the power to sign and do anything...is *necessary* to give effect to any power or duty vested in the guardian.’ This principle is presumed to follow the VLRC Report 24 (2012), which states that ‘people with impaired decision-making ability should be provided with the support *necessary* for them to make, participate in and implement decisions that affect their lives (VLRC Report 24 Recommendation 21(c): new general principles).’ In fact, in the Victorian guardianship practice, the representation authority is usually reviewed after one to three years of a self-revocation term, which in principle, expires unless otherwise necessary. This principle can be said to coincide with the ‘support’ principle, which states that ‘persons who require support in decision-making must be provided with access to the support *necessary* for them to make, communicate and participate in decisions that affect their lives,’ as one of the National Decision-Making Principles in the ALRC Report 124 (Paragraph 3.18 to 3.27). It can be assumed that the principle of necessity is adopted not only to minimize restriction of a principal’s human rights but also to minimize administrative and financial burdens on relevant public agencies, including the tribunal.

Point (ii) may follow the *principle of subsidiarity (least restrictive alternative)* which was adopted in Council of Europe.⁶⁶⁰ It is, for example, emphasized in the Swiss reform, which stresses

⁶⁵⁸ Refers to ‘3.2 (1) 2000 Protection of Adults Convention and the Following Developments’ i.e., ‘*Principle 5—Necessity and subsidiarity*’ Council of Europe, *Principles concerning the Legal Protection of Incapable Adults*.

⁶⁵⁹ Refers to the Government of Scotland, *Adults with Incapacity (Scotland) Act 2000: Proposals for Reform* 10.

⁶⁶⁰ Refers to ‘3.2 (1) 2000 Protection of Adults Convention and the Following Developments.’

that Switzerland's adult protection law 'as much as possible, do not limit the human rights of the individual.' The Victorian 2019 Act, section 4(1)(c) states as a general principle that 'powers, functions and duties under this Act should be exercised, carried out and performed in a way which is... *the least restrictive* of the ability of a person with a disability to decide and act as is possible in the circumstances.'⁶⁶¹ Article 9402A(b)(3) of the U.S.'s Delaware State act also states that 'all adults should receive the most effective yet *least restrictive and intrusive* form of support, assistance, or protection when they are unable to care for themselves or manage their affairs alone.' These two principles are assumed to be the basics shared by legislation, reform policy reports and current laws of the above countries and states.

Fourth, there is a balance between state responsibility and citizen rights. There used to be a tendency for limited state responsibility and more citizen rights in the conventional family system. As population ages and the traditional family system partly breaks down, problems related to vulnerable adults have increased and sometimes become social problems. State or local authorities, including police intervention, are required in the case of abuse. In this sense, an intervention must be implemented in a reasonable way so as not to violate the sound life of people and to ensure clear, evidence-based procedures of why and how the intervention have been justified by law.

After all, an adult support and protection legislative system can be said to refer to a comprehensive package of laws for legal advocacy that aims to protect vulnerable adults through the least restrictive measures, as long as is necessary, by taking their will and preferences into consideration. In other words, an adult support and protection legislative system offers necessary support according to individual characteristics, minimizes restriction of a principal's rights, and takes less restrictive alternative measures.

⁶⁶¹ A previous law of the State of Victoria (Australia), *Guardianship and Administration Act 1986* Part 1—preliminary 4. Objects of Act (2), states that 'this Act is to be exercised or performed so that—(a) the means which is the *least restrictive* of a person's freedom of decision and action as is possible in the circumstances is adopted.'

3.4 Summary: Adult Support and Protection is Defined

An observation was attempted to find some common characteristics that constitute the legal framework in legislation, which seems to be developing in Europe and in the common law jurisdictions, for supporting and protecting vulnerable adults. 2000 Protection of Adults Convention and the following developments in Europe are reviewed. Some differences have been found after examining adult support and protection legislative developments in Switzerland, Austria, Scotland, the U.S., and Australia. It is natural that a variety of differences in legislative developments exist by country. The way to develop statutory systems to support and protect vulnerable adults may vary by country.

The following commonalities have been clarified. First, respect for human rights, particularly a principal's autonomy and right to self-determination. Second, there is a tendency of each of the above countries to accept the CRPD Article 12—equal recognition before the law. A UN General Comment No.1 (2014) acknowledges a possible paradigm shift from substituted decision-making to supported decision-making, which ensures that the principal's will and preferences are understood, and their wishes implemented. Above countries have developed their own adult support and protection legislative systems or reform policy reports, which were considered in light of their own sociocultural background to balance the systems with the existing law systems. Third, the principle of necessity and less restrictive alternative can be found in the legislations and reform policy reports of the above countries as the common principles. Fourth, there is balance between country's responsibility and citizen rights for each of these countries.

Through analysis of these commonalities and comparison of models, an adult support and protection legislative system can be said a comprehensive package of laws for legal advocacy that aims to protect vulnerable adults through the least restrictive measures, as long as is necessary, by taking their will and preferences into consideration. In other words, an adult support and protection legislative system offers necessary support according to individual characteristics, minimizes restriction of a principal's rights, and takes less restrictive alternative measures.

Chapter 4

Adult Support and Protection in the Australian Context

4.1 Introduction

Chapter 4 focuses on the amendments made to state laws concerning guardianship in the States of Victoria and New South Wales (hereinafter referred to as ‘NSW’) of the Commonwealth of Australia (hereinafter referred to as ‘Australia’), and national legislative policy for elder abuse.⁶⁶² It provides an outline of legal content, policy objectives, and features of the legislation. The meaning and intention of Australian legislative project will be examined from the legal viewpoint of adult support and protection.

The reason why Australian law is examined is because the States of Victoria and NSW, two leading states in guardianship law, are in the process of amending state laws related to adult guardianship and supported decision-making for the first time in over thirty years. In addition, Australia is in the process of developing state laws to combat elder abuse under the national policy (hereinafter collectively referred to as ‘Australian legislative project’). It can be assumed that the significance and purpose of adult support and protection legislation would be clarified by analyzing the Australian legislative project. And Australian legislative project may have some implications to other countries/areas, including Japan, in their legislation and public policy on adult guardianship, supported decision-making, and safeguards against elder abuse.

In fact, the former Public Advocate of South Australian State John Brayley addressed his idea in 2009, which implied the basics of adult support and protection paradigm. According to Brayley, the

⁶⁶² This chapter is an updated version of the previously published articles by the author: Yukio Sakurai, ‘Australian Adult Support and Protection for Vulnerable Adults: Through Law Reforms of Guardianship and Elder Abuse Legislation (Part I)’ (2020) 25(2) *Yokohama Journal of Social Sciences* 119, 139. <doi/10.18880/00013445>, Yukio Sakurai, ‘Australian Adult Support and Protection for Vulnerable Adults: Through Law Reforms of Guardianship and Elder Abuse Legislation (Part II)’ (2021) 25(4) *Yokohama Journal of Social Sciences* 97, 119. <doi/10.18880/00013705>.

advantages of adult protection are that ‘the focus is on *vulnerability* not incapacity, more people can be helped,’ ‘there is an emphasis on *teamwork, partnership, and local responsibility*. This can provide more timely local responses,’ and ‘the adult protection strategy offers a range of *health, social service and legal practical assistance*—using similar approaches that are used for people who suffer domestic violence.’⁶⁶³ John Brayley demonstrated a ‘stepped approach to substituted and supported decision-making’ to identify where supported decision-making is mapped, comparing with substituted decision-making and associated models, in the graph of X axis *care and protection* and Y axis *autonomy and self-determination*.⁶⁶⁴

The adult support and protection system refers to a comprehensive package of laws for legal advocacy that aims to protect vulnerable adults through the least restrictive measures, as long as is necessary, by taking their will and preferences into consideration.⁶⁶⁵ The scope of adult support and protection comprises the adult guardianship system, supported decision-making, and safeguards against elder abuse. This may suggest that the adult support and protection system is not a single law but rather a package of multiple laws for legal advocacy to vulnerable adults⁶⁶⁶ Research methods include literature research and interviews with experts.⁶⁶⁷ The previous studies on the Australian adult

⁶⁶³ The author partially changed the text to Italic letters for an emphasis. John Brayley, ‘Supported Decision-making in Australia’ (Conference Paper, Victorian Office of the Public Advocate held in Melbourne on December 14, 2009) 16–17.

⁶⁶⁴ Ibid 5–7; John Brayley, ‘Developing a Model of Practice for Supported Decision Making’ (Office of the Public Advocate, South Australia. In collaboration with the Julia Farr MS McLeod Benevolent Fund, 2011) 11–13.

⁶⁶⁵ Refers to ‘3.3.2 Commonality.’

⁶⁶⁶ The term ‘vulnerable adults’ is used in this dissertation as the object of adult support and protection legislation, although the object is defined by each relevant law.

⁶⁶⁷ The author conducted interview with experts in Melbourne (Victoria) on March 1–3, 2017 and March 4–12, 2019. The subjects of the survey were the Victorian Civil and Administrative Tribunal (VCAT), the Office of the Public Advocate (OPA), State Trustees Limited (STL) headquarters and VCAT satellite offices, the Melbourne Central Police, and the Department of Health and Human Services; the Social Equity Research Institute, the Senior Rights Victoria and COTA Victoria; University of Melbourne, Monash University, La Trobe University, the University of Sydney, and Queensland

guardianship system and supported decision-making refer mainly to Australian and some international literature surveys because those in Japan are limited to several ones, such as Suga (2007), Nishida (2015), Japan Federation of Bar Associations (2015), Sugita (2021), and the likes.⁶⁶⁸

Then, the following three research questions will be examined: (i) What new acts and draft amendments to the guardianship state laws are being enacted in Victoria and proposed by NSW Law Reform Commission, and what do these mean from a legal perspective? (ii) What proposals to the national legislation policy for elder abuse are being made by the Australian Law Reform Commission, and what do these mean from a legal perspective? (iii) What does the Australian legislative project mean from an adult support and protection legislative perspective, and how does a comparative law study show these projects affecting possible adult support and protection legislation in Japan in the future?

4.2 Australian Guardianship Laws

4.2.1 Australian Law and its Guardianship

The Australia comprises six states and two territories with self-governing powers, i.e., NSW, Queensland, South Australia, Tasmania, Victoria, Western Australia, the Australian Capital Territory,

University of Technology who joined the Australian Adult Guardianship and Administration Council conference (AGAC2019) in Canberra on March 13–15, 2019. The author joined a supported decision-making facilitation training (two weeks), conducted by Cher Nicholson in Adelaide (South Australia) in February 23 to March 4, 2016.

⁶⁶⁸ Fumie Suga, 'Australia's Adult Guardianship System – from a Comparative Law Perspective' (2007) 20 *Adult Guardianship Practices* 106, 117. (in Japanese) *; Kazuhiro Nishida, 'Trends in Welfare Legislation on Guardianship and Responsibility and Role of Public: Based on Australian Law' (2015) 2636 *Weekly Social Security* 46, 51. (in Japanese) *; Japan Federation of Bar Associations, 'Supported Decision-Making (SDM) Model in the South Australia' (Human Rights Convention/Symposium No. 58 the second Subcommittee: Survey No. 2, Online, October 1, 2015) (in Japanese) * <https://www.nichibenren.or.jp/document/symposium/jinken_taikai.html>; Hiroko Sugita, 'A Study on the Supported Decision-Making System for the Elderly with Dementia (2): Focusing on the South Australian Legal System' (2021) 179 *The Graduate School Law Review* 71–98, 94. (in Japanese)

and the Northern Territory.⁶⁶⁹ These states and special territories have their own constitutions, parliaments, governments, and laws. These parliaments are permitted to pass laws related to any matter that is not controlled by the Commonwealth under sections 51 and 52 of the Australian Constitution.⁶⁷⁰

Australia has the common law system, and the sources of the laws include legislation made by parliament and case laws developed by the judiciary. Under such a legal structure, the guardianship system is defined by the legislation of each state and special territory. The guardianship system in Australia has uniformity. Namely, each state and special territory has three main Acts: Guardianship Act, Powers of Attorney Act, and Civil and Administrative Tribunal Act. Each state and special territory has three main public agencies: Office of the Public Advocate or Office of the Public Guardian, Civil and Administrative Tribunal, and a State or Public Trustee, which work for the guardianship system. The summary of relevant legislation and public agencies is provided in Table 6 and Table 7.

Table 6: Relevant Legislation by Jurisdiction

JURISDICTION	GUARDIANSHIP AND ADMINISTRATION	POWERS OF ATTORNEY	CIVIL AND ADMINISTRATIVE TRIBUNAL
AUSTRALIAN CAPITAL TERRITORY	<i>Guardianship and Management of Property Act 1991</i>	<i>Powers of Attorney Act 2006</i>	<i>ACT Civil and Administrative Tribunal Act 2008</i>
NORTHERN TERRITORY (NT)	<i>Guardianship of Adults Act 2016</i>	<i>Powers of Attorney Act 1992</i>	<i>Northern Territory Civil and Administrative Tribunal Act 2014</i>
NEW SOUTH WALES (NSW)	<i>Guardianship Act 1987</i>	<i>Powers of Attorney Act 2003</i>	<i>Civil and Administrative Tribunal Act 2013</i>

⁶⁶⁹ Refers to the Parliament of Australia, *The Constitution* (Web Page, May 2022)

<https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_13_-_The_Constitution>.

⁶⁷⁰ Refers to the Parliament of Australia, *Making Laws* (Web Page, May 2022)

<https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_7_-_Making_laws>.

QUEENSLAND	<i>Guardianship and Administration Act 2000</i> ⁶⁷¹	<i>Powers of Attorney Act 1998</i>	<i>Queensland Civil and Administrative Tribunal Act 2009</i>
SOUTH AUSTRALIA (SA)	<i>Guardianship and Administration Act 1993</i>	<i>Powers of Attorney Act and Agency 1984</i>	<i>South Australian Civil and Administrative Tribunal Act 2013</i>
TASMANIA	<i>Guardianship and Administration Act 1995, Wills Act 2008</i>	<i>Powers of Attorney Act 2000</i>	<i>Guardianship and Administration Regulations 2017</i>
VICTORIA	<i>Guardianship and Administration Act 2019</i>	<i>Powers of Attorney Act 2014</i>	<i>Victorian Civil and Administrative Tribunal Act 1998</i>
WESTERN AUSTRALIA (WA)	<i>Guardianship and Administration Act 1990</i>	<i>Powers of Attorney Act 1990</i>	<i>State Administrative Tribunal Act 2004</i>

Source: Partly modified by the Author based on Sue Field, Karen Williams and Carolyn Sappideen, *Elder Law: A Guide to Working with Older Australians* (the Federation Express, 2018) 15.

Table 7: Guardianship and Trustee Agencies by Jurisdiction

JURISDICTION	GUARDIANSHIP AGENCY	TRUSTEE AGENCY
ACT	The Public Trustee and Guardian (R-1)	The Public Trustee and Guardian (R-1)
NT	Office of the Public Guardian	Public Trustee Community Services Division
NSW	Office of the Public Guardian (R-2)	NSW Trustee and Guardian (R-2)
QUEENSLAND	Office of the Public Guardian Office of the Public Advocate (R-3)	The Public Trustee
SA	Office of the Public Advocate	The Public Trustee
TASMANIA	Office of the Public Guardian	The Public Trustee
VICTORIA	Office of the Public Advocate	State Trustees Limited (R-4)
WA	Office of the Public Advocate	Public Trust Office

Source: Same as Table 6.

Remarks: (R-1) The agency merged with both offices of public guardian and public trustee on April 1, 2016. (R-2) The administration department of both institutions has been shared since 2009. (R-3) The Public Advocate in Queensland works on behalf of adults with impaired decision-making capacity but does not advocate directly on behalf of individuals. (R-4) State Trustees Limited in Victoria is a 100 per cent state-owned corporation, and the other trustee agencies that belong to each state's treasury institution.

⁶⁷¹ Changes to guardianship laws and new enduring power of attorney and advance health directive forms commenced based on the Act on November 30, 2020. Queensland Government, *Changes to Guardianship Laws and Forms* (Web Page, November 30, 2020) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/guardianship-changes>>.

As seen in Table 7, the States of Victoria and NSW enacted the *Guardianship and Administration Act 1986*⁶⁷² and the *Guardianship Act 1987* and offered guardianship models in Australia. Regarding guardianship laws, both states have played leading roles in Australia.⁶⁷³ Namely, Victoria took the lead by providing basic structures of guardianship. Within a few years after the enactment of legislation in 1986, other Australian states and special territories followed by creating guardianship tribunals together with associated public advocates, or the more restricted form, public guardians.⁶⁷⁴ Arrangements made by financial management agencies were also adopted. NSW took lead by enacting substituted consent for medical treatment in the ‘Part 5 Medical and Dental Treatment’ of the *Guardianship Act 1987* (NSW).⁶⁷⁵

Modern guardianship and administration law was established by states and special territories over Australia between 1986 to 2000 based on above two Acts.⁶⁷⁶ It is understood that the legislation and policies of these two states in guardianship may generally represent the basic stances of Australian legislation at large, and other states and territories followed their lead. Therefore, the analysis provided

⁶⁷² The original name of the law was the *Guardianship and Administration Board Act 1985*, which came into force in 1987, and was renamed the *Guardianship and Administration Act 1986* in 1998 by the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* section 115. Nick O'Neill and Carmelle Peisah, ‘Chapter 5 – The Development of Modern Guardianship and Administration’ in O'Neill, Nick and Peisah, Carmelle (eds), *Capacity and the Law* (Sydney University Press, 2011) 7.

⁶⁷³ Victoria's adult guardianship system was known as the ‘Victorian model,’ based on the ‘one-stop-shop’ concept. Victoria and NSW were in a rivalry relation with each other to make guardianship models. Terry Carney and David Tait, *The Adult Guardianship: Experiment Tribunals and Popular Justice* (The Federation Press, 1997) 18 and 23.

⁶⁷⁴ Guardianship in Australia includes two main duties conducted by two independent entities, namely, the guardian and/or the administrator/financial manager nominated separately by tribunal orders. The guardian takes care of the principal's personal affairs, and the administrator or financial manager manages the principal's finances. Therefore, an administration in this Chapter as a duty of the administrator or financial manager refers to financial management of the principal.

⁶⁷⁵ Part 5 explored discussion: Ben White et al, ‘The Legal Role of Medical Professionals in Decisions to Withhold or Withdraw Life-sustaining Treatment: Part 1 (New South Wales)’ (2011) 18(3) *Journal of Law and Medicine* 498–522, 508.

⁶⁷⁶ The main issue in the 1980s was how to accommodate people with intellectual disabilities in communities with deinstitutionalization of psychiatric hospitals. Steve Bottomley, ‘Mental Health Law Reform and Psychiatric Deinstitutionalization: The Issues in New South Wales’ (1987) 10 *International Journal of Law and Psychiatry* 369, 362.

in this chapter will focus on these two states, Victoria and NSW, as representatives of Australian guardianship models. In the States of Victoria and NSW, draft amendments to the guardianship state laws were made for the first time in over thirty years.⁶⁷⁷ In Victoria, the bill passed the state parliament in May 2019 and the *Guardianship and Administration Act 2019* came into force in March 2020. A national statutory policy regarding elder abuse was tabled in June 2017 at the federal parliament aiming at legislating the elder abuse at the national or state level. This process of amendments to state laws and national legislation policy was a response to social-environmental changes that are happening across Australia as follows:

First, Australia is seen as a steady rise in the ageing of the population.⁶⁷⁸ There is a rapid increase in the number of the elderly who suffer from dementia.⁶⁷⁹ Adults with intellectual disabilities previously comprised adults with insufficient mental capacity, but mostly now consist of the elderly with dementia. People with higher brain dysfunction and those with mental disabilities are also increasing.⁶⁸⁰ Australian state and special territory governments are now requested to respond to those who have various disabilities, including insufficient mental capacity.

⁶⁷⁷ Refers to the Reference Survey: The Way Law Reform Reports are Processed in Australia. This survey summarizes how the law reform reports are processed in legislation, which is addressed by Terry Carney. The author received the permission from Terry Carney to include it in this dissertation by email correspondence on July 20, 2021.

⁶⁷⁸ The proportion of the population aged 65 and over in Australia was 15.6 per cent (2019) and is expected to rise 23.0 per cent (2055). 30 per cent of the elderly aged 85 and over suffer from dementia. The current population of Australia is approximately 25 million. ALRC, *Elder Abuse—A National Legal Response Final Report* (ALRC Report 131, 2017) 18.

⁶⁷⁹ There is an estimate of 472,000 Australians living with dementia in 2021, and the number of people with dementia is expected to increase to 590,000 by 2028 and 1,076,000 by 2058. (2018 commissioned research undertaken by the National Centre for Social and Economic Modelling (NATSEM), University of Canberra. Dementia Australia, *Dementia Statistics* (Web Page, January 2021) <<https://www.dementia.org.au/statistics>>; Craig Sinclair et al, *Supporting Decision-Making: A Guide for People Living with Dementia, Family Members and Carers* (Cognitive Decline Partnership Centre, 2018).

⁶⁸⁰ Refers to the New South Wales Law Reform Commission (NSW LRC), *Review of the Guardianship Act 1987* (NSW LRC Report 145, 2018) xxii.

Second, national legislation that respects the autonomy and right to self-determination of a person with disabilities is required. This is for legislative acceptance of the UN *Convention on the Rights of Persons with Disabilities* (hereinafter referred to as ‘CRPD’), which was ratified by Australia with a declaration of reservation in July 2008.⁶⁸¹ National legislation must follow the values of the CRPD.⁶⁸² In practice, supported decision-making activities recommended by the CRPD and its General Comment No.1 to realize the will and preferences of persons with disabilities are gradually being implemented in the community.⁶⁸³ The consciousness and mindset of supporters who stand by persons with disabilities are now changing.

Third, the Australian society has become multicultural due to the acceptance of immigrants with diverse languages and cultures, particularly since the 1970’s. Acceptance and maintenance of diversity, including the elderly, must be considered, which may influence advocacy activities in the community.

⁶⁸¹ The Government of Australia declared its understanding of several points at the ratification of the CRPD on July 17, 2008, including that the Convention fully allows supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only when such arrangements are necessary, that is, as a last resort and subject to safeguards. UN, *Treaty Collection: Australia: 15. Convention on the Rights of Persons with Disabilities* (Web Page, n/a) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4#EndDec>.

⁶⁸² Anita Smith, ‘Developments in Australian Incapacity Legislation’ (2018) 145 *PRECEDENT* 4, 8; See Article 3 (general principles) of the CRPD, such as respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society, and so on. UN, *Convention on Rights of Persons with Disabilities (CRPD)*.

⁶⁸³ Australia has many practices of supported decision-making, which have explored discussion for research, such as legal capacity, autonomy, dignity of risk, and elder abuse. Piers Gooding, ‘Supported Decision Making: A Rights-based Disability Concept and its Implications for Mental Health Law’ (2012) 20(3) *Psychiatry, Psychology and Law* 431, 451; Typical articles on supported decision-making in Australia: Michelle Browning, Christine Bigby and Jacinta Douglas, ‘Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice’ (2014) 1(1) *Research and Practice in Intellectual and Developmental Disabilities* 34, 45; Anna Arstein-Kerslake et al, ‘Future Direction is Supported Decision-Making’ (Online 2017) 37(1) *Disability Studies Quarterly* <<https://dsq-sds.org/article/view/5070/4549>>; Terry Carney, ‘Supported Decision-making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-building?’ (2017) 35(2) *Disability, Rights and Law Reform in Australia* 44, 63.

4.2.2 Victorian State Act

(1) Guardianship Legislation

The *Guardianship and Administration Act 2019* (Act No. 13 of 2019) was enacted in May 2019 and came into force in March 2020 in the State of Victoria. The earlier legislation, the *Guardianship and Administration Act 1986* (hereinafter referred to as ‘Victorian Act 1986’)⁶⁸⁴ and the *Powers of Attorney Act 2014* (hereinafter referred to as ‘PoA Act 2014’), will be reviewed. The Victorian Act 1986 and the PoA Act 2014 are the essential laws to prescribe the legal frameworks of the adult guardianship system.⁶⁸⁵ The main points are summarized as follows:⁶⁸⁶

- (a) The guardianship system is mainly divided into two types: guardianship for personal affairs of the principal and an administration for the financial management of the principal.⁶⁸⁷ The Victorian Civil and Administrative Tribunal (hereinafter referred to as ‘VCAT’) appoints the guardian and/or the administrator separately (sections 22 and 46 of the Victorian Act 1986).⁶⁸⁸ They are responsible for personal affairs (the guardian) and financial management (the administrator) of the

⁶⁸⁴ The Victorian Act 1986 was drafted based on the designs proposed in the ‘Cocks Report,’ which was the legislative report submitted in 1982 by the Victorian Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons headed by Errol Cocks. Victoria. Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons and Errol Cocks, *Report of The Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons* (Victorian State Government, 1982)

<https://www.vgls.vic.gov.au/client/en_AU/VGLS-public/search/results?qu=Cocks%2C+E.+%28Errol%29&ps=300>.

⁶⁸⁵ Section 3(1) (definitions) of the Victorian Act 1986 states that the term ‘disability’ includes physical ability. The Japan’s statutory guardianship system is not subject to people with physical disabilities.

⁶⁸⁶ The main features are summarized by the author based on the relevant Acts and website information on the guardianship law and policy, such as the Office of the Public Advocate (OPA). Victorian OPA, *Guardianship and Administration* (Web Page, 2019) <<https://www.publicadvocate.vic.gov.au/guardianship-administration>>.

⁶⁸⁷ The ‘represented person’ in law refers to ‘the principal’ in this dissertation.

⁶⁸⁸ The emergence of the tribunal-based guardianship system was first in Tasmania in 1963. ‘The *Mental Health Act 1963* (Tas.) established both a Guardianship Board, with power to regulate its own proceedings, and a Mental Health Review Tribunal.’ Nick O'Neill and Carmelle Peisah, ‘Chapter 5—The Development of Modern Guardianship and Administration’ in Nick O'Neill and Carmelle Peisah (eds), *Capacity and the Law 2021 Edition* (Online, December 14, 2021) <<http://austlii.community/foswiki/Books/CapacityAndTheLaw/WebHome>> 3.

principal. VCAT may appoint multiple guardians or administrators. VCAT may appoint administrators to have joint and several powers but ensuring that they act jointly on major financial transactions. Additionally, VCAT might appoint administrators with different powers, for example, one administrator may have powers to engage in specific litigation for the principal, whereas the other manages have powers to engage in his or her usual financial responsibilities.⁶⁸⁹

- (b) A guardian is not entitled to any remuneration for acting that role.⁶⁹⁰ A relative or friend of the principal is usually appointed as the guardian. If the relative or friend is not eligible for appointment, VCAT may appoint a Public Advocate as the adult guardian (section 23). The Public Advocate may further assign his/her duties to either an advocate guardian who belongs to the Office of the Public Advocate (hereinafter referred to as ‘OPA’), or a community guardian who is an individual or a not-for-profit organization (hereinafter referred to as ‘NPO’) that has participated in an adult guardianship training program (section 18).⁶⁹¹
- (c) Among relatives, friends, solicitors, accountants, the State Trustees Limited (hereinafter referred to as ‘STL’), and professional financial manager, an administrator shall be appointed by VCAT as a person appropriate for the principal in financial management (section 47). The Public Advocate is not appointed as an administrator. The administrator conducts financial processes, such as

⁶⁸⁹ The VCAT can appoint a guardian or administrator who has the power to undertake legal proceedings in the name of and on behalf of the principal, and in relation to personal or financial matters named in the order. Victorian OPA, *Litigation Guardian* (Web Page, n/a) <<https://www.publicadvocate.vic.gov.au/guardianship-and-administration/litigation-guardian>>.

⁶⁹⁰ Non-remuneration policy for guardians and administrators is adopted in the Victorian Act 1986 based on the Cocks Report 1982. This is ‘to avoid the conflict associated with payment,’ as remarked by Terry Carney in email correspondence on December 6, 2021. Due to this policy, paid workers or corporations receiving remuneration are basically not eligible to be appointed guardians or administrators except for those who are accepted by section 94A. This policy is adopted in jurisdictions all over Australia.

⁶⁹¹ Eleven community guardians involved with fifteen guardianship matters in the state of Victoria between 2020 and 2021. Victoria, Office of Public Advocacy (OPA), *Annual Report 2020–21* (Victorian OPA Report, Online, 2021) <<https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/359-opa-annual-report-2020-2021>>19.

banking affairs, payments, sales of assets, and makes legal decisions that are in the best interest of the principal (section 48). An administrator is not entitled to any remuneration for acting that role, but the remuneration of a professional administrator is entitled to be approved by the VCAT (section 47A).

- (d) The *PoA Act 2014* establishes a general power of attorney (PoA) and an enduring power of attorney (hereinafter referred to as ‘EPA’). An EPA is a legal document that lets the donor appoint one or more people, known as attorneys, to help make decisions or to make decisions on their behalf about their property or money. The designated third party by PoA or EPA makes decisions concerning the principal. A PoA loses its legal effect if the mental capacity of the principal is lost. In an EPA, a proxy can be made for decision by a designated third party even if the principal loses his/her mental capacity. It is widely encouraged for those who are over the age of 18, i.e., citizens who can understand the meaning and impact of an EPA. An EPA is not required to register at any authority.⁶⁹² An EPA is common in common law jurisdictions, including the U.K., the U.S., and Canada. The *PoA Act 2014* introduces the ‘supportive attorney’ appointment, which is regarded as a milestone with proceeding to supported decision-making.⁶⁹³

(2) Public Agencies

The State of Victoria has three public agencies as the component that are involved in guardianship as follows:

⁶⁹² A mandatory registration scheme for enduring power of attorney relating to financial matters is a possible measure to prevent financial exploitation but has not been materialized yet. Australian Government, Attorney-General’s Department, *National Register of Enduring Powers of Attorney: Public Consultation Paper* (Attorney-General’s Department, April 2021).

⁶⁹³ A ‘supportive attorney’ is a person under Part 7 of the *PoA Act 2014* to support a person with disability to exercise his/her rights in making and giving effect to decisions related to any personal, financial, or other matter specified in the appointment. A supportive attorney is not entitled to any remuneration (section 84 and 90 (2) of *PoA Act 2014*); John Chesterman, ‘Supported Decision-Making’ in Sue Field, Karen Williams, and Carolyn Sappideen (eds), *Elder Law: A Guide to Working with Older Australians* (The Federation Press, 2018) 103–104.

- (a) **The Office of the Public Advocate**⁶⁹⁴ (hereinafter referred to as ‘OPA’) was established within the Department of Justice and Community Safety of the State of Victoria, based on the Victorian Act 1986. The director-general of Victorian OPA, the Public Advocate, is an individual who is appointed by the Governor in Council, who holds office for seven years (schedule 3 cl 1(1) of the Victorian Act 1986). The Public Advocate is independent of the state government and is responsible for directly reporting to the state parliament (schedule 3 cl 1(5)). The main roles of the Victorian OPA are as follows: advice and consultation service; research and policy planning in advocacy for persons with disabilities; education; public relations; seminar activities; and operating volunteer programs, including the community visitor program (sections 15 and 16).
- (b) **The Victorian Civil and Administrative Tribunal (VCAT)** was established in 1998 based on the *Victorian Civil and Administrative Tribunal Act 1998* (hereinafter referred to as ‘VCAT Act 1998’). It became an independent institute from the state courts system by the *Courts Services Victoria Act 2014*. VCAT has a total of 45 satellite offices by the district in the State of Victoria. VCAT deals with civil disputes, such as residential tenancies, guardianship, civil claims, planning and environment, and Owners Corporation. A total of 75,290 cases were lodged between 2020 and 2021, of which some 14,169 cases (18.8 per cent) were the guardianship cases as a part of the human rights division.⁶⁹⁵ The President and Vice Presidents (a total 10 judicial members) of the VCAT are judges, but the other 191 VCAT members who decide guardianship cases are practitioners with relevant human rights experience in legal practice or community members with

⁶⁹⁴ The Victorian OPA has 122 paid employees with an annual income of A\$15.6 million (US\$11.4 million), which breaks down into A\$12.4 million (US\$9.1 million) by output appropriation (the state budget) and A\$3.2 million (US\$2.3 million) by the grants. Victorian OPA, *Annual Report 2020–21* (Web Page, 2021) 60–62.

⁶⁹⁵ There were 17,452 major applications and activities in the VCAT guardianship list between 2020 and 2021. The break down by section showed 5,473 guardianship/administration orders, 6,917 reassessment orders, 3,268 advice to the administrator, 548 PoAs, and 1,246 the others. The number of PoA applications was as small as some 3 per cent but the cases of complicated PoAs increased. Victorian Civil and Administrative Tribunal (VCAT), *Annual Report 2020–21* (Online, 2021) <<https://www.vcat.vic.gov.au/about-vcat/annual-reports-and-strategic-plan>> 49 and 81.

practical experience.⁶⁹⁶ They have hearings at the VCAT with the applicants and their related citizens, including relatives, friends, nursing home practitioners, and interpreters within thirty days after receiving the applications.⁶⁹⁷ A VCAT member issues an order for the guardianship with a one to three years self-revocation term and judges whether or not to renew the order at the rehearing when the term is over.⁶⁹⁸ The VCAT ‘must act fairly and according to the substantial merits of the case in all proceedings’ (section 97 of the VCAT Act 1998) while the VCAT allows the members be flexible in their decision-making processes (section 98).⁶⁹⁹ Emphasis is placed

⁶⁹⁶ The VCAT has a total of 201 members, including 10 judicial members (President/Vice presidents), and 263 staff in office as of June 2021 and one VCAT member holds hearings and issues an order to the applicants. VCAT, *Annual Report 2020–21*, 120; In the state of NSW, three members who are composed of a lawyer in attorney, a welfare practitioner, and a community representative conduct hearing. Interview of VCAT by the author on March 6, 2019; ‘Tribunal members usually sit as a single member or multi-disciplinary panels of three and come from various disciplines, including law, medicine, finance, social work and welfare.’ Robyn Carroll and Anita Smith, ‘Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective’ (2010) 28(1) *The Windsor Yearbook of Access to Justice* 53–80, 63.

⁶⁹⁷ The author attended four hearing sessions at VCAT with permission on am March 12, 2019. Hearings are set in 45-minute increments 7 times a day for one member, and a hearing may even end in less time. The conversations at each session are recorded for evidence. An interpreter is frequently arranged by the VCAT to interpret English into an applicant’s mother tongue and vice versa if an applicant does not understand English. The VCAT cases are published in a web-database with privacy considerations. AustLii, *Victorian Civil and Administrative Tribunal* (Web Page, n/a) <<http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/vic/VCAT/>>.

⁶⁹⁸ In empirical test data, tribunal members in the State of Queensland largely rely on medical evidence in capacity assessment of principals and the preference for evidence of incapacity in personal/financial capacity decisions is seen. Sam Boyle, ‘Determining Capacity: How Beneficence Can Operate in an Autonomy-focused Legal Regime’ (2018) 26(1) *The Elder Law Journal* 35, 63; VCAT cases between 2001 and 2016 are analyzes: Joanne Watson et al, ‘The Impact of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on Victorian Guardianship Practice’ (Online, 2020) *Disability and Rehabilitation* <doi:10.1080/09638288.2020.1836680>.

⁶⁹⁹ Section 98(1) of the VCAT Act 1998 stipulates that ‘The Tribunal—(a) is bound by the rules of natural justice; (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures; (c) may inform itself on any matter as it sees fit; (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.’

on *the principle of necessity* and the *less restrictive alternative*.⁷⁰⁰ In case of dispute on an EPA, relevant people can lodge a petition to the VCAT to settle a dispute, although an EPA is not required to register at public agencies by law.⁷⁰¹

- (c) **The State Trustees Limited** (hereinafter referred to as ‘STL’), a state-run financial management company in the State of Victoria, provides financial management services with fees.⁷⁰² STL provides various management services with citizens, including wills, PoA/EPA, estates, and personal financial administration.⁷⁰³ If the relative or friend of the principal is not a qualified person, the VCAT may appoint an STL as the administrator with or without fees (section 47A).⁷⁰⁴ STL assists the VCAT by contract on reviewing and providing the financial reports which the

⁷⁰⁰ For example, there was the case that VCAT withdrew a guardianship order with ‘an emphasis on exploring less restrictive options, promoting AC’s best interests, and giving effect to his wishes.’ *AC (Guardianship) [2009] VCAT 753* (8 May 2009).

⁷⁰¹ The Supreme Court or VCAT may order an attorney under an EPA to compensate the principal a loss caused by an attorney contravening any provision of the *Power of Attorney Act 2014* (section 77). There was the case that the NSW Civil and Administrative Tribunal reviewed the EPA and revoked it, then issued an order to appoint the other person as a public guardian. *QBU [2008] NSWGT 18* (4 July 2008); See these articles regarding the misuse or abuse of PoAs: Nola M. Ries, ‘When Powers of Attorney Go Wrong: Preventing Financial Abuse of Older People by Enduring Attorneys’ (2018) 148 *Precedent* 9, 13; This is the article to analyze damage and countermeasures related to CPAs in five European countries.

⁷⁰² The STL is 100 per cent owned by the Victorian state treasurer and the policy of the STL is determined by the board members who are appointed by the Victorian Minister of Treasure. STL has 506 employees with an income AS\$72.2 million (US\$52.7 million), and AS\$21.0 (US\$15.3 million, approximately 29.0 per cent of the income) is ‘community service agreement income,’ which is a state subsidy. This state subsidy is based on the statutory agreement regulated by section 21 of the *State Trustees (State Own Company) Act 1994*. Victoria State Trustees Limited, *Annual Report 2021* (Online, 2021) <<https://www.statetrustees.com.au/about-us/our-governance/annual-reports>> 25 and 44.

⁷⁰³ The STL has about 9,000 personal financial administration clients and about 6,700 PoA contracts clients. STL takes care of 220,000 wills and 31,000 estates. STL, *Homepage* (Web Page, March 2021) <<https://www.statetrustees.com.au/>>.

⁷⁰⁴ If the principal cannot pay fees, VCAT may appeal that the principal does not have to pay fees to the STL, and the fees are paid from the state budget on behalf of the principal (from the interview of the VCAT on March 6, 2019, by the author). There is a case that the tribunal appoints a state trustee as the administrator because of potential conflict of interest between the principal and the son. *SA (Guardianship) [2008] VCAT 2345* (17 November 2008).

administrators must submit annually to the VCAT.⁷⁰⁵ STL has a satellite office in the VCAT headquarter and its manager is in charge of any business transaction between the TSL and VCAT, including financial exploitation claims.⁷⁰⁶ It seems that there is room for the STL to improve their services to respond to the needs of clients by carefully taking their will and preferences into consideration.⁷⁰⁷

(3) Dispute Response Mechanism

VCAT has adopted a dispute response mechanism known as alternative dispute resolution (hereinafter referred to as ‘ADR’). Four measures can be processed through VCAT: complaint resolution; mediation; Fast Track Mediation and Hearing service (hereinafter referred to as ‘FTMH’); and appeals to the Supreme Court.⁷⁰⁸

- (a) Any member of the public or group of people, including companies or public agencies, can make a complaint through the VCAT.⁷⁰⁹ VCAT takes a three-tier approach (i.e., frontline resolution, investigation, internal interview) to resolve complaints. In fact, VCAT received 313 complaints

⁷⁰⁵ From the interview of STL VCAT satellite office by the author on March 3, 2017.

⁷⁰⁶ The STL suggests the clients who suffer from fraudulent damage or financial exploitation to claim to the VCAT (from the interview of the STL VCAT satellite office by the author on March 6, 2019).

⁷⁰⁷ The client complaints against the STL have been increasing over the years, which resulted in a Victorian ombudsman investigation to determine the reason. The findings were reported in June 2019, which pointed out 30 problem cases involving in the STL and proposed 14 recommendations to the STL and the Victorian State Government for improvements. Victorian Ombudsman, *Investigation into State Trustees* (Web Page, June 29, 2019) <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/>>.

⁷⁰⁸ It is emphasized that the persons with disabilities must be included in any process of ADR so that the principals’ wishes are considered in the resolution of the dispute. Law Institute Victoria, *ONE-VCAT: President’s Review of the Victorian Civil and Administrative Tribunal* (VCAT Report, 2009).

⁷⁰⁹ Alternatively, people may complain with the Victorian Ombudsman. VCAT, *Complaints Policy* (Web Page, n/a) <<https://www.vcat.vic.gov.au/about-vcat/feedback-and-complaints/complaints-policy/>>.

about VCAT people or processes between July 2020 and June 2021 and provided a response within 10 business days of receiving the complaint of these cases.⁷¹⁰

- (b) VCAT advocates mediation as the preferred option for resolving disputes. Mediation provides an alternative to a hearing as a way of resolving a dispute. Mediation is more informal, less stressful for those involved, and can lead to better outcomes—people may feel empowered by the process. VCAT expanded the reach of the FTMH in 2017. If the amount in dispute is between A\$500 and A\$10,000 (US\$365 and US\$7,300), parties may be invited to attend a mediation—an opportunity to resolve the dispute by talking through the issues with the other people involved. It is assisted by an accredited mediator from the Dispute Settlement Centre of Victoria (hereinafter referred to as 'DSCV') or the VCAT.⁷¹¹ If the dispute is not resolved at mediation, the dispute goes to a VCAT hearing within a few hours. At the hearing, a VCAT member decides about the case. There are no hearing fees necessary for this same-day service. Between July 2020 and June 2021, VCAT assessed 1,695 cases as being suitable for the FTMH (online video). About 46 per cent of the cases out of the mediation and compulsory conference conducted for 2,725 cases were settled.⁷¹² Mediation and the FTMH, however, are not often used in the guardianship cases because of its characteristics.⁷¹³
- (c) If the VCAT is satisfied on reasonable ground that there is an immediate risk of harm to the health, welfare or property of a proposed principal if the order was not made, the VCAT may prioritize a

⁷¹⁰ Twenty complaints out of a total 313 complaints were fully or partially upheld because the allegations were substantiated. VCAT, *Annual Report 2020–21*, 126.

⁷¹¹ The Victorian Government supports the FTMH program with A\$6.26 million (US\$4.6 million) over four years to the DSCV.

⁷¹² Refers to the VCAT, *Annual Report 2020–21*, 53.

⁷¹³ A VCAT member comments on the mediation system in practice by email (August 12, 2021) that 'only when there is a compensation application against an attorney and the principal is deceased, VCAT members would generally mediate in a guardianship matter.' Robyn Carroll and Anita Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (2010) 28(1) *The Windsor Yearbook of Access to Justice* 53, 80.

case in the guardianship and administration list.⁷¹⁴ The VCAT may apply two different processes, namely, the VCAT makes an urgent guardianship order or urgent administration order (valid for 21 days) to parties concerned without hearing,⁷¹⁵ or has a hearing to facilitate the process. These are in the process of guardianship and administration list and a VCAT member issues an order.⁷¹⁶ These cases are mostly disputed between older mothers and their sons. In such family dispute cases, it is assumed by the statistics that the VCAT hearing would be appropriate, keeping people's sentiments and privacy in mind. VCAT decisions can be appealed to the Supreme Court only on the question of law—that is, where a party believes the judge or tribunal member made a legal error. Between July 2020 and June 2021, the total number of appeals lodged was 76, and only three of these appeals were granted and upheld by the Supreme Court.⁷¹⁷

(4) Victorian Unique Legislations

The State of Victoria has unique legislations to regulate the charter of human rights, a medical treatment/medical treatment decision, and voluntary assisted dying as follows:

- (a) The *Charter of Human Rights and Responsibilities Act 2006* is a law that sets out the basic rights, freedom, and responsibilities of people in the State of Victoria, in which twenty fundamental

⁷¹⁴ Refers to the Victorian Act 2019 section 36(2), which stipulates that the 'risk of harm' is abuse, exploitation, neglect, and self-neglect.

⁷¹⁵ Ibid.

⁷¹⁶ The STL report in 2016 indicates that approximately 15 per cent of the financial exploitation cases employing hearing through the VCAT could recover the financial damage. The 2014–15 dispute results were reported by the Victorian STL: 26 per cent investigation has not progressed due to personal death, etc.; 39 per cent insufficient evidence; 20 per cent has not chosen legal procedure; 15 per cent has recovered damages by using legal procedure. Lewis Melanie, 'Financial Elder Abuse in a Victorian Context: Now and into the Future' (Conference Paper at the fourth National Conference on Elder Abuse held in Melbourne on February 24–25, 2016).

⁷¹⁷ Refers to the VCAT, *Annual Report 2020–21*, 99. This appeal is based on section 148 of the *Victorian Civil and Administrative Tribunal Act 1998*.

human rights are listed.⁷¹⁸ It regulates the relationship between the government and the people it serves. The Constitution in Australia does not state a bill of rights. Human rights are protected by case laws and statute laws. This Act is a comprehensive law that empowers human rights in the state of Victoria; however, some critiques are addressed with lack of some rights. Some rights are not included in the Charter after the debates in the state parliament, such as the right to life and the right to self-determination because ‘the Charter only includes human rights that had extraordinarily strong, certainly at least majority community support.’⁷¹⁹

- (b) VCAT can grant the authority of medical consent for or refuse medical treatment to the third party after hearings, and usually nominates a person other than the guardian or administrator.⁷²⁰ The *Victorian Medical Treatment Planning and Decisions Act 2016* was enacted in 2016 and came into force on March 12, 2018.⁷²¹ In this law, a medical support person is to support the principal by communicating information on the principal’s medical treatment, including when the principal does not have a decision-making capacity. However, a medical support person does not have the power to make a principal’s medical treatment decision (section 32). The medical treatment decision-maker, not a medical support person, who is appointed by the principal or the VCAT has

⁷¹⁸ Refers to the Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities* (Web Page, n/a) <<https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter/>>.

⁷¹⁹ George Williams, ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope (2006) 30(3) *Melbourne University Law Review* 880, 905.

⁷²⁰ The tribunals of the states and special territories except the Northern Territory have powers to provide consent for or refuse medical treatment on behalf of a person with a disability by trial. Sue Field, Karen Williams and Carolyn Sappideen, *Elder Law: A Guide to Working with Older Australians* (The Federation Press, 2018) 27.

⁷²¹ Futoshi Iwata, ‘The Role of the Law in the Medical Care and Care of the Elderly in Australia: Focusing on the Recent Amendments to Victoria State law’ (2019) 80(1) *Comparative Law Research* 42, 55. (in Japanese) *

the power to make the principal's medical treatment decisions (section 55).⁷²² The Act 2016 makes it possible for Victorians to create legally binding advance care directives to make an instructional directive about treatment a person consents to or refuses, or a values directive about a person's views and values (section 6). In practice, there are statutory and non-statutory advance care directives, which still makes the situation complex.⁷²³

- (c) The *Voluntary Assisted Dying Act 2017* was enacted on November 29, 2017 and came into force on June 9, 2019.⁷²⁴ The law was drafted, as a model law in the U.S. State of Oregon, with comprehensive safeguards and rigorous protections.⁷²⁵ Voluntary assisted dying is available to Victorians who are over the age of 18, who have lived in Victoria for at least 12 months, and who have decision-making capacity.⁷²⁶ It is only for people who are suffering from an incurable,

⁷²² It is complicated that legally recognized multiple support schemes for people with disabilities by law are seen in the State of Victoria, in addition to a guardian/administrator and a supportive guardian/administrator (the *Guardianship and Administration Act 2019*), i.e., a medical support person, a medical treatment decision-maker (the *Medical Treatment Planning and Decisions Act 2016*), a supportive attorney (the *Powers of Attorney Act 2014*), a plan nominee or correspondence nominee (*The National Disability Insurance Scheme Act 2013*), and a nominated person (the *Mental Health Act 2014*).

⁷²³ The recent research survey shows that 60 per cent of people with dementia had some form of advanced care planning documentation and only half of the cases in which advanced care planning was documented included an advanced care directive completed by the person themselves. Bryant J. et al, 'Advance Care Planning Participation by People with Dementia: A Cross Sectional Survey and Medical' (2021) *BMJ Supportive and Palliative Care* 1, 5.

⁷²⁴ The *Voluntary Assisted Dying Act 2019 (WA)* was enacted in the State of Western Australia. Takako Minami, 'Characterization of the Voluntary Assisted Dying Legislation in the Australian State of Victoria' (2018) 28(1) *Bioethics* 40, 48. (in Japanese); Takako Minami, 'Issues Surrounding Voluntary Assisted Dying Laws in Australia' (2021) 34 *Journal of Australian Studies* 14, 29. (in Japanese); Ben White et al, 'Does the Voluntary Assisted Dying Act 2017 (Vic) Reflect Its Stated Policy Goals?' (2020) 43(2) *UNSW Law Journal* 417. 451; Nola M. Ries and Elise Mansfield, 'Supported Decision-Making: A Good Idea in Principle but We Need to Consider Supporting Decisions about Voluntary Assisted Dying' in Daniel J. Fleming and David J Carter (eds), *Voluntary Assisted Dying: Law? Health? Justice?* (ANU Press, 2022) 49, 73.

⁷²⁵ From the interview of the Victorian Department of Health and Human Services by the author on March 12, 2019.

⁷²⁶ Refers to the Health Vic., *Assisted Voluntary Dying* (Web Page, October 24, 2021)

<<https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/end-of-life-care/voluntary-assisted-dying>>.

advanced and progressive disease, illness or medical condition, who are experiencing intolerable suffering. The condition must be assessed by two medical practitioners to be expected to cause death within six months. The Voluntary Assisted Dying Review Board independently monitors and reviews all activities under the law. Since the enforcement of the Act in June 2019 till June 2021, it was reported that a total of 331 people died from taking the prescribed medication.⁷²⁷

(5) Victorian Interdisciplinary Research and Practices

Victorian interdisciplinary research and practices are seen in the State of Victoria to support people with disability or diagnoses as follows:

- (a) The practice framework of La Trobe University provides an evidence-based guide for engaging in effective support for decision-making with people with disability. ‘The framework outlines the steps, principles, and strategies involved in support for decision-making. It focuses on understanding the will and preferences of people with cognitive disabilities and guides those who provide support including families, support workers, guardians, and health professionals.’⁷²⁸
- (b) Lisa Brophy presents findings from an interdisciplinary supported decision-making project, investigating the facilitators for people living with diagnoses, including severe depression,⁷²⁹

⁷²⁷ It was reported that 836 people have been assessed for eligibility to access a voluntary assisted dying, 674 permit applications have been made, 597 permits have been issued, and 331 people have died since June 2019. Victorian Voluntary Assisted Dying Review Board, *Voluntary Assisted Dying Report of Operations (January to June 2021)* (Victoria State Government, December 14, 2021) <<https://www.bettersafecare.vic.gov.au/publications/voluntary-assisted-dying-report-of-operations-january-to-june-2021>>.

⁷²⁸ Jacinta Douglas and Christine Bigby, ‘Development of an Evidence-based Practice Framework to Guide Decision Making Support for People with Cognitive Impairment’ (2020) 42(3) *Disability and Rehabilitation* 434, 441.

⁷²⁹ Lisa Brophy et al, ‘Community Treatment Orders and Supported Decision-Making’ 10 *Frontiers in Psychiatry* Article 414.

- (c) The National Disability Services (NDS) developed a checklist to quantify and operationalize ‘at risk’ adults for disability service providers and organizations. This checklist is useful for local governments and the relevant agencies;⁷³⁰
- (d) A study of collaboration of healthcare staff and lawyer reveals that ‘the Community Health Service (hereinafter referred to as ‘CHS’) staff regarding the integration of a lawyer into their CHS.’ It is confirmed by research data that ‘[t]hese CHS staff were aware of the potential impacts of elder abuse and supported embedding a lawyer in the health service’. Such a CHS staff and lawyer collaboration model can be assumed to be an applied method to be useful to start with community whenever they are possible.⁷³¹
- (e) A research program by Monash University in the State of Victoria, known as the Protecting Elders’ Assets Study (PEAS), examines rural and multi-cultural responses to intra-familial and inter-generational asset management in the State of Victoria.⁷³² This research implies gaps of behavior in asset management among older Victorians according to their cultural backgrounds. It establishes the fact that Australians with roots in non-English speaking countries, such as Vietnamese Australians, do not use EPAs as much as Australians with English-speaking ancestry do. It can be said that, generally, people with Asian origins do not use EPAs.

⁷³⁰ Emily Moir et al, ‘Best Practice for Estimating Elder Abuse Prevalence in Australia: Moving Towards the Dynamic Concept of “Adults at Risk” and Away from Arbitrary Age Cut-Offs’ (2017) 29(2) *Current Issues in Criminal Justice* 181, 190.

⁷³¹ Virginia J. Lewis et al, ‘Addressing Elder Abuse Through Integrating Law into Health: What Do Allied Health Professionals at a Community Health Service in Melbourne, Australia, think?’ (2019) 17 *Australasian Journal of Ageing* 1, 6.

⁷³² C. King et al, ‘For Love or Money: Intergenerational Management of Older Victorians’ Assets, Protecting Elders’ Assets Study’ (Monash University, Eastern Health Clinical School, 2011) <https://www.eapu.com.au/uploads/research_resources/VIC-For_Love_or_Money_JUN_2011-Monash.pdf>.

- (f) The dignity of risk, i.e., the principle of allowing an individual the dignity afforded by risk-taking, with subsequent enhancement of personal growth and quality of life or risk enablement⁷³³ is being discussed as a process of positively taking risk within established safeguards.⁷³⁴ By this method, people with disability would keep consumer choice and control over activities. This is a significant development in risk and welfare studies that is to be researched further to seek a possibility to overcome certain risk factors by advocating the risk.

(6) Main Characteristics and Summary of the Victorian Act 1986

Viewing the above, the main characteristics of the Victorian guardianship system can be summarized as the following six points:⁷³⁵ (i) The roles of the guardian, administrator, and medical support person/medical treatment decision-maker are legally separated⁷³⁶; (ii) Emphasis is placed on *the principle of necessity* and the *less restrictive alternative* in the adult guardianship system; (iii)

⁷³³ The ‘risk enablement’ refers to a way of supporting people with a cognitive impairment, such as intellectual disabilities, traumatic brain injury or dementia, to participate in activities that involve risk. La Trobe University (Victoria), *Enabling Risk* (Web Page, n/a) <<http://www.enablingriskresource.com.au/>>.

⁷³⁴ The ‘dignity of risk’ refers to ‘the principle of allowing an individual the dignity afforded by risk-taking, with subsequence of personal growth and quality of life.’ Joseph E. Ibrahim raises a dilemma case whether or not an elderly person with dementia is fit to drive, conflicting interests between the person with dementia and the community in a short video. Joseph E. Ibrahim and Marie-Claire Davis, ‘Impediments to Applying the “Dignity of Risk” Principle in Residential Aged Care Services’ (2013) 32(3) *Australasian Journal on Ageing* 188–193, 189; Victorian Equal Opportunity and Human Rights Commission, *Rights and Risk* (Victorian Equal Opportunity and Human Rights Commission, 2014) 14; Marta H. Woolford et al, ‘Applying Dignity of Risk Principles to Improve Quality of Life for Vulnerable Persons’ (2020) 35(1) *International Journal of Geriatric Psychiatry* 122, 130.

⁷³⁵ The five principles of the Australian guardianship law are seen: (a) presumption of capacity, (b) the least restrictive option taken by the decision-maker, (c) respect for autonomy, (d) inclusion as a valued member of the community, and (e) the adult’s welfare and interests. Lindy Willmott et al, ‘Guardianship and Health Decisions in China and Australia: A Comparative Analysis’ (2017) 12(2) *Asian Journal of Comparative Law* 371, 400.

⁷³⁶ It is viewed that such divisions of the roles and duties by the adult guardian, the administrator, and medical support person/medical treatment decision maker may make sense to the principal because of cross-checking and balancing the function of one another. In this sense, they say that the worst case is where the adult guardian can do everything to the principal without any accountability. From the interview of Victorian OPA by the author on March 5, 2019.

VCAT as the tribunal, not the courts, make a judgement on the adult guardianship by hearings and issues orders; (iv) OPA provides various public supports for the guardianship in policy reviewing that contributes to the community; (v) A state-run financial management company, STL provides financial management services with fees; and (vi) Collaboration of practitioners, institutions, and NPOs in communities are ongoing. Please refer to Table 8 as the summary of the Victorian Act 1986.

Table 8: Victorian Act 1986

<i>ITEMS</i>	<i>COMMENTS</i>
<i>ADULT GUARDIANSHIP SYSTEM</i>	Divided into two types: an adult guardianship and a financial management or administration which are responsible for personal affairs and financial management of the represented person.
<i>ADULT GUARDIAN</i>	A friend or relative familiar with the represented person is usually appointed. If the friend or relative is not a qualified person, VCAT may appoint a public advocate (an advocate guardian).
<i>ADMINISTRATOR</i>	Among friends, relatives, staff solicitor, accountant, state trustees, and professional financial manager, an administrator shall be appointed by VCAT as a person appropriate for the represented person in financial management.
<i>REMUNERATION</i>	A guardian or an administrator is not entitled to any remuneration for acting that role, but the remuneration of a professional administrator is entitled to be approved by the VCAT.
<i>ENDURING POWER OF ATTORNEY(EPA)</i>	EPA is widely encouraged for those who are over the age of 18, that can understand the meaning and impact of an EPA.
<i>OFFICE OF PUBLIC ADVOCATE (OPA)</i>	Victorian OPA has been established within the Department of Justice and Community Safety of Victoria. The main roles of OPA are as follows: advice and consultation services; research and policy planning in advocacy for persons with disabilities; education; public relations; seminar activities; and operating volunteer programs, including the community visitor program. ⁷³⁷

⁷³⁷ ‘Community Visitors,’ which are Victorian Governor in Council appointees, are appointed for a three-year term, and have significant powers of entry and inspection to Victorian accommodation facilities for people with disability or mental illness in their local area. They visit unannounced, monitor, and write a report on adequacy of the services provided. Victorian OPA, *Community Visitors* (Web Page, n/a) <<https://www.publicadvocate.vic.gov.au/opa-volunteers/community-visitors>>; Terry Carney states this is one of ‘advocacy solutions as a way of solving the conundrum how to regulate or influence that private marketplace in a practical way.’ Terry Carney, ‘The Limits and the Social Legacy of Guardianship in Australia’ (1998) 18(4) *Federal Law Review* 231–266, 265.

<i>VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT)</i>	A total of 46 satellite offices by district in Victoria. VCAT primarily deals with disputes concerning human rights affairs including adult guardianship. The staff member consists of expert who has a long experience in adult guardianship and administration.
<i>MEDICAL TREATMENT PLANNING AND DECISIONS ACT 2016</i>	A medical decision-making system based on an advanced care directive came into force on March 12, 2018. <i>Voluntary Assisted Dying Act 2017</i> was introduced and came into force on June 19, 2019.

Source: Made by the author

4.2.3 NSW State Act: Summary

Please refer to Table 9 as the summary of the NSW State Act (the *Guardianship Act 1987*).⁷³⁸

Table 9: NSW State Act 1987

<i>ITEMS</i>	<i>COMMENTS</i>
<i>ADULT GUARDIANSHIP SYSTEM</i>	Mainly divided into two types: a guardianship and a financial management. <i>Guardianship Act 1987</i> is the key legislation in NSW which protects the rights of people with impaired decision-making capacity.
<i>ADULT GUARDIAN</i>	A guardian is a substitute decision-maker appointed by NCAT or the Supreme Court with authority to make health and lifestyle decisions. A person is not eligible to be appointed as a guardian, who provides the services for fee to the person, such as medical service, accommodation, and any other services to support the person making the appointment.
<i>FINANCIAL MANAGER</i>	A financial manager shall be appointed as a person appropriate for the represented person in financial management among friends, relatives, staff solicitor, accountant, NSW Trustee and Guardian, and professional financial manager.
<i>ENDURING POWER OF ATTORNEY (EPA)</i>	EPA is widely encouraged for those who are over the age of 18, that can understand the meaning and impact of an EPA.
<i>OFFICE OF NSW PUBLIC GUARDIAN (OPG)</i>	OPG promotes the rights and interests of people with disabilities through the practice of guardianship, advocacy, and education. PG is a statutory official appointed by the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) or the Supreme Court under the <i>Guardianship Act 1987</i> .

⁷³⁸ The scope of a person with disability is defined in a broader sense in Article 3(2), the *Guardianship Act 1987*: ‘(a) who is intellectually, physically, psychologically, or sensorily disabled, (b) who is of advanced age, (c) who is a mentally ill person within the meaning of the *Mental Health Act 2007*, or (d) who is otherwise disabled, and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.’

<i>NSW CIVIL AND ADMINISTRATIVE TRIBUNAL (NCAT)</i>	NCAT exercises a protective jurisdiction under the Guardianship Act 1987. Its purpose is to protect and promote the rights and welfare of adults with impaired decision-making capacity.
<i>MEDICAL TREATMENT GUIDELINES</i>	<i>Guardianship Act 1987</i> (section 33) regulates medical treatments. The Medical Treatment Guidelines (April 2016) offers further details.

Source: Made by the author

4.2.4 Number of Tribunal Orders in 2020–2021

The number of applicants for the guardianship list in the State of Victoria from July 2020 to June 2021 was 5,560 applications, i.e., 2,776 for guardians and 2,784 for administrators. It was 3,373 tribunal orders, i.e., 1,336 for guardians and 2,037 for administrators.⁷³⁹ In the State of NSW, the number of applications was 8,094 i.e., 4,569 for guardians and 3,525 for administrators. It was 5,473 tribunal orders, i.e., 2,908 for guardians and 2,565 for administrators. The difference between the number of applications to the guardianship list and that of the tribunal orders was assumed to be the number of reassessing applications after the end of the guardianship term. Regarding the breakdown between the public or private guardians and administrators in tribunal orders (public: Public Advocate or Public Guardian, etc.; private: relatives, friends, professionals, etc.), in the state of Victoria, the guardians' public-private ratio was 42:58, the administrators' public-private ratio was 30:70. In the state of NSW, the guardians' public-private ratio was 51:49 and the administrators' public-private ratio was 52:48. The ratios of the public and private of the guardians and administrators in both states are more or less 50:50, except for the Victorian administrators' one.⁷⁴⁰

⁷³⁹ Refers to the Australian Guardianship and Administration Council (AGAC), *Australian Adult Guardianship Orders 2020/21* (Web Page, February 2022) <<https://www.agac.org.au/assets/images/Annual-Report-on-Adult-Guardianship-Orders-2020-2021.pdf>>.

⁷⁴⁰ Ibid.

The number of tribunal orders across Australia between July 2020 and June 2021 was 19,393.⁷⁴¹ It should be noted that the number of guardianship list tribunal orders includes cases where the same applicants applied for both guardians and administrators. If there is a 50 per cent overlap between guardians and administrators for cases where the same applicants applied, the number of tribunal orders per year could be estimated at 12,930 on a different applicant basis. The number of guardianship orders in 2021 was approximately 39,800 in Japan,⁷⁴² which has a population five times greater than Australia's. With an Australian population scale, the number of orders in Australia and Japan would be adjusted to 12,930 and 7,960 respectively. It is therefore understood that the guardianship system is used considerably more in Australia than in Japan (approximately 1.6 times).⁷⁴³

4.3 Victoria and NSW State Acts Incorporating Supported Decision-Making

4.3.1 Amendments to Victoria State Act

In the State of Victoria, the *Guardianship and Administration Act 2019*⁷⁴⁴ (hereinafter referred to as 'Victorian Act 2019') was enacted in May 2019 and came into force in March 2020. The Victorian Act 2019, which superseded the Victorian Act 1986, can be summarized as follows:

- (i) The Victorian Act 2019 indicates that 'a person is presumed to have decision-making capacity unless there is evidence to the contrary' (section 5(2)) and recognizes that 'a person has capacity to make a decision in relation to a matter (decision-making capacity)' (section 5(1)).⁷⁴⁵

⁷⁴¹ Refers to the AGAC, *Australian Adult Guardianship Orders 2020/21*. There are no statistics indicating the number of contracted EPAs in Australia because document is not required by law to be registered at public agencies.

⁷⁴² Refers to the Courts of Japan, *The Annual Overview of Adult Guardianship Cases* (Web Page, March 2022) 2. (in Japanese) *

⁷⁴³ The AGAC statistics remarks that the number of Australian tribunal orders include some temporary and emergency ones that should be excluded for comparison but could not be done due to a technical reason. For this reason, Australian figure appears larger, but this does not deny the trend that the guardianship system is used more in Australia than in Japan.

⁷⁴⁴ Victorian Act 2019, Section 3(1) (definitions) stipulates that the 'disability' in relation to a person means neurological impairment, intellectual impairment, mental disorder, brain injury, physical disability, or dementia.

⁷⁴⁵ Similarly, the England and Wales law, the *Mental Capacity Act 2005* (MCA 2005) stipulates that 'A person must be assumed to have capacity unless it is established that he lacks capacity' (section 1(2)).

- (ii) The purpose of the Victorian Act 2019 is ‘to promote the personal and social wellbeing of a person’ (section 4). For that reason, ‘the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person’ (section 8).
- (iii) Even when some support is needed for the principal, it is not always the case that the supportive guardian and the supportive administrator are appointed by the Victorian Civil and Administrative Tribunal (VCAT). If a close relative plays such a role properly, there is no need to change (section 31).
- (iv) The appointment of adult guardians will be limited by the VCAT as a last resort. Thus, the adult guardian and the administrator must respect the will and preferences of the principal, substitute the principal’s decision as far as necessary, and explain the substituted decision so that the principal can understand the content (sections 41 and 46).
- (v) Supported decision-making is incorporated into the legislative system (sections 79 to 98, Part 4—supportive guardianship orders and supportive administration orders). The principal can appoint a supportive attorney who has the legal authority to make supportive decisions on personal affairs or financial management (Part 7—Power of Attorney Appointments, *Power of Attorney Act 2014*). Also, on behalf of the principal, the VCAT may designate the supportive guardian and supportive administrator (section 87). A supportive guardian and a supportive administrator are not entitled to any remuneration for acting in that role (section 95).
- (vi) If an adult guardian or an administrator performs an illegal act, such as financial fraud or financial exploitation, the provisions to impose penalties are stipulated (sections 188 and 189), and a warranty for damages is included in the law (sections 181 and 185).

4.3.2 Draft Amendments to NSW State Act

In the State of NSW, the draft amendment to the *Guardianship Act 1987* was tabled in the NSW state parliament in August 2018 but the consideration of its implementation has been deferred. The main points of the proposal for amendments to the state law can be summarized as follows:

- (i) The draft amendments propose to dispel substituted decision-making in the adult guardianship system to minimize possible restrictions on the rights of the principal. Instead, it will introduce supported decision-making to respect the principal's will and preferences.
- (ii) The revised law will be renamed the *Assisted Decision-Making Act*. If the principal is age 18 or older and desires assisted decision-making by an appropriate supporter, the principal may make a personal support agreement with the supporter. The supporter must not be age 16 or younger, the Public Trustee or the Public Advocate, or subject to bankruptcy or possessing a criminal record if financial management is the subject of support. Personal agreements prepared in a predetermined formal and witness procedures are necessary.
- (iii) Each official name is to be renamed as follows: The Public Guardian to the Public Representative, the Office of the Public Guardian to the Office of Public Advocate; the Guardian Division of the NSW Civil and Tribunal to the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal; and the NSW Trustee and Guardian to the NSW Trustee. Consequently, the term guardian is entirely deleted. The duties of the Office of the Public Advocate cover assistance for supportive decision-making, problem-solving, information provision, aid and support, abuse, and neglect.
- (iv) The principal shall be deemed to have decision-making ability. The supporter carries out decision-making support following the support agreement or a tribunal order. When assisting, the supporter is obliged to observe the general principles of the revised Act. A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment.
- (v) The tribunal may appoint a supporter by a tribunal support order if required, and the supporter may assist the principal in decision-making. In addition to the principal, a public representative, the Office of the Public Advocate, or any other person who is involved in the life and welfare of

the principal may also make this application to the tribunal. The Act has no enforcement to change informal arrangements if they are implemented with the consent of the principal and the supporter.

- (vi) The mental capacity of the principal is lost, and the substituted decision-making for the principal is required as a last resort, the tribunal may issue a representation order to the representative. If the principal has an EPA with a third party, then the agreement becomes effective and the designated third party will take the substituted decision-making in line with the EPA.⁷⁴⁶

4.3.3 Comments on Amendments to Victoria and NSW State Acts

(1) Comparisons between Amendments to Victoria and NSW State Acts

The main comparisons between the amendments to Victoria and NSW State Acts are summarized in Table 10.⁷⁴⁷

Table 10: Comparisons between Amendments to Victoria and NSW State Acts

<i>GUARDIANSHIP AND ADMINISTRATION</i>	<i>VICTORIA</i>	<i>NSW</i>	<i>REMARKS</i>
<i>LEGISLATION</i>	<i>Guardianship and Administration Act</i> (Enacted in May 2019)	<i>Assisted Decision-Making Act</i> (Under consideration)	NSW will rename Act.
<i>PURPOSE</i>	To promote personal and social wellbeing of the person.	To respect the will and preferences of the person.	NSW directly follows CRPD.

⁷⁴⁶ The State of Queensland (Australia) implemented the new guardianship law which includes the improved enduring power of attorney and advanced health directive forms as of November 30, 2020. The Queensland Cabinet and Ministerial Directory, *Guardianship Reforms Improve Safeguards for Vulnerable Queenslanders* (Web Page, November 30, 2020).

⁷⁴⁷ The Guardianship and Administration bill 2014 did not pass the state parliament in 2014, and the bill 2018 passed in May 2019. Both bill contents had no considerable changes, and it was assumed that the necessity of amendments to the guardianship law was well understood in 2019 as the ageing of the population has progressed. It was also influenced by the ALRC Report 124 (2014) that indicated the national guideline principles for the guardianship. In fact, there were no objections in the parliament debates. The session on 19 December 2018 was a turning point to the conclusion of the bill in the parliament. The process of the parliament debates for the bill 2018: See Parliament of Victoria, *Parliamentary Debates (HANSARD) in Legislative Assembly, Fifty-Eighth Parliament, First Session (Wednesday, 7 March 2018 and Thursday, 29 March 2018) and in Legislative Assembly, Fifty-Ninth Parliament, First Session (Wednesday, 19 December 2018 and Tuesday, 28 May 2019)* (Web Page, n/a) <<https://www.parliament.vic.gov.au/hansard/daily-hansard>>.

<i>DECISION-MAKING CAPACITY/ABILITY</i>	A person is presumed to have decision-making capacity unless there is evidence to the contrary.	A person shall be deemed to have decision-making ability if some criteria is fulfilled.	Same.
<i>SUPPORTIVE GUARDIAN AND SUPPORTIVE ADMINISTRATOR OR SUPPORTERS</i>	A person or Tribunal may designate a supportive guardian and a supportive administrator.	A person may make personal support agreement with a supporter, or Tribunal may appoint a supporter by an order.	Same.
<i>REMUNERATION</i>	A supportive guardian and a supportive administrator are not entitled to any remuneration for acting in that role.	A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment.	Victoria does not accept supporters receiving remuneration. NSW accepts exceptions.
<i>INFORMAL ARRANGEMENTS</i>	No need to change informal arrangements if they work well.	The Act has no enforcement to change informal arrangements if they are implemented with the consent of a person and a supporter.	Same.
<i>TRIBUNAL</i>	Tribunal may limit guardianship appointments by hearings as possible.	Tribunal may appoint a supporter by an order who may assist a person in decision-making.	Almost same.
<i>OFFICE OF THE PUBLIC ADVOCATE</i>	Office of the Public Advocate	Office of the Public Advocate (To be renamed)	Same.
<i>SUBSTITUTED DECISION-MAKING WHEN THE MENTAL CAPACITY IS LOST</i>	Tribunal may issue an order to an adult guardian and an administrator, or EPA becomes effective.	Tribunal may issue a representation order to a representative, or EPA becomes effective.	Almost same.

Source: Made by the author

(2) Victoria Act 2019 vs. NSW LRC Report 145

a. Purpose of Act/Report

The Victorian Act 2019 reflects the values of the CRPD.⁷⁴⁸ It respects the will and preferences of the principal, understands the policy to implement the values of the CRPD. It also tries to fuse the

⁷⁴⁸ Paragraph 27 of General Comment No.1 (Corrigendum issued on January 26, 2018) for the CRPD stipulates some points that ‘Substituted decision-making regimes can take many different forms, including plenary guardianship, judicial

values of the CRPD with the existing guardianship system. NSW LRC Report 145 proposes a more advance institutional design in line with the values of the CRPD compared to those of the State of Victoria. In particular, the report suggests that the paternalistic aspect of the guardianship system is undesirable. A policy will be introduced to prioritize the respect for autonomy and right to self-determination more, even if the protection of the principal may be somewhat lessened.⁷⁴⁹ Overall, it is assumed that autonomy and right to self-determination of the principal are to be directly respected in the NSW LRC Report 145.

The purpose of the Victorian Act 2019 is ‘to promote social and personal wellbeing of the person.’ It can be considered a compromise between ‘best interests’ as a current criterion and ‘the will and preferences’ as the CRPD requires for the principal.⁷⁵⁰ Supported decision-making is incorporated into the legal system, and a supportive guardian and a supportive administrator have a role in this. An adult guardian and an administrator can conduct substituted decision-making only in cases that it is deemed necessary. They must fulfill accountability to the principal and are obliged to report the contents of the substituted decision-making to the VCAT annually in writing. As a system, substituted decision-making is regarded as a last resort, narrowing down opportunities for substituted decision-making, instead of urging supported decision-making as an alternative. This policy seems to indicate

interdiction, and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where: (a) legal capacity is removed from a person, even if this is in respect of a single decision; (b) a substitute decision maker can be appointed by someone other than the person concerned, and this can be done against his or her will; or (c) any decision made by a substitute decision maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.’ UN, Committee on the Rights of Persons with Disabilities, *General Comment No. 1* (Web Page, partly amended 2018/2014).

⁷⁴⁹ Refers to the Sydney Health Law, ‘NSW Law Reform Commission Recommends Far-reaching Reform of Guardianship Legislation’ (Web Page, February 21, 2018) <<https://sydneyhealthlaw.com/tag/assisted-decision-making/>>.

⁷⁵⁰ It is called a strategic compromise. From the interview of Victorian OPA by the author on March 5, 2019.

that the Victorian Act 2019 corresponds to the challenges of the State of Victoria as well as the CRPD.⁷⁵¹

The purpose of the NSW LRC Report 145 is ‘to respect the will and preferences of the principal,’ to implement and to ensure the will and preferences of the principal. Renaming of various terms intends to design a new system that is entirely different from the current guardianship system. The report also intends to use the terms, ‘supporter’ and ‘representative,’ following the ALRC Report 124 (2014).⁷⁵² The revised law is to be called the *Assisted Decision-Making Act* rather than the *Guardianship Act 1987*. It pushes forward ‘assisted decision-making’ as a new legal concept. If the mental capacity of the principal is lost and substituted decision-making for the principal is required as a last resort, the tribunal may issue a representation order to the representative. The revised law is thus intended to supersede the *Guardianship Act 1987*.

b. Capacity and Capacity Assessment

Regarding ‘mental capacity’ of a person, ‘capacity is not a unitary concept but rather refers to specific decisions, tasks, or domains. (...) Capacity is also issue specific.’⁷⁵³ The Victorian Act 2019

⁷⁵¹ Based on the interviews of the Australian experts by the author on March 1–3, 2017, the challenges of the State of Victoria can be summarized in the four points: (i) Rapid and appropriate responses by the Victorian OPA and VCAT to the adult guardianship cases are increasing in number and have become more complicated. (ii) Revise the law for improving legal system to meet the international human rights requirements. (iii) Realization of supported decision-making. (iv) Combat elder abuse, particularly responding to adults at risk for undue influence and financial exploitation. Yukio Sakurai, ‘Adult Guardianship System in Australia and its Recent Discussion Points’ (2018) 7 *Quarterly Journal of Comparative Guardianship Law* 30, 41. (in Japanese)

⁷⁵² The ALRC Report 124 in Chapter 4: Supported Decision-Making in Commonwealth Laws provides a Commonwealth decision-making model based on the positions of ‘supporters’ and ‘representatives.’ Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws Final Report* (ALRC Report 124, 2014) 91–118; The terms of ‘supporters’ and ‘representatives’ are carefully selected and used. Rosalind Croucher ‘Confronting Words: Driving a New Legal Lexicon of Disability’ (2017) 35 *Law Context: A Socio-Legal Journal* 15, 20.

⁷⁵³ This is acknowledged in *Gibbons and Wright* case [GIBBONS v. WRIGHT [1954] High Court of Australia 91 CLR 423, 23 April 1954] where the High Court said: ‘[T]he mental capacity required by law in respect of any instrument is

and the NSW LRC Report 145 share the key legal concept ‘decision-making capacity’ and its capacity assessment procedures. The Victorian Act 2019 section 5(1) stipulates the definition of decision-making capacity that ‘a person has capacity to make a decision in relation to a matter (decision-making capacity) if the person is able—(a) to understand the information and the effect of the decision; and (b) to retain that information to the extent necessary to make the decision; and (c) to use or weigh that information as part of the process of making the decision; and (d) to communicate the decision and the person’s views and needs as to the decision in some way, including by speech, gesture or other means.’ The NSW LRC Report 145 recommends ‘a new definition of decision-making ability that is consistent with (...) the Capacity Toolkit and the recommendations of the VLRC [the Victorian Act 2019].’⁷⁵⁴ This means that the Victorian Act 2019 and the NSW LRC Report 145 share the same legal concept ‘decision-making capacity’ on the same ground.

With regard to ‘capacity assessment’ procedures, the NSW *Capacity Toolkit*, as guidelines on capacity, includes ‘capacity assessment principles’ (section 3).⁷⁵⁵ The ‘capacity assessment principles’ are composed of six principles to be applied when assessing a person’s capacity. These are as follows: (i) Always presume a person has capacity; (ii) Capacity is decision specific; (iii) Do not assume a person lacks capacity based on appearance; (iv) Assess the person’s decision-making ability – not the decision they make; (v) Respect a person’s privacy; and (vi) Substitute decision-making is a last resort. These principles aim to support and protect vulnerable adults and help them make the most of their

relative to the particular transaction which is being affected by means of the instrument and may be described as the capacity to understand the nature of the transaction when it is explained.’ Nick O’Neill and Carmelle Peisah, ‘Chapter 1—What is capacity?’ in Nick O’Neill and Carmelle Peisah (eds), *Capacity and the Law 2021 Edition* (Online, 2021) <<http://austlii.community/foswiki/Books/CapacityAndTheLaw/WebHome>>.

⁷⁵⁴ Refers to the NSW LRC Report 145, Paragraph 6.12.

⁷⁵⁵ Refers to the NSW Government, Communities and Justice, *Capacity Toolkit* (Web Page, July 8, 2019) <https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

decision-making ability.⁷⁵⁶ In the State of Victoria, these principles are shared with the capacity guidelines *The LIV Capacity Guidelines and Toolkit* published by the Law Institute Victoria and reflected in the Victorian Act 2019 (section 5).⁷⁵⁷

c. Guidelines for Supported Decision-Making Practice

The guidelines for supported decision-making are shown in the capacity guidelines *The LIV Capacity Guidelines and Toolkit* in the state of Victoria. It seems that there are some points to be clarified when supporters practice supported decision-making on site.⁷⁵⁸ In fact, reviewing the supported decision-making pilot programs in Australia from 2010 to 2015, it was tentatively concluded that ‘some form of authority may facilitate the role of supporters, help to engage others in a person’s life, and integrate decision making support across all life domains.’⁷⁵⁹ The Victorian Act 2019 does not state any operational details about the scope of supported decision-making. For example, a Canadian report points out that the use of supported decision-making should be limited to a certain area.⁷⁶⁰ This report suggests the eligible scope of supported decision-making practice by type of

⁷⁵⁶ Hilary Brown points out that the standard of mental capacity in MCA 2005 (England and Wales) is based on a cognitive, linear model of decision-making and the emotional factors of the principals are not taken into consideration. The emotional factors include their personal history, their relationship history or family dynamics. This discussion can be applied to the Australian capacity assessment. Hilary Brown, ‘The Role of Emotion in Decision-Making’ (2011) 13(4) *The Journal of Adult Protection* 194, 202.

⁷⁵⁷ Refers to the Law Institute Victoria, *The LIV Capacity Guidelines and Toolkit* (Online, Concise edition: November 2020, Full version: 2018) Concise edition <<https://www.compass.info/resources/resource/liv-capacity-guidelines-and-toolkit/>>.

⁷⁵⁸ Supported decision-making has been widely practiced on sites in Australia. Jan Killeen, *Supported Decision-making: Learning from Australia* (Rights for Persons with Cognitive Disabilities: Learning from Australia, 2016).

⁷⁵⁹ Australian people have learnt the lesson from SDM pilot programs since 2010 that ‘It may be that workable models of delivering decision making support need to straddle civil society and the law.’ Christine Bigby et al, ‘Delivering Decision Making Support to People with Cognitive Disability—What Has Been Learned from Pilot Programs in Australia from 2010 to 2015’ (2017) 52 *Australian Journal of Social Issues* 222–240, 222 and 236.

⁷⁶⁰ A report was issued in the province of Ontario in Canada. It states that the subjects who are relatively suitable for supported decision-making are persons with mental disabilities. Supported decision-making is not well-suited to persons

disability but no such report is seen in Australia.⁷⁶¹ A challenge is how to properly implement supported decision-making and to deal with risks for possible undue influence and illegal acts accompanying supported decision-making.⁷⁶² In addition, VCAT is requested to have hearings with principals as much as possible. VCAT has been able to conduct most hearings by either having the principal at the hearing or being satisfied that he or she is unable or unwilling to attend.⁷⁶³

In NSW, the guidelines *Capacity Toolkit* have been prepared like the case in the state of Victoria. Assisted decision-making is a challenge to administer. The challenges are same as these in the State of Victoria, i.e., to properly implement supported decision-making and avoid possible undue influence and illegal acts accompanying assisted decision-making.⁷⁶⁴ Personal support agreements are not

with psychiatric and social psychological disabilities. In addition, the elderly with dementia should use an informal arrangement for a certain period until the proceedings of substituted decision-making start. Krista James and Laura Watts, 'Understanding the Lived Experiences of Supported Decision-Making in Canada: Legal Capacity, Decision-Making and Guardianship' (Study Paper, Canadian Center for Elder Law (CCEL) commissioned by the Law Commission of Ontario, Canada, Online, March 2014) <<https://www.bcli.org/project/understanding-lived-experience-supported-decision-making>>; Representation Agreement has not delivered a workable framework for people with dementia in the province of British Columbia, although it has been successful in intellectual/development disabilities. Mary Donnelly, 'Deciding in Dementia: The Possibilities and Limits of Supported Decision-Making' (Online, 2019) 60 *International Journal of Law and Psychiatry* <<https://doi.org/10.1016/j.ijlp.2019.101466>>.

⁷⁶¹ An article appears to point out that it is essential for health and legal practitioners to make 'an understanding of these inter-professional differences in perceived roles of providing decision-making support' for people with dementia. Craig Sinclair et al, 'Professionals' Views and Experiences in Supporting Decision-Making Involvement for People Living with Dementia' (2021) 20(1) *Dementia* 84, 105.

⁷⁶² A principal with insufficient mental capacity may be assisted by a supported decision-maker for the principal's will and preferences, but in fact, the principal might be forced to engage in an action that serves the interest of the supported decision-maker. Mary Joy Quinn, 'Undue Influence and Elder Abuse' (2002) 23 (1) *Geriatric Nursing* 11, 17.

⁷⁶³ A member of the VCAT comments that 'Since COVID-19 pandemic, VCAT has implemented new administrative processes by telephone or video conference to ensure that [they] can capture the principal's will and preference in the hearing.' From email correspondence of a VCAT member by the author on August 12, 2021.

⁷⁶⁴ Kathy Pryor states that financial exploitation is often referred to as undue influence, which is so difficult to address legislatively. Kathy Pryor, 'Averting Financial Exploitation and Undue Influence through Legislation' (2016) 31(2) *Age in Action* 1, 6.

required to be registered with public agencies. It is thus unclear to what degree public agencies will be involved in the event of a dispute or misbehavior related to assisted decision-making contract.

d. Non-Remuneration Policy

The Victorian Act 2019 does not recognize remuneration for acting in SDM (section 95). The Victorian Act 2019 expects principals' supportive guardians and supportive administrators to be relatives, friends, or public advocates, but not legal/welfare practitioners.⁷⁶⁵ This non-remuneration policy is established in the Victorian Act 1986 based on the Cocks Report 1982⁷⁶⁶ and has been applied to other jurisdictions over Australia because this is in order to avoid the conflict of interest associated with payment.⁷⁶⁷ The Victorian Act 2019 recognizes that principals' supportive guardians and supportive administrators are supporters for 'decision-making' of the principals, there does not often arise a situation where they need to have specialist skills.⁷⁶⁸ Principals' supportive guardians and

⁷⁶⁵ The VLRC Report 24 (2012), Paragraph 8.89 states that 'supporter arrangements are designed for close, personal relationship, which cannot be replaced by professional appointments.'

⁷⁶⁶ 'The Cocks Report 1982' is the final report made by the Victorian Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons headed by Errol Cocks. Victoria. Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons and Errol Cocks, *Report of The Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons* (Victorian State Government, 1982).

⁷⁶⁷ This view was addressed by Terry Carney in email correspondence on December 6, 2021; Cocks and Duffy define advocacy as: 'functioning (speaking, acting, writing) with minimum conflict of interest on behalf of the sincerely perceived interests of a person or group, in order to promote, protect and defend the welfare of, and justice for, either individuals or groups, in a fashion which strives to be emphatic and vigorous,' referring to the article: Wolf Wolfensberger, *Social Advocacies on behalf of Devalued and Disadvantaged People* (Workshop provided at Adelaide, 1992). They propose five principles for advocacy: '(i) Advocacy is on the side of the disadvantaged person/people. (ii) Advocacy is concerned with genuine life needs. (iii) Advocacy strives to minimize conflicts of interest. (iv) Advocacy engages in vigorous action. (v) Advocacy has fidelity to disadvantaged people.' They review the term advocacy with 'its emphasis on minimum conflict of interest and its focus on action.' This approach may lead to non-remuneration policy to avoid paid social workers due to potential conflict of interest by payment. Errol Cocks and Gordon Duffy, *The Nature and Purposes of Advocacy for People with Disabilities* (Edith Cowan University Publications, 1993) 42 and 121 <<https://ro.ecu.edu.au/ecuworks/7172>>.

⁷⁶⁸ From email correspondence of a VCAT member with the author on September 2, 2021. She points out: a supportive guardian or a guardian is strictly a supporter of decision-making or decision-maker for the principal.'

supportive administrators must have sufficient skills to seek advice or arrange care by specialists. Staff in the Office of the Public Advocate (OPA) are people with a social welfare background, such as a social worker, lawyer, or nurse etc., which assists supportive guardians and supportive administrators to know where to seek such advice and how to evaluate that advice in making their decisions.

In contrast, the NSW LRC Report 145 recommends that ‘A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment’ (paragraph 7.50 (2)). The issue of remuneration for supporters in SDM suggests the difference between the Victorian and NSW law reform policies in ‘who will act as supporters and for what purpose.’ Namely, the Victorian Act 2019 adopts the design that relatives, friends, or public advocates should act as supporters for decision-making of the principals, and the NSW LRC Report 145 basically follows the same design as the Victoria’s but allowing some exceptional cases to appoint paid workers or corporations receiving remuneration if they are deemed necessary.⁷⁶⁹

e. Summary

In summary, the State of Victorian is advanced in practice to implement supported decision-making by law, appointing supportive attorneys by principals or appointing supportive guardians/supportive administrators on their behalf by tribunal orders. Monitoring VCAT as the tribunal operation in the Victorian Act 2019 will be attention after the enforcement in March 2020. NSW-proposed law is more advanced than the Victorian Act 2019 with hopes that the purpose of the law follows the CRPD. The supported decision-making concept is more incorporated into the law reform plan. Also, its renaming of the *Assisted Decision-Making Act* gives an innovative image to NSW citizens who listen to and see this naming. This system will be entirely renewed from the current NSW guardianship system, which has a flexibility of the non-remuneration policy to involve legal/welfare practitioners receiving remuneration as supporters if it is necessary. It is however

⁷⁶⁹ The NSW LRC Report 145 policy allows an alternative to appoint paid a worker or corporation as an exceptional case where no family member, friend, public advocate is prepared to act as a supporter of the principal.

uncertain whether the NSW LRC Report 145 proposals will be accepted by the NSW State parliament. It is subject to change in the NSW State parliament debates and drafting bill.⁷⁷⁰

(3) What are the Common Values in Australian Law Reforms?

What are the values that are considered common in two law reforms? It is presumed by Australian scholars, including Terry Carney, that these are mentioned as the National Decision-Making Principles addressed in the ALRC Report 124.⁷⁷¹ The ALRC Report 124 is the national guardianship law reform report, which has mainly examined the ‘ability to exercise legal capacity’ and ‘equal recognition before the law of people with disability’ that the CRPD requires, and provides the four National Decision-Making Principles (Paragraph 3.4). Namely, Principle 1: *The equal right to make decisions* (i.e., all adults have an equal right to make decisions that affect their lives and to have these decisions respected.), Principle 2: *Support* (i.e., persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.), Principle 3: *Will, preferences and rights* (i.e., the will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.), and Principle 4: *Safeguards* (i.e., laws and legal frameworks must contain appropriate and effective safeguards concerning interventions for persons who may require decision-making support, including to prevent abuse and undue influence.). In addition, the ALRC Report 124 provides five

⁷⁷⁰ This was Terry Carney’s remarks in the AGAC2019 conference in Canberra on March 15, 2019.

⁷⁷¹ From the interview and email correspondence to Victorian OPA and Terry Carney on March 5, 14, and afterward, 2019 by the author; Terry Carney et al, ‘Realising “Will, Preferences and Rights”: Reconciling Differences on Best Practice Support for Decision-Making?’ (Online, 2019) *Griffith Law Review* <doi:10.1080/10383441.2019.1690741>; Bruce Alston, a member of ALRC then, states that ‘the [National Decision-Making] Principles can be a catalyst for facilitating important law reform over following decades.’ Bruce Alston, ‘Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform’ (2017) 35 *Law in Context* 21–43, 1 and 27–31.

Framing Principles for guiding the recommendations for reform: *dignity; equality; autonomy; inclusion and participation; and accountability* (Paragraph 1.34 to 1.39).⁷⁷²

The ALRC considers an overall framework of these principles and guidelines as the template for the specific reforms in national and state/special territory levels (Paragraph 3.7). Stakeholders have supported these principles which are reflected in a Commonwealth decision-making model that is developed in the ALRC Report 124 (Paragraph 1.51 to 1.116). These principles and the ALRC Report 124 are known in Australia and cited in administrative and judicial documents, parliamentary debates, and academic articles. In fact, the four National Decision-Making Principles are used for the policy guideline document for aged care providers in Australia.⁷⁷³ Furthermore, the ALRC Report 124 has become known by international agencies because the Australian national government submitted their combined second and third reports to the UN Committee on September 6, 2018.⁷⁷⁴ These reports explained a recommendation addressed by the ALRC Report 124 that ‘a Commonwealth decision-making model be introduced into relevant laws and legal frameworks that encourage supported decision-making.’⁷⁷⁵

⁷⁷² Regarding autonomy, Paragraph 1.37, the ALRC Report 124 states that ‘This Inquiry has been informed by autonomy in the sense of “empowerment”, not just “non-interference”. This involves seeing an individual in relation to others, in a “relational” or “social” sense and understanding that connects with respect for the family as the “natural and fundamental group unit of Society” that is entitled to protection by States Parties.’ It can be assumed that ALRC Report 124 is based on the notion of relational autonomy, although ‘Terms and Reference’ of ALRC report 124 includes ‘how maximizing “individual autonomy” and “independence” could be modelled in Commonwealth laws and legal frameworks.’

⁷⁷³ Craig Sinclair, Sue Field and Meredith Blake, *Supported Decision-Making in Aged Care: A Policy Development Guideline for Aged Care Providers in Australia* (Cognitive Decline Partnership Centre, 2nd ed 2018); Meredith Blake et al, ‘Supported Decision-Making for People with Dementia: An Examination of Four Australian Guardianship Law’ (2021) 28(2) *Journal of law and Medicine* 389–420, 405–416.

⁷⁷⁴ Refers to the UN, *Combined Second and Third Periodic Reports submitted by Australia under Article 35 of the Convention, due in 2018* (Web Page, February 5, 2019)

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/AUS/2-3&Lang=en>.

⁷⁷⁵ Refers to the ALRC Report 124, Paragraph 146.

The Victorian Act 2019 and the NSW LRC Report 145 have been produced through a democratic process by the state Law Reform Commission and the state parliament. Both referred to the public opinions expressed by the Office of the Public Advocate or the Guardian, relevant public agencies, NPOs, experts, and civil society. It is recognized that people in Australia respect the consensus-making process through democratic procedures, even though it takes time to make law and public policy concerning the guardianship system.⁷⁷⁶ These law reforms follow four National Decision-Making Principles and five Framing Principles addressed in the ALRC Report 124.

4.4 Legislation for Elder Abuse

4.4.1 Background of 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 numbers of publications and research projects on the topic.⁷⁷⁷ But there is no comprehensive legislation to combat elder abuse in Australia. Instead, the *Aged Care (Security and Protection) Act 2007* was enacted to amend the *Aged Care Act 1997*, a national law, inserting an additional Article 63-1AA.⁷⁷⁸

⁷⁷⁶ 'It is from such small steps that sufficient incremental knowledge ultimately accrues, and apparently worthy social policies are refined over time.' Terry Carney, 'Supported Decision-making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-building?' 35(2) *Disability, Rights and Law Reform in Australia* (2017) 63; Ronald McCallum, a well-known blind law scholar in Australia, states that 'Australia's moves in these legal fields have been rather slow, nevertheless in time most, if not all, jurisdictions will most likely adopt to varying degrees the paradigm change ushered by article 12.' Ronald McCallum, *Research Report: The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020) 55.

⁷⁷⁷ Regarding domestic violence, the research project team in the State of Victoria reported recommendations in 2014. Delanie Woodlock et al, *Voices Against Violence Paper One: Summary Report and Recommendations* (Women with Disabilities Victoria, Victorian Office of the Public Advocate, and Domestic Violence Resource Centre Victoria, 2014).

⁷⁷⁸ Rae Kaspiew, Rachel Carson, and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No. 35, Australian Institute of Family Studies, 2016/Correction November 2, 2018) 22; Susan Kurrle and Gerard Naughtin, 'An Overview of Elder Abuse and Neglect in Australia' (2008) 20(2) *Journal of Elder Abuse & Neglect* 108, 125.

This Article states that ‘responsibilities relating to alleged and suspected assaults’ require mandatory reporting of incidents of elder abuse occurring in institutional aged care settings.⁷⁷⁹ 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, 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 the last few years concerning the issue. Elder abuse is one of the major social problems in Australia.⁷⁸⁰ Elder abuse often goes unreported because the perpetrators are frequently the adult children of the victims; this may contribute to the reluctance of the elderly to seek help.⁷⁸¹ It is assumed that elder abuse is a complex, multidimensional, and often hidden form of abuse, and requires a multi-faceted response.⁷⁸² The current problem of elder abuse is left to the treatment in each state, special territory, and local government in Australia, but these entities cannot fully tackle elder abuse problems.

In fact, the number of calls to the NPO, Seniors Rights Victoria’s advice call service related to elder abuse from the period July 2012 to June 2019 increased every year. The proportions of calls

⁷⁷⁹ Krista James, *Legal Definitions of Elder Abuse and Neglect* (Department of Justice Canada, 2019) 57–62.

⁷⁸⁰ A case for elder abuse in an aged care setting. Yvette Maker and Bernadette McSherry, ‘Regulating Restraint Use in Mental Health and Aged Care Settings: Lessons from the Oakden Scandal’ (2019) 44(1) *Alternative Law Review* 29, 36.

⁷⁸¹ Between 5 per cent and 14 per cent of older Australians experience elder abuse in any given year, and the prevalence of neglect may be higher. Briony Dow, Freda Vrantzidis, Meghan O’Brien, Melanie Joosten and Luke Gahan, ‘Elder Abuse in Australia’ in Mala Kapur Shankardass (ed), *International Handbook of Elder Abuse and Mistreatment* (Springer, 2020) 559–574; Almost 60 per cent perpetrators of elder abuse incidents is a family member. National Council of Aging, Gets the Facts on Elder Abuse (Web Page, 21 February 2022) <<https://www.ncoa.org/article/get-the-facts-on-elder-abuse>>.

⁷⁸² A systematic review of the literature reveals that elder abuse is a multifactorial phenomenon and various risk factors are involved, such as age, sex, marital status, educational level, income, family arrangement, family relationship, social support, solitude, mental disorder, depression, dependence on others for activities of daily living (ADL) and instrumental activities of daily living (IADL), and others. Maria Angélica Bezerra dos Santos et al, ‘Factors Associated with Elder Abuse: A Systematic Review of the Literature’ (2020) 25 *Ciência & Saúde Coletiva* 2153–2175, 2173.

concerning financial abuse and social abuse particularly increased, with 6.12 per cent increase in financial abuse and 4.21 per cent increase in social abuse.⁷⁸³ Research in the state of Victoria indicates that elder abuse prevalence rates among the principals in the guardianship were estimated to be 13 per cent in 2013–14 and 21 per cent in 2016–17. Research shows that women who have experienced elder abuse are at a higher rate than men, and the elderly with dementia or intellectual disability are more likely to have experienced elder abuse than those with other disabilities.⁷⁸⁴ 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.⁷⁸⁵ It also shows an upward trend of the elder abuse prevalence rate among the principals in the guardianship.⁷⁸⁶

Considering the lack of legislation and public policy that prevents to and responds elder abuse in states and special territories, there is a view that a collaborative national strategy, incorporating a right-based approach to the review and reform of state and special territory laws, is essential.⁷⁸⁷ For this reason, the responsible entity in question was upgraded from the state and special territory to the Commonwealth. Officially, the Attorney-General for Australia announced an inquiry into the Australia

⁷⁸³ Melanie Joosten et al, *Seven Years of Elder Abuse Data in Victoria (2012–2019)* (National Ageing Research Institute in Partnership with Seniors Rights Victoria, August 2020) 35.

⁷⁸⁴ Lois Bedson, John Chesterman and Michael Woods, ‘The Prevalence of Elder Abuse Among Adult Guardianship Clients’ 18 *Macquarie Law Journal* (2018) 15–34, 25.

⁷⁸⁵ Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies – It’s Time to Face the Facts!’ (2013) 7 *Elder Law Review* 1, 30.

⁷⁸⁶ Ben Chen, ‘Elder Financial Abuse: Capacity Law and Economics’ (2020) 106 *Cornell Law Review* 1457, 1538.

⁷⁸⁷ John Chesterman proposes five key reform imperatives: reduce reliance on substitute decision making, facilitating complaints, funded advocacy, on-site monitoring, and investigation of concerns. Chesterman, ‘The Future of Adult Guardianship in Federal Australia’ (2013) 66(1) *Australian Social Work* 26, 38; 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; Stephen Duckett and Anika Stobart, ‘From Rationing to Rights: Creating a Universal Entitlement to Aged Care’ (2021) 54(2) *The Australian Economic Review* 257, 265.

Law Reform Commission (hereinafter referred to as ‘ALRC’) on ‘protecting the rights of older Australians from abuse’ on February 23, 2016.⁷⁸⁸

The inquiry includes a matter concerning ‘relevant international obligations relating to the rights of older people under United Nations (UN) human rights conventions to which Australia is a party.’⁷⁸⁹ A new national legislative policy 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*⁷⁹⁰ (ALRC Report No.131, 2017, hereinafter referred to as ‘ALRC Report 131’) was tabled on the Commonwealth 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.

4.4.2 ALRC Report 131 and the Responses

(1) ALRC Report 131

a. Legislative Policy to Combat Elder Abuse

The ALRC Report 131 clarifies the Australian national legislative policy to combat elder abuse. 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’ (paragraph 2.25/paragraph 2.45 of ALRC Report 131).⁷⁹¹ Five types of abuse are stated in the Report: psychological or emotional abuse, financial abuse, physical abuse, neglect, and sexual abuse (paragraph 2.46 to 2.60).

⁷⁸⁸ Refers to the Australian Law Reform Commission (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/>>.

⁷⁸⁹ Ibid.

⁷⁹⁰ Refers to the ALRC, *Elder Abuse – A National Legal Response Final Report* (ALRC Report 131, 2017) <<https://www.alrc.gov.au/publications/elder-abuse-report/>>.

⁷⁹¹ Refers to the WHO, *The Toronto Declaration on the Global Prevention of Elder Abuse* (Web Page, November 17, 2002); WHO, *Elder Abuse* (Web Page, June 6, 2018) <<https://www.who.int/news-room/fact-sheets/detail/elder-abuse>>.

The ALRC Report 131 takes into consideration relevant international obligations relating to the rights of older people under the UN conventions. The United Nations Principles for Older Persons was adopted by the General Assembly resolution 46/91 of December 16, 1991.⁷⁹² This resolution recommended the UN Parties to incorporate the following five principles into their national programs: *Interdependence, Participation, Care, Self-fulfillment, and Dignity*.⁷⁹³ Paragraph 11.18 of the ALRC Report 131 refers to the resolution of the UN Principles for Older Persons regarding the *dignity and autonomy* (paragraph 2.84 to 2.87) of the elderly.

The ALRC Report 131 is based on two key framing principles, namely *dignity and autonomy* and *protection and safeguarding* (paragraph 2.83 to 2.99). *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.’ *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 references of the person.’ The policy stresses that the *dignity and autonomy* of the elderly, in addition to their *protection and safeguarding*, should be considered in a balanced manner.

A number of key terms are summarized in the Terminology of the ALRC Report 131, such as ‘supported and substitute decision-making,’ ‘supporters and representatives,’ ‘will, preferences and rights’ standard, ‘national decision-making principles,’ and ‘legal capacity’ (paragraph 2.100 to 2.119). These key terms are clarified and discussed in the ALRC Report 124, a national law reform report on the guardianship system. Thus, it can be understood that the policy to combat elder abuse and the reforms of the guardianship law are positioned back-to-back. This close relationship between the two

⁷⁹² Refers to the UN, Human Rights Office of the High Commissioner, *United Nations Principles for Older Persons Adopted by General Assembly Resolution 46/91* (Web Page, December 16, 1991)

<<https://www.ohchr.org/en/professionalinterest/pages/olderpersons.aspx>>.

⁷⁹³ Alan Gutterman, ‘Convention on Human Rights of Older Persons’ (Online, 2021)

<<https://ssrn.com/abstract=3876618>>.

ALRC Reports 124 and 133 in the national policy is addressed in the ‘Terms of Reference’ and is also advocated by the former President of the ALRC, Rosalind F. Croucher, who published the ALRC Reports 124 and 131.⁷⁹⁴

b. Countermeasures to Cope with Elder Abuse

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,⁷⁹⁵ 5) superannuation, 6) wills, 7) banking, 8) guardianship and administration, 9) health and the national disability insurance scheme (NDIS), 10) social security, 11) criminal justice responses, and 12) safeguarding adults at risk. The scope of the countermeasures against elder abuse is broader and comprehensive. These are the ALRC’s response ‘with a set of recommendations—traversing laws and legal frameworks across Commonwealth, state and territory laws—aimed at achieving a nationally consistent response to elder abuse’ (paragraph 1.20). 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. Captioned ‘Safeguarding Adult at Risk,’⁷⁹⁶ Chapter 14 of the ALRC Report 131 proposes establishing the first adult safeguarding law in Australia.⁷⁹⁷ It quotes Jonathan

⁷⁹⁴ Rosalind F. Croucher highlights how deeply the ALRC members debated on elder abuse based on the guardianship reform report. Rosalind F. Croucher, ‘Modelling Supported Decision Making in Commonwealth Laws—The ALRC’s 2014 Report and Making it Work’ (Conference Paper, AGAC conference held in Sydney on October 18, 2016) 11–20.

⁷⁹⁵ The ‘family agreements’ are discussed at Chapter 6 of the ALRC Report 131. Family agreements between a principal and their relatives are not typically put in writing, and the relatives take care of the principals in exchange for the principals’ property transfer. Such agreements are fragile, and the principals’ interests are not guaranteed by law. The Australian Law Reform Commission (ALRC) recommends that disputes within families should be under the jurisdiction of the tribunal, but access to the tribunal is another challenge for vulnerable adults. ALRC, The ALRC Report 131, 203-230.

⁷⁹⁶ ‘Safeguarding is protecting the welfare and human rights of people that are, in some way, connected your charity or its work – particularly people that may be at risk of abuse, neglect or exploitation.’ Australian Government (ACNC), *Governance Toolkit: Safeguarding Vulnerable People* (Web Page, n/a).

⁷⁹⁷ Refers to the Australian research focusing on the adult safeguarding comparison analysis in 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, 2013).

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' (paragraph 14.12).⁷⁹⁸ This acknowledgement in part comes from the vulnerability approach, where a general view is to be derived that vulnerable adults at risk of harm must be protected by the law and public policy.⁷⁹⁹ A review of 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.

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 ranks of the current administrative system, a national elder abuse legislation framework is needed to fill the gaps (paragraph 14.36).⁸⁰⁰ Paragraph 14.37 of the ALRC Report 131 states that the ALRC recommends 'the introduction of adult safeguarding law throughout Australia as an important measure filling the gap.' This will provide a uniform standard policy throughout Australia. Daily responses to elder abuse will then be provided by local governments by each state and special territory law under the uniform national legislative policy.⁸⁰¹ 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.

⁷⁹⁸ 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.

⁷⁹⁹ Refers to '2.3.2 Vulnerability Approach.'

⁸⁰⁰ Refers to a *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' (2014) 36 *Sydney Law Review* 99–130, 105.

⁸⁰¹ There is an article asking, 'if the reforms are implemented, what will 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.

In the ALRC's view, support and protection to adults at risk of harm should be provided by state and special territory safeguarding agencies (paragraph 14.40). 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 (recommendation 14-3).⁸⁰² The first step of an inquiry should be to contact the at-risk adult. 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 (recommendation 14-5).⁸⁰³ Responding effectively to elder abuse may often require the cooperation and expertise of people from multiple disciplines and multiple agencies (paragraph 14.132).⁸⁰⁴ Adult safeguarding agencies should lead and coordinate this work. The ALRC Report 131 recommends that adult safeguarding agencies should provide a clear point of accountability within the government (paragraph 14.138).

The ALRC concludes that the consent of an adult at risk must be secured before safeguarding agencies can investigate, or take any other action, in relation to the abuse or neglect of the adult (recommendation 14-4). This is due to the respect to 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 emergency cases, the safety of the at-risk adult needs to be secured, even against their wishes.⁸⁰⁵ The ALRC Report 131 suggest that in limited cases it may

⁸⁰² 'At-risk adult' is defined in the Report 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.

⁸⁰³ The actions that can be taken 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.

⁸⁰⁴ Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No. 35, Australian Institute of Family Studies, 2016/Correction November 2, 2018) 43–44.

⁸⁰⁵ Rosalind F. Croucher and Julie MacKenzie, 'Framing Law Reform to Address Elder Abuse' (2018) 18 *Macquarie Law Journal* 5–14, 14.

be appropriate to act without their consent (paragraph 14.102).⁸⁰⁶ This may apply to only those who need such care and support and cannot protect themselves (recommendation 14-4).⁸⁰⁷ This is a rescue model which is only activated in limited cases where law regulates. An adult safeguarding agency must determine whether the intervention is done, when and how it is done. This mission clarifies a logical reason why adult safeguarding agencies should provide a clear point of accountability within the government.

(2) Responses to the ALRC Report 131

a. National Response

In response to the ALRC Report 131, 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, 2018.⁸⁰⁸ Later, the Prime Minister of Australia Scott Morrison announced on September 18, 2018, that the Royal

⁸⁰⁶ The ALRC Report 124 states in the footnote that ‘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); Dunn et al states that ‘First, protective interventions would need to reduce the risk of the “vulnerable adult” being denied the ability to make a free choice, being abused, or being unable to give complete, coherent, and accurate evidence. Secondly, these interventions would need to engage meaningfully with that person’s subjective experience of his/her vulnerability such that any intervention does not impinge negatively on his/her self-identity, or his/her perceived ability to lead a meaningful life. Only if these two criteria were met would a protective intervention in the life of an autonomous adult be ethically defensible.’ Michael C. Dunn et al, ‘To Empower or to Protect? Constructing the “Vulnerable Adult” in English Law and Public Policy’ (2008) 28(2) *Legal Studies* 234–253, 248.

⁸⁰⁷ The ALRC Report 131 (recommendation 14-4) states that ‘consent is not 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.’

⁸⁰⁸ Kay Patterson 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. The Australian Human Rights Commission’s Age Discrimination Commissioner Kay Patterson, ‘Elder Abuse is Everybody’s Business’ (Speech delivered at the Aged Rights Advocacy Service World Elder Abuse Awareness Day Conference held in Adelaide on June 15, 2018).

Commission into Aged Care Quality and Safety (hereinafter referred to as ‘Royal Commission’) was introduced by the Letters Patent December 6, 2018.⁸⁰⁹ The Royal Commission was established by the Governor-General of the Commonwealth on October 8, 2018. The Royal Commission organized a 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. On March 1, 2021, the Royal Commission then published and tabled in Parliament a *Final Report—Care, Dignity and Respect* to summarize the activities and propose 148 wide-ranging recommendations, including a new *Aged Care Act*.⁸¹⁰ The report calls for fundamental reform of aged care system. It says that ‘A philosophical shift is required that places the people receiving care at the center of quality and safety regulation. This means a new system empowering them and respecting their rights.’⁸¹¹

Following the above activity, the Attorney-General of Australia conducted public consultation in April to June 2021 regarding ‘A mandatory national registration scheme for enduring powers of attorney relating to financial matters.’⁸¹² This action is to comply with the recommendation of the ALRC Report 131 (recommendation 5.3) and will consider policy design of a mandatory national online register of EPAs to be adopted in the future so as to reduce the financial abuse of older

⁸⁰⁹ Refers to the Royal Commission, *Letters Patent – 6 December 2018* (Web Page, December 6, 2018) <<https://agedcare.royalcommission.gov.au/publications/letters-patent-6-december-2018>>.

⁸¹⁰ Refers to the Royal Commission, *Final Report—Care, Dignity and Respect* (Web Page, March 1, 2021) <<https://agedcare.royalcommission.gov.au/publications/final-report>>.

⁸¹¹ Refers to the Royal Commission, *Final Report—Care, Dignity and Respect* [Volume 1: Summary and Recommendations] 21.

⁸¹² Refers to the Commonwealth Attorney-General’s Department, *National Register of Enduring Powers of Attorney* (Web Page, April 2022) <<https://www.ag.gov.au/rights-and-protections/consultations/national-register-enduring-powers-attorney>>.

Australians.⁸¹³ The policy design of a national register includes a digitalization of EPAs.⁸¹⁴ In the background, numerous cases of financial exploitations are estimated to happen with misconducts of EPAs in Australia.⁸¹⁵

Similarly, the Serious Incident Response Scheme (hereinafter referred to as ‘SIRS’) was implemented on April 1, 2022, as an initiative to help prevent and reduce the risk and occurrence of incidents of abuse and neglect in residential aged care services subsidized by the Australian Government.⁸¹⁶ The SIRS was proposed by the ALRC Report 131 (recommendation 4.4) and reconfirmed by the Royal Commission 2021 report. The SIRS complements existing provider obligations under the *Aged Care Act* by establishing responsibilities for providers to prevent and manage incidents, to use incident data to drive quality improvement and to report serious incidents. The Department of Health and Aged Care conducted public consultation in June to August 2022 regarding the SIRS framework, namely, responsibility to manage and prevent incidents, responsibility to notify reportable incidents, scope of reportable incidents, and reporting timeframe and priorities. These two policies are still under the process of establishment.

Regarding the national budget and policy, the national government had an annual budget of approximately AS\$15 million (US\$11.0 million) related to the elder abuse policy measures since the 2016 fiscal year. This budget was then increased to A\$22 million (US\$16.1 million) in the 2018–2019 fiscal year. On March 19, 2019, the Commonwealth Attorney-General launched the ‘National Plan to

⁸¹³ Trevor Ryan, ‘Developments in Enduring Powers of Attorney Law in Australia’ in Lusina Ho and Rebecca Lee (eds) *Special Needs Financial Planning: A Comparative Perspective* (Cambridge University Press, 2019) 179–211; Rieneke Stelma-Roorda, ‘The Misuse or Abuse of Continuing Powers of Attorney: What Are Appropriate Safeguards?’ (2021) 00 *International Journal of Law, Policy and The Family* 1, 25.

⁸¹⁴ The digitalization of lasting powers of attorney is implemented in Singapore by the reform of the Singapore MCA 2021.

⁸¹⁵ Anita Smith, ‘Tribunal Update: Compensation Where Loss Caused by Actions of An Attorney Using Power of Attorney’ (2019) 12 *Elder Law Review*.

⁸¹⁶ Refers to the Department of Health and Aged Care (Australian Government), *Serious Incident Response Scheme (SIRS)* (Web Page, May 31, 2022) <<https://www.health.gov.au/initiatives-and-programs/serious-incident-response-scheme-sirs>>.

Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023’⁸¹⁷ (hereinafter referred to as ‘National Plan’). Developed in collaboration with state and special territory governments, the National Plan provides an overview of the issues that all governments need to act on as a priority. The five key priority areas are included in the National Plan: 1) enhancing our understanding, 2) improving community awareness and access to information, 3) strengthening service responses, 4) planning for future decision-making, and 5) strengthening safeguards for vulnerable older adults.⁸¹⁸

b. Response by State

State of South Australia

There has been a remarkable progress in elder abuse legislation in the state of South Australia. The 2011 Wendy Lacey co-author report *Closing the Gaps*⁸¹⁹ was presented to the state parliament, and legislation of an Act on adult guardianship was considered to combat elder abuse. Consequently, the *Office of the Ageing (Adult Safeguarding) Amendment Act 2018* was enacted in November 2018 to amend the *Office for the Ageing Act 1995*. The Act was planned to be implemented step by step. At the first stage, elderly people aged 65 and over and indigenous elderly people aged 50 and over became subject to the law in 2019.⁸²⁰ The target of the Act was expected to expand gradually for three years.

⁸¹⁷ Refers to the Council of Attorney-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Attorney-General’s Department, July 8, 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023>>.

⁸¹⁸ Refers to the Commonwealth Attorney-General’s Department, *Protecting the Rights of Older Australians* (Web Page, n/a) <<https://www.ag.gov.au/rights-and-protections/protecting-rights-older-australians#national-plan-to-respond-to-the-abuse-of-older-australians>>.

⁸¹⁹ Wendy Lacey, Nicholas Procter, and Kay Price, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Office of the Public Advocate in collaboration with the University of South Australia, 2011); Wendy Lacey et al published another report based on interview surveys of relevant agencies: Wendy Lacey, Haemish Middleton, Lia Bryant, and Bridget Garnham, *Prevalence of elder abuse in South Australia: Final Report: Current Data Collection Practices of Key Agencies* (University of South Australia, Department of Health and Ageing (SA), 2017).

⁸²⁰ This is due to shorter lifetime expectancy of indigenous people. According to Census of population in 2016, just 5 per cent of indigenous people were aged 65 and over compared with 16 per cent of the non-indigenous population in Australia.

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 that should be responsible for elder abuse. The Office of the Public Advocate in charge of the guardianship was a candidate for the agency responsible for elder abuse. It was then concluded that the adoption of this proposal should be dropped.⁸²¹ 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 possible conflict of interest within the agency. Therefore, the responsibility was given to a new agency, the Adult Safeguarding Unit (ASU). This decision corresponds to the ALRC Report 131 recommendation.⁸²² The Adult Safeguarding Unit (ASU) is located at the Office for Well Ageing and has a focus on the safeguarding the rights of adults at risk of abuse.

State of NSW

Similarly, in the state of New South Wales (NSW), an Ageing and Disability Commissioner was established in July 2019 by the *NSW Ageing and Disability Commissioner Act 2019* to better protect

Australian Institute of Health and Welfare (AIHW), *Older Australian at A Glance* (Web Page, September 10, 2018) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/summary>>.

⁸²¹ Stephan G. Wade, the Minister for Health and Wellbeing, stated that '[t]he government has chosen to establish the adult safeguarding unit as a function of the new office for ageing well primarily because it enables coordination with the continuum of responses to elder abuse that unit already provides, including statewide policy development, awareness raising, including across culturally and linguistically diverse groups, workforce training and other policy initiatives.' South Australia, SA Parliamentary Debates (Legislative Council), October 23, 2018, p 1723–24 in HANSARD–10–24770. (Web Page, n/a) <<http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-24768>>.

⁸²² The ALRC Report 131 states that 'the states and territories decide which of their agencies might perform this role, or whether a new agency needs to be created' (Paragraph 14-50); John Chesterman remarks that 'new agencies could be created if particular jurisdictions took the view that such an initiative would provide better responses.' John Chesterman, 'The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives' (2019) 73(3) *Australian Social Work* 381, 389.

vulnerable adults.⁸²³ The Ageing and Disability Commission is an independent agency of the NSW Government.⁸²⁴ The role is ‘to better protect older people and adults with disability from abuse, neglect and exploitation from someone they know living in their home or community, and promote their fundamental human rights.’⁸²⁵ The activities of the Adult Safeguarding Unit (ASU) in the state of South Australia and those of the 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 legislation in other states and special territories. The point to note is how effectively the Adult Safeguarding Unit and the Ageing and Disability Commissioner will conduct their broad investigative powers by law, considering conflicting objectives between safeguarding and self-autonomy of vulnerable adults.⁸²⁶

State of Victoria

In the State of Victoria, the Victorian Act 2019 states that the functions of the Public Advocate include the protection of persons with disabilities from abuse (section 5).⁸²⁷ The Public Advocate however does not have enough power and personnel to do so. The Victorian OPA recommends that

⁸²³ Lenny Roth, ‘Adult Safeguarding Laws: Reviewing the Proposal for NSW Ageing and Disability Commissioner’ in *NSW Parliamentary Research Service E-brief Issue 3/2019* (NSW Parliamentary Research Service, Online, March 2019) <<https://www.parliament.nsw.gov.au/researchpapers/Documents/Adult%20safeguarding%20laws.pdf>>.

⁸²⁴ 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* (Web Page, November 2, 2018) 21. <<https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/community-and-disability-services/abuse-and-neglect-of-vulnerable-adults-in-nsw-the-need-for-action-2-november-2018>>.

⁸²⁵ Refers to the NSW Government, Ageing and Disability Commission, *Who We Are* (Web Page, November 23, 2020) <<https://www.ageingdisabilitycommission.nsw.gov.au/about-us/who-we-are>>.

⁸²⁶ For example, the *Ageing and Disability Commissioner Act 2019* No. 7, section 12 stipulates that ‘The Commissioner has the following functions—(a) to deal with allegations of abuse, neglect and exploitation of adults with disability and older adults, whether on the basis of a report made to the Commissioner or at the Commissioner’s own initiative, including by referring matters to appropriate persons or bodies and by conducting investigations.’

⁸²⁷ The Public Advocate ‘may investigate any complaint or allegation that a person is under inappropriate guardianship, is being exploited or abused or is in need of guardianship (section 16(1)g).’

‘state and special territory governments amend their guardianship legislation in order to give public advocates and public guardians the broad power to investigate, via complaints or on their own motion, the abuse, neglect and exploitation of adults with apparent impaired decision-making ability, where this apparent impaired ability is likely to be more than temporary.’⁸²⁸ It has not been concluded in the state parliament when and where the adult safeguarding body will be formed and placed in the State of Victoria.⁸²⁹ It can be assumed that the state parliament might hesitate to establish the adult safeguarding body, which has powers to intervene into the self-autonomy in civil society, because it may appear a dilemma between the freedom of people and protection by public intervention.

4.4.3 Discussion on Elder Abuse Legislation

(a) Elder Abuse Legislation in Australia and England

It is particularly interesting to see in 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. Legal devices for the adult guardianship, supported decision-making, and safeguards against elder abuse are interrelated.⁸³⁰ Amendments to the adult guardianship system in state laws and the national legislative policy of elder abuse are ongoing in parallel and are expected to provide a unique Australian adult support and protection legislative system. The Australian elder

⁸²⁸ John Chesterman and Lois Bedson (Victorian OPA), *Decision Time* (Victorian OPA Report, 2021) 61–62; Office of Public Advocate, *Line of Sight: Refocusing Victoria's Adult Safeguarding Laws and Practices* (OPA, 2022) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/503-line-of-sight-refocussing-victoria-s-adult-safeguarding-laws-and-practices>>.

⁸²⁹ John Chesterman, ‘The Future of Adult Safeguarding in Australia’ (2019) 54(4) *Australian Journal of Social Sciences* 360–370, 367

⁸³⁰ Terry Carney and Shih-Ning Then, ‘Combating Elder Abuse: Any Role for Supported-Decision-Making, Adult Guardianship or Other Laws?’ in Mala Kapur Shankardass (ed), *Combating Elder Abuse in Australia and India* (Nova Science, 2021).

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.⁸³¹

In England, the *Care Act 2014* was enacted, which regulates 'safeguarding adults at risk of abuse or neglect' (sections 42 to 47 of the Act).⁸³² The Act replaces the term 'vulnerable adult' with 'adult at risk' and regulates that a local authority should provide 'care and support' with an adult at risk to promote that individual's well-being (sections 42 and 1).⁸³³ 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, neighbors, friends and associates, people who deliberately take advantage of vulnerable people, strangers, and people who see an opportunity to abuse.⁸³⁴ 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 the local authority, National Health Service (NHS), the police, and so on, who may play an important role in adult safeguarding activities in the community. An SAB has the primary responsibility to deal with an abuse case in the

⁸³¹ From the interviews of Victorian OPA and the Senior Rights Melbourne by the author on March 2–3, 2017.

⁸³² The guidance for elder abuse was published in 2000 and 2015 before and after 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, 2nd ed. 2015).

⁸³³ 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.' It implies more attention to social model of people with disabilities. Sarah Donnelly et al, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* (Health Service Executive, National Safeguarding Office and Trigraph Limited, 2017) 25; Bridget Penhale et al, 'The *Care Act 2014*: A New Legal Framework for Safeguarding Adults in Civil Society' (2017) 19(4) *The Journal of Adult Protection* 169, 174.

⁸³⁴ Refers to the GOV. UK, *Policy Paper SD8: Office of the Public Guardian Safeguarding Policy* (Web Page, n/a) <<https://www.gov.uk/government/publications/safeguarding-policy-protecting-vulnerable-adults/sd8-opgs-safeguarding-policy>>; In Japan, elder abuse by third parties other than 'caregivers' at home and 'care home staff members' in nursing home is not covered by the Elder Abuse Prevention Act. If the empirical data often indicates elder abuse by third parties other than caregivers at home and care home staff members in nursing home, it will be an idea to consider a possible amendment to the laws to understand that third parties could be held liable for abuse.

community in cooperation with other agencies by making a Safeguarding Adults at Risk referral (SAAR) or vice versa.

In this regard, the public agencies engaged in adult safeguarding for abuse, on a SAAR basis, are the Office of the 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*⁸³⁵ (hereinafter referred to as ‘MCA 2005’). The OPG, originally in charge of 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, also in cooperation with other public agencies, including local authority.⁸³⁶ 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 local authority, the police, and the Forced Marriage Unit,⁸³⁷ and shares information when it is necessary.

It can be assumed that the legal devices for the adult guardianship, supported decision-making, and safeguards against elder abuse in England are interrelated to some extent. It is also 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 emphasis

⁸³⁵ The *Mental Capacity (Amendment) Act 2019* amends the *Mental Capacity Act 2005* to replace the deprivation of liberty safeguards (DoLS) with the liberty protection safeguards (LPS). The new law came into effective in November 2020. GOV. UK, *Mental Capacity (Amendment) Act 2019: Liberty Protection Safeguards (LPS)* (Web Page, December 17, 2021) <<https://www.gov.uk/government/collections/mental-capacity-amendment-act-2019-liberty-protection-safeguards-lps>>; Lucy Series, ‘Comment: *Mental Capacity (Amendment) Act 2019 (UK)*’ (Online, 2020) 12 (Part 1) *The Elder Law Review* <https://www.westernsydney.edu.au/elr/elder_law/elder_law_review_elr/elder_law_review_vol_12_part_1>.

⁸³⁶ David Reid et al, ‘Form and Function: Views from Members of Adult Protection Committees in England and Wales’ (2009) 11(4) *The Journal of Adult Protection* 20, 29.

⁸³⁷ A forced marriage is recognized in the U.K. 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, Law and the Justice System, *Forced Marriage* (Web Page, May 24, 2019) <<https://www.gov.uk/guidance/forced-marriage>>.

should be on the circumstances adults find themselves.’⁸³⁸ This seems to emphasize a preventive model rather than a reactive model. 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.⁸³⁹ This preventive method 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 and regulations.⁸⁴⁰ It can be said that Australian elder abuse policy is consistent with the character of Australian’s multicultural society and draws more England’s elder abuse legislation than U.S. method, which refers to a preventive approach rather than a reactive approach.⁸⁴¹

(b) Elder Abuse Responses of Australian States

Following the ALRC Report 131, the activities of the Adult Safeguarding Unit (ASU) in the state of South Australia and those of the Ageing and Disability Commissioner in the state of NSW have begun by the state initiatives.⁸⁴² 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 scale up in national

⁸³⁸ Refers to the previous remarks [833]. Sarah Donnelly et al, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review* 25.

⁸³⁹ Two approaches addressing elder abuse are comparatively discussed between the U.S. and Japan, 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.

⁸⁴⁰ The three main federal APS statutes in the U.S. 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 XinQi Dong (ed), *Elder Abuse* (Springer, 2017) 695.

⁸⁴¹ From the interviews of Victorian OPA and the Senior Rights Melbourne by the author on March 2–3, 2017.

⁸⁴² The February 2022 report addresses that ‘Australia needs national consistency in power of attorney (PoA), a national PoA register to verify PoA documents, and a place to report suspected abuse in each state.’ National Seniors Australia, *Scams and Financial Abuse Update: Snapshots from National Seniors Australia* (Canberra: National Seniors Australia, 2022) 19.

level.⁸⁴³ The elder abuse policy requires ‘nuanced consideration of many and varied factors, including the nature of relationships of care and support, cultural values, and the role of civil society.’⁸⁴⁴

According to the legal system of Australia, the procedure on legal reforms of each state and special territory under the umbrella of the Commonwealth is first informally negotiated between the national government and the state and special territory government.⁸⁴⁵ Second, the national 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.⁸⁴⁶ A strong and unified initiative over the national and state and territory levels is vital if the legislations are to address the scourge of elder abuse.⁸⁴⁷ It can be said that combating elder abuse is an important Australian national project.

4.5 Australian Principal Values and the Implications

4.5.1 Discussion on Australian Adult Support and Protection

(1) Australian Adult Support and Protection Legislation

a. Policy Objectives

The policy objectives of the Australian legislative project can be summarized as follow: First, the framework of the guardianship system established over thirty years ago has been or would be

⁸⁴³ John Chesterman, ‘The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives’ 387.

⁸⁴⁴ Terry Carney, ‘Combating Elder Abuse: Any Role for Supported-Decision-Making, Adult Guardianship or Other Laws?’ in Mala Kapur Shankardass (ed), *Combating Elder Abuse in Australia and India* (Nova Science Publishers, 2020) 1-20, 15.

⁸⁴⁵ The institutional mechanism to adjust interests between national and state/territory is reported. Jun Ashida (National Diet Library of Japan), ‘Australian Intergovernmental Council: Method of Federal and State Government Coordination’ (2018) 277 *Foreign Legislation* 77, 91. (in Japanese) *

⁸⁴⁶ From the interview of Victorian OPA by the author on March 2–3, 2017.

⁸⁴⁷ An article to focus on lawyers’ responsibilities by using screening tools for the elderly clients: Nola M. Ries, ‘Elder Abuse and Lawyers’ Ethical Responsibilities: Incorporating Screening into Practice’ (2018) 21(1) *Legal Ethics* 23, 45; Briony Dow, Freda Vrantidis, Meghan O’Brien, Melanie Joosten and Luke Gahan, ‘Elder Abuse in Australia’ in Mala Kapur Shankardass (ed), *International Handbook of Elder Abuse and Mistreatment* (Springer, 2020) 559–574.

changed. Supported decision-making has been or would be incorporated into the legislation that was recommended by the UN CRPD.⁸⁴⁸ Second, personal protection, autonomy and right to self-determination were clarified and prioritized, even if they may somewhat change the balance of protection and autonomy.⁸⁴⁹ Third, informal arrangements by relatives or 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.

In the two Australian States of Victoria and NSW, the guardianship system and supported decision-making are incorporated into the state legislation. Legal devices for the guardianship, supported decision-making, and safeguards against elder abuse are interrelated. Amendments to the adult guardianship system in the state Acts and the national legislative policy of elder abuse are ongoing in parallel and are expected to provide a unique Australian legislative system. The adult support and protection system refers to an offer of necessary sustenance, according to individual characteristics, that minimizes restrictions on a principal's rights. This system is considered to take less restrictive alternative measures. A person-centered approach is emphasized according to the relevant mental capacity of the principal, unlike a traditional guardianship system that uniformly restrict rights.

If the adult support and protection system is considered as a comprehensive legal system, the amendments to the state laws and national legislative policy covered in this chapter are an example of

⁸⁴⁸ Ronald McCallum, *Research Report: The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance* 46–55.

⁸⁴⁹ ALRC Report 131, Paragraph 1.19 states that '[t]he 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.'

legislation of the adult support and protection.⁸⁵⁰ The values enshrined in the CRPD, international human rights law, and rising human rights awareness make up the background of the adult support and protection system.⁸⁵¹ The Australian legislative project has been under discussion at the Law Reform Commission of each state and national 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.

b. Unique Institutional Design

In the meantime, some unique institutional designs that support the Australian adult support and protection system need to be understood.⁸⁵² First, Australia has the Public Advocate or the Public Guardian in each jurisdiction. This office, a part of the state Department of Justice, implements a legal support system and deals 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 solution for tenancy, family, civil, and human rights issues. Third, Australia has a state-run or public

⁸⁵⁰ Reviewing 67 international law reform reports on the guardianship, 9 reports were found to have recommendations to enact supported decision-making, including 5 reports in Australia, 2 reports in Canada, 1 report in the U.K., 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* 64, 75.

⁸⁵¹ ‘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’ in *Disability, rights and law reform in Australia* (The Federation Press, 2017) 14.

⁸⁵² Terry Carney remarks that public agencies ‘offer a responsive and personalized service rather than bureaucratic and impersonal service to which they may be predisposed by virtue of the prior history (and operating “culture”) of such institutions.’ Terry Carney, ‘Challenges to the Australian Guardianship and Administration Model’ (2003) 2 *Elder Law Review* <<http://classic.austlii.edu.au/au/journals/ElderLawRw/2003/8.html>>.

financial management institution, State Trustees Limited or Public Trustee.⁸⁵³ 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.⁸⁵⁴ Fourth, Australia has many NPOs that operate in communities based on a charity, grant, or welfare funding system. This concept of institutional agencies mentioned above may enable the smooth implementation of the guardianship in practice.

Figure 1 is an illustration of the relevant agencies and their interrelations with people in the community who apply to participate in the Victorian adult support and protection and the Public Advocate tasked with responding to these people. This is an attempt to show a conceptual illustration, simplifying the mechanism and interrelations between relevant agencies and people in community.⁸⁵⁵ The Australian adult support and protection system is a costly design because personnel expenses and operational expenses of public agencies related to adult guardianship are almost fixed. As far as Australia is concerned, the national population scale is relatively small, at approximately 25 million,

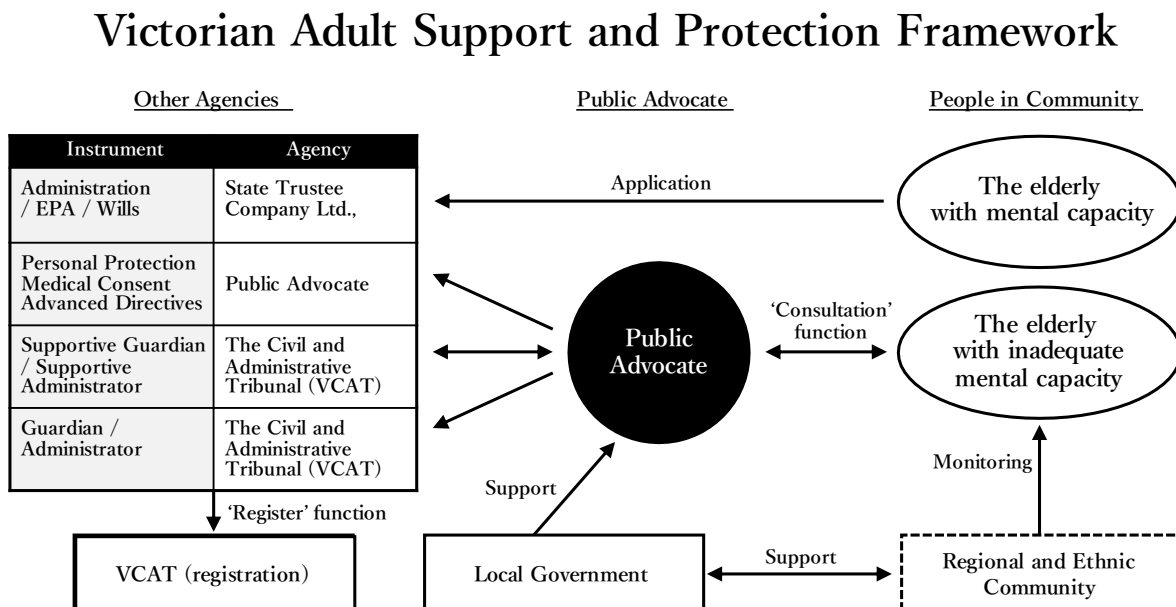
⁸⁵³ The history of public trustees started in Australia at the colonial days in 1880s, following the development in New Zealand, which influenced England to establish public trustees: E. J. Trevelyan et al, 'The Public Trustee in India, New Zealand, Australia, and England' (1916) 16(2) *Journal of the Society of Comparative Legislation* 110–139, 126–130.

⁸⁵⁴ In the State of Victoria, five types of public guardianship are utilized, centered on three types of public agencies. Namely, the tribunal is involved in the dispute of the EPA, the Public Advocate office associated NPOs/individuals are involved in SDM/guardianship for personal support, the STL is involved in SDM/guardianship for property management, and NPOs/individuals are independently involved in SDM/guardianship. See Suga-classified public guardianship types: (i) judicial direct intervention type, (ii) administrative direct control (public guardianship) type, (iii) public sector type, (iv) private organization formation (corporate guardianship) type, and (v) individual type. Fumie Suga, *The Doctrine of Autonomous Support in the English Adult Guardianship System: Towards a Society Pursuing the Best Interests* (Minerva Shobo, 2010) 258. (in Japanese) *

⁸⁵⁵ Hiroko Sugita advocates an idea to build an advocacy network for the elderly with dementia in collaboration with medical care, aged care, and the judiciary using the existing community-based integrated care system, and to provide support centered on advance directives created by the principals, referring to the State of South Australia's laws and policy. Hiroko Sugita, 'A Study on the Supported Decision-Making System for the Elderly with Dementia (2): Focusing on the South Australian Legal System' (2021) 179 *The Graduate School Law Review* 71–98, 94. (in Japanese)

and thus these institutional agencies can be run. The national productivity and the living standard are relatively high to pay for the institutional burden. But it is unlikely that this institutional design will be applied in the exact same way to any other country, including Japan.⁸⁵⁶ This is because there will be financial challenges in maintaining the institutional agencies in any country with a higher population scale, such as Japan. 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.

Figure 1: Illustration of the Victorian Adult Support and Protection Framework



Source: Made by the Author

c. Uncertainties on SDM Development

There are some uncertainties as to how supported decision-making model is to be developed. In the process of legislation, further consideration should be given to the supported decision-making

⁸⁵⁶ From the interview by the author of a Japanese lawyer in attorney, a leading member of the Japan Adult Guardianship Law Corporation Association (JAGA) at the World Congress of Adult Guardianship (WCAG) in Seoul, South Korea on October 25, 2018.

model.⁸⁵⁷ For example, what supported decision-making model will be most effective to the elderly with dementia?⁸⁵⁸ Mary Donnelly remarks that ‘After almost two decades in operation, it would appear that, in spite of its success for adults with intellectual/development disabilities, the *Representation Agreement Act 2000*⁸⁵⁹ in British Columbia (Canada) has not delivered a workable framework for people with dementia.’⁸⁶⁰ Craig Sinclair proposed ‘a spectrum model of supported decision-making which incorporates both a formal framework for “supporters” and recourse to a “representatives” role as a last resort.’⁸⁶¹ 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 [an] unpredictable

⁸⁵⁷ Malcolm Parker, ‘Getting the Balance Right: Conceptual Considerations Concerning Legal Capacity and Supported Decision-Making’ (2016) 13(3) *Journal of Bioethical Inquiry* 381, 393.

⁸⁵⁸ Craig Sinclair et al implemented the interdisciplinary project ‘Supported Decision-Making in Dementia Care across three states in Australia (2016–19).’ Through legal, policy and empirical social science research in the project, they have produced a policy guideline for aged care providers, a consumer guidebook, and other resources. The University of Sydney, *Supported Decision-Making* (Web Page, n/a) <<https://cdpc.sydney.edu.au/research/planning-decision-making-and-risk/supported-decision-making/>>; A woman living with dementia (age 54) of the project issues a short essay: Theresa Flavin, ‘Supported Decision Making for People Living with Dementia’ (2020) 19(1) *Dementia* 95, 97.

⁸⁵⁹ The *Representation Agreement Act 1996* is the first Canadian legislation in the British Columbia province to establish a comprehensive framework for supported decision-making. See British Columbia, *Incapacity Planning* (Web Page, n/a) <<https://www2.gov.bc.ca/gov/content/health/managing-your-health/incapacity-planning>>; Canadian Centre for Elder Law (CCEL), Study Paper on Inclusive Investing: *Respecting the Rights of Vulnerable Investors through Supported Decision-Making* (Canadian Centre for Elder Law, May 5, 2021) 73-77 <<https://ssrn.com/abstract=3855139>>.

⁸⁶⁰ A tendency is seen to move straight to substituted decision-making in dementia cases because it is easier and convenient to supporters. Mary Donnelly, ‘Deciding in Dementia: The Possibilities and Limits of Supported Decision-Making’ (Online, 2019) 60 *International Journal of Law and Psychiatry* <<https://doi.org/10.1016/j.ijlp.2019.101466>>.

⁸⁶¹ Craig Sinclair et al, ‘“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; Terry Carney and Shih-Ning Then, ‘Support for Decision-making for People Age with a Cognitive Impairment’ in Michelle Putnam and Christine Bigby (eds), *Handbook Ageing and Disability* (Routledge, 2021).

course.⁸⁶² 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.⁸⁶³ Undue influence may happen by a supporter to use a superior position to control over a principal or to exercise improper persuasion.⁸⁶⁴ 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 interest of a third party.

d. What Research on Supported Decision-Making Needs Further

There is room necessary for further research on supported decision-making (SDM), particularly regarding the principal's 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.⁸⁶⁵ This is because the meaning of the will and preferences and practice implications are, in fact, sometimes disputed and poorly understood by practitioners.⁸⁶⁶ These measures to determine them may need a nuanced understanding of the will and preferences of the principal.⁸⁶⁷ These measures also may include how to incorporate opinions of

⁸⁶² Craig Sinclair et al, "'A Real Bucket of Worms': Views of People Living with Dementia and Family Members on Supported Decision-Making' 605.

⁸⁶³ Fiona R. Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *UNSW Law Journal* 145, 185.

⁸⁶⁴ Mary Joy Quinn, 'Undue Influence and Elder Abuse' (2002) 23 (1) *Geriatric Nursing* 11–17, 15.

⁸⁶⁵ Karen Strickland et al, (2021) 'Supported Decision-making to Assist Older Persons Experiencing Elder Abuse: An Integrative Review' 28(4) *Collegian* 447, 455; Malcolm Parker, 'Getting the Balance Right: Conceptual Considerations Concerning Legal Capacity and Supported Decision-Making' (2016) 13(3) *Journal of Bioethical Inquiry* 381, 393.

⁸⁶⁶ Terry Carney et al, 'Realising "Will, Preferences and Rights": Reconciling Differences on Best Practice Support for Decision-Making?' (Online, 2019) *Griffith Law Review* <doi:10.1080/10383441.2019.1690741>.

⁸⁶⁷ A recent research survey finds that 'the highly individualized and contextually dependent nature of SDM has implications for SDM practice.' Michelle Browning, Christine Bigby and Jacinta Douglas, 'A process of Decision-Making

relatives and acquaintances surrounding the principal in decision-making process.⁸⁶⁸ The guidelines, such as the code of practice or toolkits for SDM, would be essential.⁸⁶⁹ It is important to train professionals to lead and coordinate supporters' activities. This professional human resource system may correspond to how to guide SDM practices on site and how to solve any technical problems related to SDM in communities. If such a professional is 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 2005) was enacted, an independent mental capacity advocate (hereinafter referred to as 'IMCA') system based on the MCA 2005 was introduced.⁸⁷⁰ The main tasks of an IMCA are support for an important legal decision, such as making decision about where they live and about serious medical treatment options. An IMCA may

Support: Exploring Supported Decision-Making Practice in Canada' (Online, 2020) *Journal of Intellectual & Developmental Disability* <doi:10.3109/13668250.2020.1789269>; Another article analyzes what and how guardians take the processes to understanding the will and preferences of principals, focusing on their personal factors. Alice L. Holmes et al, 'Integrity in Guardianship Decision Making: Applying the Will and Preferences Paradigm' (Online, 2022) *Journal of the American Medical Directors Association* 1, 8. <doi:10.1016/j.jamda.2022.01.050>.

⁸⁶⁸ The model of ASSET (South Australia) is effective in such a case: if a decision-maker (a principal) with disability wishes to independently live in an apartment by his/herself, but the parents disagree. A team may help his/her wishes come true under the condition that every team member agrees with the decision-maker's wishes. This model is based on mutual agreements among all team members to respect the decision-maker's wishes. It is understood that this model tries to avoid any misunderstanding among team members. The ASSET model is applied to people with disabilities in Japan, but it is being used on a small scale and further development may be expected. Piers Gooding, 'Supported Decision Making: A Rights-based Disability Concept and its Implications for Mental Health Law' (2012) 20(3) *Psychiatry, Psychology and Law* 431, 451.

⁸⁶⁹ Peterson et al proposes 'three-step model for implementing supported decision-making,' which comprises (i) identify domains where support is needed and desired, (ii) identify kinds of support that are (or will be) needed and desired, and (iii) establish a supported decision-making agreement. Andrew Peterson et al, 'Supported Decision Making with People at the Margins of Autonomy' (Online, 2020) *The American Journal of Bioethics* 1, 15. <doi:10.1080/15265161.2020.1863507>.

⁸⁷⁰ Refers to the Social Care Institute for Excellence (UK), *Independent Mental Capacity Advocate (IMCA)* (Web Page, January 2010) <<https://www.scie.org.uk/mca/imca>>.

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 may support practical activities of SDM.⁸⁷¹ 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, accessing to personal information of principals.

The aspects of supported decision-making that need further research are an empirical analysis of practices on site and ‘social change and policy amendment’ in addition to the regulatory reform of SDM, particularly support mechanisms and networks in community.⁸⁷² Regarding the former issue, based on interviews with parents who act supporters to their adult children with an intellectual disability, Shih-Ning Then et al note a challenge at moving from support for decision-making to substituted decision-making. Namely, Then et al demonstrate that the additional considerations of risk and future opportunities for the principal proved to be more nuanced factors taken into account by supporters who shifted into a substituted decision-maker role, and this is not well accounted for in their legal frameworks.⁸⁷³ Regarding the latter issue, as Christine Bigby and Jacinta Douglas point out, supported decision-making must incorporate ‘mechanism that proactively reach out to find, encourage

⁸⁷¹ Gerard Quinn proposed the ‘Office of Public Support’ as a moral agency of the person in 2016. Gerard Quinn, ‘Reflecting Will and Preference in Decision Making’ (2016) (Conference Paper, Australian Guardianship and Administration Council (AGAC) Conference held in Sydney on October 17-18, 2016) 31.

⁸⁷² Interviews research survey in England suggests that ‘as a range of SDM techniques have been developed in practice, paradoxically, it appears that decisions become more complex and the supports available to people with disabilities reduce, particularly for more difficult decisions, such as finances, healthcare, and legal matters.’ Harding and Taşcıoğlu have pointed out the importance of supports of multi-domains, including social change and policy amendment in addition to regulatory reform. Rosie Harding and Ezgi Taşcıoğlu, ‘Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity’ (2018) 8(2) *Societies* 25–42, 39–40.

⁸⁷³ Shih-Ning Then et al, ‘Moving from Support for Decision-making to Substitute Decision-making: Legal Frameworks and Perspectives of Supporters of Adults with Intellectual Disabilities’ (2022) 37(3) *Law in Context* <<https://journals.latrobe.edu.au/index.php/law-in-context/article/view/174>>.

and nurture supporters for the many people who do not have strong existing support networks.’⁸⁷⁴ It is supposed that the support mechanisms and networks in community would be part of the foundation where supporters can deal with various types of disabilities, including intellectual/mental disabilities, higher brain dysfunction, and dementia. It is therefore required to specifically consider how to support people who do not have effective mechanisms and networks in remote areas.⁸⁷⁵ An idea would be a combination service of weekly patrol around the principals’ residences and daily online communication by social workers.

(2) The National Disability Insurance Scheme (NDIS)

a. What is the NDIS?

The national Disability Insurance Scheme⁸⁷⁶ (hereinafter referred to as ‘NDIS’) is not central in this dissertation. Considering the significant role of the NDIS, it must be appropriate to take it up as long as the NDIS is systematically involved in the guardianship. The NDIS is a major program designed as a national insurance system by law, the *National Disability Insurance Scheme Act 2013* (Act No. 131 of 2017). It provides support and services under the supervision of the nominees as an option to people with disabilities.⁸⁷⁷ The NDIS is designed to empower people with disabilities and facilitate their choice and control (section 3(1)). It started the post-trial roll-out in 2016 and completed over Australia in 2020. The intention was for the NDIS and the guardianship to play their respective

⁸⁷⁴ Christine Bigby and Jacinta Douglas, ‘Supported Decision Making’ in R.J. Stancliffe, M. Wehmeyer, K. Shogren and B.H. Abery (eds), *Choice, Preference, and Disability: Promoting Self-Determination Across the Lifespan* (Springer, 2020) 45–66, 61.

⁸⁷⁵ Ilan Wiesel et al, ‘The Temporalities of Supported Decision-Making by People with Cognitive Disability’ *Social and Cultural Geography* (2020).

⁸⁷⁶ Terry Carney states that the NDIS will be the second largest national government program after Medicare at A\$21.5 billion (US\$15.7 billion) annually in the full implementation. Terry Carney et al, ‘National Disability Insurance Scheme Plan Decision-Making: Or When Tailor-Made Case Planning Met Taylorism & the Algorithms?’ (2019) 42(3) *Melbourne University Law Review* 1–37, 3.

⁸⁷⁷ Sue Olney and Helen Dickinson, ‘Australia's New National Disability Insurance Scheme: Implications for Policy and Practice’ (2019) 2(3) *Policy Design and Practice* 275, 290.

roles in the legislative process. Namely, the NDIS participants are people less than the age of 65 who have permanent and significant disabilities (approximately a total of 500,000 persons in Australia) and receive support and services as early intervention.⁸⁷⁸ While vulnerable adults with insufficient mental capacity, regardless of age or reason, can lodge to the tribunal for the guardianship list.

b. Relationship between the NDIS and the Guardianship

The current Australian trend in the relationship between the NDIS and the guardianship can be summarized as follows: First, regarding the domestic legislation of the CRPD requirements, states and special territories have been trying to deal with disability policy, the guardianship, and safeguards against elder abuse in a unified manner across Australia. In other words, national standardization has been occurring in response to public policy and laws to some extent. Secondly, common goals behind the NDIS and the guardianship reform include autonomy, right to self-determination, and consumer choice.⁸⁷⁹ These common goals are thought to be in line with the values of the CRPD. Thirdly, the guardianship, supported decision-making, and the NDIS are positioned as legal instruments to prevent elder abuse, and each legal system and policy must complement the other. To put together the above three points, it could be said that the NDIS is packaged with social welfare policy, the guardianship, supported decision-making, and safeguards against elder abuse.

⁸⁷⁸ Section 17A (Principles relating to the participation of people with disability) of the *National Disability Insurance Scheme Act 2013* stipulates: (1) People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives. (2) People with disability will be supported in their dealings and communications with the Agency so that their capacity to exercise choice and control is maximized. Australian Government, *National Disability Insurance Scheme Act 2013*.

⁸⁷⁹ John Chesterman emphasizes on ‘consumer choice’ or ‘consumer directed care’ to meet individual needs even in adult protection programs. John Chesterman, ‘Modernising Adult Protection in an Age of Choice’ (2014) 73(4) *Australian Journal of Public Administration* 517–524, 519; John Chesterman, ‘Supported Decision-Making’ in Sue Field, Karen Williams, and Carolyn Sappideen (eds), *Elder Law: A Guide to Working with Older Australians* (The Federation Press, 2018) 105; John Chesterman, ‘Adult Guardianship and its Alternatives in Australia’ in Claire Spivakovsky, Kate Seear, and Adrian Carter (eds) *Critical Perspectives on Coercive Interventions* (Routledge, 2018) 225–235; John Chesterman, ‘The Future of Adult Safeguarding in Australia’ (2019) 54(4) *Australian Journal of Social Sciences* 360–370, 362–363.

Some NDIS participants have wanted to nominate their guardians (mainly public advocates) as the nominees in the state of Victoria, as the Annual Report 2020–2021 of Victorian OPA states.⁸⁸⁰ There has been a trend that the new guardianship orders in which the represented person (the principal) was a participant in the NDIS were increasing in number and the percentage of the all eligible matters involving NDIS.⁸⁸¹ The reasons why this happens is not so clear, presumably due to the eligibility of the NDIS nominee candidates or the like.⁸⁸² The decision by the NDIS participants should be respected as consumer choice, but from the viewpoint of the principles of the Victorian Act 2019, backlash by the NDIS participants has apparently led to an increase in the number of guardians over the last three years.⁸⁸³ It is unpredictable what the situation will be like. Namely, how will the NDIS and the guardianship, including the Victorian Act 2019, reconcile in practice? Further observations will be important.⁸⁸⁴

⁸⁸⁰ Refers to the Victorian OPA, *Annual Report 2020–21*: ‘Continuing NDIS Impact’ 17; Australian Government’s view: ‘There is a presumption that a guardian should be appointed nominee where their responsibilities are comparable to the duties of a nominee.’ NDIS, *Guardians and Nominees Explained* (Web Page, November 5, 2019) <<https://www.ndis.gov.au/understanding/families-and-carers/guardians-and-nominees-explained>>.

⁸⁸¹ Ibid [Victorian OPA]. It has increased as follows: 20.0 percent (83 out of 415) in 2017–18, 58.6 per cent (284 out of 485) in 2018–19, 72.6 per cent (369 out of 508) in 2019–20, and 82.0 per cent (521 out of 635) in 2020–21.

⁸⁸² Some jurisdictions, such as Queensland, Victoria, and Western Australia, have also experienced increased demand for public guardianship services resulting from decision-making needs related to the NDIS.’ Victorian OPA, *Decision Time* (Web Page, March 1, 2021) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/141-decision-time>> 54.

⁸⁸³ It may include the number of petitions to the tribunal asking for adding the nominee duties to the guardians because the guardians without such an authorization cannot be engaged in the nominee. A NDIS nominee, in contrast of a guardian, can sign any service contract based on the NDIS and manage the budget associated with NDIS planning. Emiko Kiguchi, Masaru Nagawa, and Yukio Sakurai, ‘Australian Guardianship and National Disability Insurance Scheme: Focusing on Supported Decision-Making Practices in the States of Victoria and New South Wales’ (2020) 33 *Journal of Australian Studies* 1–14, 9. (in Japanese)

⁸⁸⁴ The NDIS faces challenges: ‘it ultimately falls short in fully embracing the obligations of Article 12 and the notions of autonomy and personhood underlying it.’ Emily Cukalevski, ‘Supporting Choice and Control—An Analysis of the Approach Taken to Legal Capacity in Australia’s National Disability Insurance Scheme’ (2019) 8(2) *Disability Human Rights Law* 1–19, 1.

Australia is a Commonwealth that inherited English law, and Australia's legal and administrative structure differs from Japan's. The simplification of the Australian guardianship system remains within the scope of common law, administrative law jurisdictions, including the management of public agencies related to the guardianship. The NDIS is a part of social welfare law, and its administration is performed through public agencies and private service providers in communities.⁸⁸⁵ Thus, administrative law and common law are mutually involved in jurisdictions. It can be understood that both the guardianship and the NDIS function within a similar domain and are ultimately heading towards the same goals. The difference between them is that the NDIS is a national insurance system run by tax, based on both national and state laws, while the guardianship is a state or special territory law system. Due to efforts to standardize the guardianship system at the state and special territory level under the national policy, it is expected that the difference among states and special territories of the guardianship system will not be so large. It could therefore be understood that the guardianship and the NDIS are to be placed to mutually complement each other in the legal domain, although some competing phenomenon happens in some States as mentioned above.

(3) Theoretical Framework

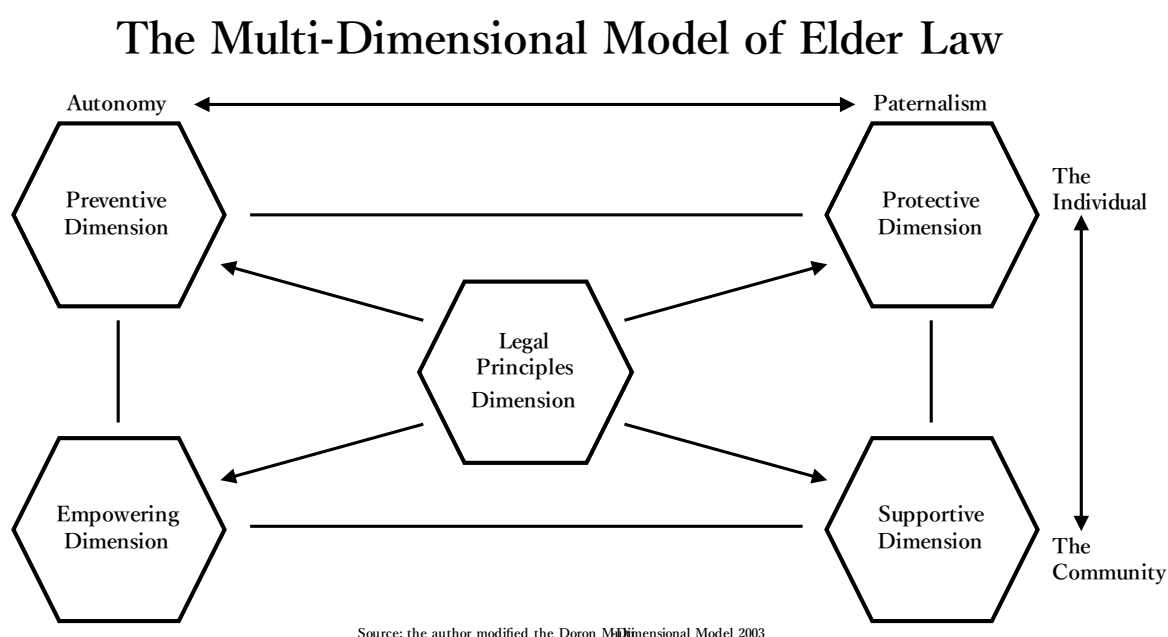
A theoretical analysis of the guardianship law reforms and national legislation policy of elder abuse in Australia is shown in accordance with a multi-dimensional model of elder law. The multi-dimensional model of elder law was advocated by Israel Doron in 2003/2009 as 'an efficient comparison tool in international and comparative law.'⁸⁸⁶ The purpose of the model is to clarify elder law system through mapping, as shown in Figure 2, and to make a comparative law study in the

⁸⁸⁵ The NDIS aims to better link between the community and people with disabilities by relevant interactivities. Productivity Commission, *Disability Care and Support, Report No. 54* (Productivity Commission, 2011) 2.

⁸⁸⁶ This model was originally introduced in the article in 2003 without consideration of supported decision-making before the CRPD was adopted in the UN. Israel Doron, 'A Multi-Dimensional Model of Elder Law: An Israeli Example' (2003) 28(3) *Ageing International* 242–259, 256; Israel Doron, 'A Multi-Dimensional Model of Elder Law' in *Theories on Law and Ageing* (Springer, Berlin, Heidelberg, 2009) 59–74.

international context.⁸⁸⁷ 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 publications and both laws share the same values.⁸⁸⁸

Figure 2: The Multi-Dimensional Model of Elder Law



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

Hence, the Australian adult support and protection legislation system, comprising guardianship state law reforms and national legislation policy of elder abuse, is reviewed in line with this model. Some comments on each dimension are provided as follows:

⁸⁸⁷ Israel Doron proposes that '[t]he 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.' Israel Doron, 'A Multi-Dimensional Model of Elder Law: An Israeli Example' 255.

⁸⁸⁸ Lawrence Frolik and Alison Barnes, *Elder Law: Cases and Materials* (LexisNexis, 6th ed, 2015); Sue Field, Karen Williams, and Carolyn Sappideen, *Elder Law: A Guide to Working with Older Australians* (The Federation Press, 2018).

a. Legal Principles Dimension

With such an understanding that a multi-dimensional model of elder law can be applied to the adult support and protection law, the legal principles dimension comprises the values that are common in elder law as well as the adult support and protection law. The values that are common in the reforms of Australian two state guardianship laws refer to the four principles included in the ‘National Decision-Making Principles’ addressed in the ALRC Report 124, as discussed at 4.3.4(2) ‘What are the Common Values?’ It has been also confirmed, at 4.4.2(1) ‘ALRC Report 131,’ that the reforms of the Australian two state guardianship laws and the national legislative policy for elder abuse are positioned back-to-back and share the same values. Therefore, the Australian adult support and protection legislation system based on the Australian guardianship laws and the national policy for elder abuse is commonly based on the ‘National Decision-Making Principles.’ These 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 identifies five framing principles to guide the recommendations for reform, namely, *dignity; equality; autonomy; inclusion and participation; and accountability*. There has been widespread support by stakeholders for these principles, which are reflected in a Commonwealth decision-making model developed in the ALRC Report 124. The said principles may correspond to the values of the CRPD.⁸⁸⁹

b. Protective Dimension

By law, the adult guardianship system provides, as a last resort, substituted decision-making as a *protective* measure to principals with insufficient mental capacity. 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 the vulnerability approach, bearing in mind that the least restrictive measures should be taken. This is in order to avoid excess paternalism, which may violate

⁸⁸⁹ Refers to ‘4.3.4 (2) ‘What are the Common Values?’’

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, the tribunal, 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 Victorian 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, an EPA, or through informal arrangements if the principal is satisfied with the support. Public agencies are not always involved in supported decision-making activities, instead relatives, friends of principals or NPOs may be more involved. Public agencies include the Office of the Public Advocate or the Public Guardian, the tribunal, public trustee, and relevant agencies related to elder abuse.

d. Preventive Dimension

Supported decision-making and advanced planning measures for estate and healthcare treatment, as well as an EPA and the guardianship system, provide *preventive* measures for vulnerable adults at risk of harm. The harm includes, among others, abuse and financial exploitation. It is desirable for the adults to use these *preventive* measures of their own accord. Public agencies—such as the Public Advocate or the Public Guardian, the tribunal, public trustee, and relevant agencies related to elder abuse—provide some *preventive* guidelines and pay careful attention to possible misconducts by supporters, guardians, or relevant persons. These guidelines ensure that the autonomy and self-determination of the principal are respected.

e. Empowering Dimension

Vulnerable adults should be encouraged and *empowered* to use supported decision-making and relevant planning measures of their own accord, as well as an EPA. The purpose is to respect their autonomy and self-determination more than preventive dimension, focusing on his/her uniqueness as an individual. ALRC Report 124 considers an approach to autonomy as *empowerment* of people with

disability (Paragraph 1.38). This implies that ALRC Report 124 is based on the notion of individual autonomy and relational autonomy.⁸⁹⁰ The dignity of risk is being discussed as a process of positively taking risk within established safeguards.⁸⁹¹ By this method, people with disability seek an *empowerment* to overcome certain risk factors. Even in dispute cases, the principals and relevant persons may use alternative dispute resolution (ADR) provided by the tribunal outside the courts or relevant measures. For example, in the State of Victoria, four measures are available through VCAT.⁸⁹² It is understood that people may choose the solution that best suits their circumstances.

f. Summary

The Australian adult support and protection system could be illustrated as a legal architecture in accordance with the multi-dimensional model. The multi-dimensional model comprises four dimensions—*protective*; *supportive*; *preventive*; and *empowering*—and a legal principles dimension at the center 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, EPA, supported decision-making, ADR, and safeguards against elder abuse, and the relevant public agencies are placed in mapping within the four dimensions. Those are based on the foundation of the National Decision-Making Principles, that is corresponding to the legal principles dimension.

It is noteworthy how the four dimensions are kept in a reasonable balance by the legal principles dimension at the center to connect with each of the four other dimensions. The term *advocacy* refers to any action by an individual or a corporation, or any public policy to empower vulnerable adults on

⁸⁹⁰ Refers to ‘2.4.1 (2) b. Relational Autonomy.’ Regarding autonomy, Paragraph 1.37 of the ALRC Report 124 states that ‘This Inquiry has been informed by autonomy in the sense of “empowerment”, not just “non-interference”. This involves seeing an individual in relation to others, in a “relational” or “social” sense and understanding that connects with respect for the family as the “natural and fundamental group unit of society” that is entitled to protection by State Parties.’

⁸⁹¹ Refers to ‘4.2.2 (5) Victorian Interdisciplinary Research and Practices.’

⁸⁹² Refers to ‘4.3.4 (2) ‘Dispute Response Mechanism.’

minimum conflict of interests between people or between people and society.⁸⁹³ Implementing advocacy to empower vulnerable adults may contribute to improve four dimensions to keep in a reasonable balance. It can be concluded through the model analysis that the Australian adult support and protection system is theoretically a comprehensive and well-designed legal architecture aimed to cover the possible needs of adults in various aspects. This legal architecture, however, is still under construction and needs more time to reach the final product. There is likely to be variation in effectiveness between jurisdictions. The paramount importance would be a balance between autonomy and protection to be assigned case by case,⁸⁹⁴ but ‘in particularly emergency cases, the safety of the at-risk adult needs to be secured, even against their wishes.’⁸⁹⁵

4.5.2 Implications from Australian Legislative Project

The Australian legislative project suggests implications that 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.⁸⁹⁶ In the background, there is a rise in international human rights law and human rights awareness. In Australia, ‘a person is presumed to have decision-making capacity unless there is evidence to the contrary’ and the state and special territory governments are trying to reduce the use of adult guardianship as a last resort. Emphasis is placed on *the principle of necessity* and the

⁸⁹³ Errol Cocks and Gordon Duffy, *The Nature and Purposes of Advocacy for People with Disabilities* (Edith Cowan University Publications, 1993) 121 <<https://ro.ecu.edu.au/ecuworks/7172>>.

⁸⁹⁴ Terry Carney remarks ‘shifting (and delicate) balance points to be found between competing ethical principles (such as autonomy and protection), adequate accountability and freedom from undue regulation, and “workability” (fidelity of practice to intended objectives)’ Terry Carney, ‘Searching for Workable Alternatives to Guardianship for Vulnerable Populations?’ (2015) 1(1) *Ethics, Medicine and Public Health* 113, 119.

⁸⁹⁵ Refers to ‘4.4.2 (1) ALRC Report 131.’ The ALRC Report 131 addresses the importance of protection of vulnerable adults at risk in emergency cases.

⁸⁹⁶ It is mentioned as ‘A Human Rights Approach’ in the article: Shih-Ning Then, ‘Evolution and Innovation in Guardianship Laws: Assisted Decision-Making’ (2013) 35 *Sydney Law Review* 133–66, 145–47.

less restrictive alternative in supported decision-making and the adult guardianship system. Legal devices for the adult guardianship, supported decision-making, and safeguards against elder abuse are interrelated.

- (b) The Australian guardianship law reforms aim at legislation of supported decision-making (SDM). The State of Victoria has implemented the new SDM scheme of supportive guardians and supportive administrators and relevant measures, such as supportive attorneys and medical treatment supporters by laws to respect the will and preferences of the principals. The roles of supportive guardians, supportive administrators, the adult guardian, administrator, supportive attorneys, and medical support person/medical treatment decision-maker are legally separated. The non-remuneration policy is adopted in the Victorian Act 2019 in order to avoid the conflict of interest associated with payment, except for some professional administration cases, and paid workers or corporations are not subject to supportive guardians and supportive administrators.
- (c) Australia has public agencies in states and special territories, including the Office of the Public Advocate or the Public Guardian, the tribunals, and state trustee or state trustees limited. The Office of the Public Advocate or the Public Guardian provides various public supports for the guardianship in policy reviewing that contributes to the community. The tribunal, not the courts, make a judgement on the adult guardianship by hearings and issues orders. A Public Trustee is a unique public agency that contributes to communities by providing financial management services at fees for persons with disabilities and the elderly. Commercial banks and other financial institutions might be unable to attain such services from a private corporation because a private corporation typically pursues commercial profits or may has a conflict of interests with users. It is therefore understood that this public agency's business model can be a useful reference for other countries, including Japan.
- (d) A dispute response mechanism of the tribunal is important for the users. Four measures are available through Victorian Civil and Administrative Tribunal (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. VCAT makes appointments of the supportive guardians/supportive administrators after a hearing. Those appointments can be reassessed at any time if there has been a significant change in circumstances. Additionally, a person can seek a rehearing by a more senior member of VCAT if they apply within the time limits. If there is an error of law, a party can appeal to the Victorian Supreme Court (even the cases are limited).

- (e) Australia has many NPOs that operate in communities based on charity, grant, or welfare funding system.⁸⁹⁷ 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. Ethnic communities are also important, with regardless of its scale, in diverse society based on proper languages and cultures of principals.

Gooding and Carney address that Australia has adopted ‘a *reformist* and *incrementalist* reform approach to legal capacity, equality and disability,’ following global standard.⁸⁹⁸ This approach of Australia demonstrates a slowly but steadily taking steps to pave a way forward, involving in civil society in a democratic process, to consider global standard. It is understood that the Australian legislative project has not been completed yet but are ongoing. Therefore, attention must be paid for further developments of their law and policies, in theory and practices, related to adult support and protection in their national, states and special territories, and local government levels as well as civil society.

⁸⁹⁷ For example, the Community Legal Centres (CLCs) Australia, non-profit community-based organizations, provides support to 170 community legal centres across Australia (Web Page, 2019) <<https://clcs.org.au/findlegalhelp>>.

⁸⁹⁸ Piers Michael Gooding and Terry Carney, ‘Australia: Lessons from a Reformist Path to Supported Decision-Making’ in Michael Bach and Nicolás Espejo Yaksic (eds), *Legal Capacity, Disability and Human Rights: Towards A Comprehensive Approach* (Supreme Court of Mexico, Human Rights Division, Online, 2021); Shigeaki Tanaka, *Contemporary Jurisprudence* (Yuhikaku Publishing Co., Ltd., 2011) 442. (in Japanese)

4.6 Summary: Implications from Australian Legislative Project are Clarified

The amendments to the guardianship state laws of Victoria and New South Wales (NSW) and the national legislative policy for elder abuse (i.e., Australian legislative project) have been reviewed. In the two leading Australian States of Victoria and NSW, the guardianship system and supported decision-making are or will be positioned in the legal safeguards to prevent possible elder abuse. In May 2019, the State of Victoria enacted an integrated law on supported decision-making and adult guardianship system, and in the State of NSW, the NSW Law Reform Commission submitted a report to the state Parliament in August 2018. The legislative amendments and reviews of both states are in line with the ‘Commonwealth Decision-Making Model’ of the ALRC Report No. 124 prepared by the Australian Law Reform Commission (ALRC) to comply with the requirements stipulated in the CRPD. Based on the ALRC Report NO. 124 (2014), the Australian Law Reform Commission (ALRC) prepared the ALRC Report No. 131 as an elder abuse report in 2017, which positions the adult guardianship system and supported decision-making as measures against elder abuse. Following this Report, The States of South Australia and NSW have established elder abuse response agencies under state laws.

The processes of Australian legislative project are being carried out to improve the domestic legislation in compliance with the values of the CRPD. These actions are still ongoing, with the recognition that the current Australian guardianship law may be partially in conflict with Article 12 of the CRPD. Consequently, 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 respect the will and preferences of the principal. In the background, the positive attitude towards international human rights law and awareness by the Australian Government is confirmed. In fact, the Australian legislative policy on Article 12 of the CRPD was duly accepted through Australia’s law and policy reviewing process by the UN Committee in October 2019.

Some unique institutional design supports the Australian adult support and protection system. These institutions are the three public agencies: Office of the Public Advocate or the Public Guardian, the tribunal, and state trustees limited or public trustee. If the adult support and protection legislative system is considered as a comprehensive legal system, the Australian amendments to the state laws and national legislative policy for elder abuse cited in this chapter may reflect an example of legislation of adult support and protection. This move is a positive response in an aged society and will be of relevance to other countries, including Japan.

A theoretical analysis of the Australian legislative project has been shown in accordance with a multi-dimensional model of elder law. The Australian adult support and protection legislation system is commonly based on the National Decision-Making Principles as addressed in the ALRC Report 124. These Principles are as follows: principle 1, *the equal right to make decision*; principle 2, *support*; principle 3, *will, preferences and rights*; and principle 4, *safeguards*. It can be concluded through the model analysis that the Australian adult support and protection system is theoretically a comprehensive and well-designed legal architecture aimed to cover the possible needs of adults in various aspects. This legal architecture, however, is still under construction and needs more time to reach the final product.

Australian legislative project suggests possible implications for the public policy and legislation on the adult guardianship system, supported decision-making, and safeguards against elder abuse. 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. (b) the Australian guardianship law reforms aim at legislation of supported decision-making. (c) Australia has public agencies in states and special territories, including the Office of the Public Advocate or the Public Guardian, the tribunal, and the state or public trustees. (d) a dispute response mechanism of the tribunal is important for the users. (e) Australia has many NPOs, whose operations in communities are based on charity, grant, or welfare funding systems.

Chapter 5

The Idea of Adult Support and Protection in Japan

5.1 Introduction

The implications of Australia's legislation of guardianship and administration as well as elder abuse addressed in Chapter 4 are of help in consideration of Japan's adult support and protection legislative system.⁸⁹⁹ Such implications include respect for the values of the CRPD, legislation of SDM, roles of public agencies, a dispute response mechanism of the tribunal, and roles of NPOs in communities.⁹⁰⁰ In order to consider how these implications of Australia's legislation and policies are applied to Japan's legislation, it is important to establish the common ground for discussion on law comparison between Japan and Australia. Because a simple application of these implications of Australia's legislation and policies to Japan's legislation would not be realistic, considering the gaps between the law systems and policies of Japan and Australia. For this purpose, two essential legal devices, which have not been explicitly framed in Japan, must be considered to adapt them to Japan's adult support and protection legislation. Then, further discussion on adult support and protection legislation based on guardianship law comparison explores in this chapter.⁹⁰¹

One such device has to do with the roles and legal status of a core agency. A core agency is a focal point in a community that plays a central role for advocacy in line with the Basic Plan.⁹⁰² In this dissertation, a core agency is positioned as a multi-functional agency to work for legal advocacy in community support, in addition to the role that is stipulated in the Basic Plan to promote the adult

⁸⁹⁹ Refers to '4.5.2 Possible Implications from Australian Legislative Project.'

⁹⁰⁰ Ibid.

⁹⁰¹ This part is an updated version of the previously published article by the author: Yukio Sakurai 'The Idea of Adult Support and Protection Legislation in Japan: Multiple Options for Vulnerable Adults to Make Their Own Choices' (2021) 12(1) *The Journal of Aging & Social Change* 31,47. <doi:10.18848/2576-5310/CGP/v12i01/31-47>.

⁹⁰² Refers to '1.2.1 (2) c. Enactment of the Promotion Act.'

guardianship system. A core agency has a potential to empower the role in community support if people in the community want to do so. The other device has to do with the legal status and basic principles of supported decision-making (SDM).⁹⁰³ It must be clarified how SDM can be placed and framed in Japan's legislation in the middle and long term such that the values of the CRPD are respected. Both a core agency and SDM are essential legal devices that can be used to frame Japan's adult support and protection legislative system. For this reason, some implications from law comparison studies on other countries besides Australia are considered, in addition to the implications of Australia's legislation.⁹⁰⁴ Upon consideration of both a core agency and SDM, Japan's adult support and protection framework and its values will be reviewed.

Comparative law is a discipline of law that analyzes the differences and similarities between the laws of two or more countries both theoretically and practically.⁹⁰⁵ It is useful not only in terms of understanding the current state of the law system, but also in the development of law by referring to law comparison in other jurisdictions. Comparative law studies can offer useful suggestions from other jurisdictions facing the same challenge. Israel Doron⁹⁰⁶ states about a possibility of comparative law, 'Comparative law is interesting, but even the term "guardianship" has different legal meanings in each jurisdiction, and the society, culture, and history behind the law are also different. Analyzing laws by

⁹⁰³ Refers to '1.2.2 Supported Decision-Making (SDM).'

⁹⁰⁴ Refers to '3.2 Comparative Law Studies.'

⁹⁰⁵ Surveys of a discipline of comparative law studies: Rodolfo Sacco, 'Legal formants: A Dynamic Approach to Comparative Law (I)' (1991) 39(1) *The American Journal of Comparative Law* 1, 34.; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (installment II of II)' (1991) 39(2) *The American Journal of Comparative Law* 343, 401; Sue Farran and Esin Orucu, 'The Continuing Relevance of Comparative Law and Comparative Legal Studies' (2019) 6(2) *Journal of International and Comparative Law* 171, 182.

⁹⁰⁶ Israel Doron is a faculty member who studies medical errors, social work research, and safety and health in workplace at the faculty of law, Gerontology Department, University of Haifa. Israel Doron, 'Elder Guardianship Kaleidoscope—A Comparative Perspective' (2002) 16(3) *International Journal of Law, Policy, and the Family* 368, 398.

comparative law is really difficult, considering the background of the law.’⁹⁰⁷ Indeed, it is necessary to work on comparative law, bearing such an awareness in mind as to how to overcome the challenges in comparative law. In this sense, it is necessary for comparative law researchers to research the target jurisdictions locally to understand the situation of the parties concerned with local research partners. At the same time, relationships with practitioners are important so that researchers can understand not only the legal theory but also practices of the law. It can be said that the comparative law studies are based on a multi-dimensional dialogue between researchers and practitioners at both ends.

5.2 Considerations for a Core Agency and Supported Decision-Making

5.2.1 Roles and Legal Status of a Core Agency for Community Support

(1) Roles of a Core Agency

a. A Core Agency in the Basic Plan

A core agency is a focal point in a community that currently plays a central role for advocacy support in line with the Basic Plan to promote the adult guardianship system.⁹⁰⁸ The *Act on Promotion of the Adult Guardianship System 2016* (Act No. 29 of 2016, hereinafter referred to as ‘Promotion Act’) obliges the 1,741 municipalities and 47 prefectures to formulate their own basic plans within the regional welfare plans under the national Basic Plan and make efforts for necessary assistance (Article 23 and 24 of the Promotion Act). This requires uniformly formulating core agencies nationwide with flexibility in scale and form. The authority of a core agency can be a choice either in a municipality or in a larger jurisdiction according to the needs of the adult guardianship system.

As of October 2021, 31.9 per cent of the 1,741 municipalities have established core agencies while 16.7 per cent of the municipalities have the other existing agencies, such as advocacy centers or

⁹⁰⁷ Israel Doron remarked as in the text in his online lecture at the Elder Law Society Japan meeting held on February 26, 2022, and the WCAC2022 in Edinburg on June 7-9, 2022.

⁹⁰⁸ Refers to ‘1.2.1 (2) c. Enactment of the Promotion Act.’

adult guardianship support centers.⁹⁰⁹ Thus, a total of 48.6 per cent of the municipalities have core agencies or alternatives. The 77.1 per cent of the large cities with population more than 500,000 have established core agencies and 22.9 per cent of these cities have the other existing agencies.⁹¹⁰ All large cities with population more than 500,000 have core agencies or alternatives while a tendency is seen as the smaller population cities have less ratio of having established core agencies or having the other existing agencies. Currently, three types of entities of core agencies are available: (a) directly managed by the municipalities (19.3 per cent), (b) outsourced to the Council of Social Welfare, NPOs, etc. (62.7 per cent), and (c) a combination of these two types (18.0 per cent).⁹¹¹

The current situation reveals gaps between municipalities in regional collaboration network centered on core agencies although the Basic Plan sets a goal to establish the network nationwide. To bridge the gaps particularly in smaller population cities, some measures can be considered such that the existing agencies, such as advocacy centers, adult guardianship support centers, or community-based general support centers, would be reformed to have core agency functions, or alternatively, a prefecture locally will establish a public guardian agency to delegate municipalities to run core agencies where they are perceived necessary.⁹¹²

b. A Core Agency in Japan's Adult Support and Protection

It is important to consider the multiple roles of a core agency in the community to deal with Japan's adult support and protection legislative system. This idea would enable core agencies to implement legal advocacy transactions with people in the community. It can be called a 'community

⁹⁰⁹ Refers to the Ministry of Health, Labour, and Welfare of Japan, 'Results of A Survey on the Status of Measures Related to the Promotion of the Adult Guardianship System in October 2021 (Summary)' 1 (Web Page, May 18, 2022) (in Japanese)

* <<https://www.mhlw.go.jp/content/12000000/000938666.pdf>>.

⁹¹⁰ Ibid 2.

⁹¹¹ Ibid 3.

⁹¹² Refers to '5.2.1 (2) b. An Idea of Public Guardian Agency.'

support.⁹¹³ Once it is established, a core agency is accessible to vulnerable adults with insufficient mental capacity, the family court, and the municipality in the jurisdiction. It is a policy design that civil society, the family court, and the municipality should maintain a triangle relationship through the central coordination of a core agency.⁹¹⁴ This is the foundation of the regional collaboration network. A core agency has three main roles (given below) of community support, according to the Basic Plan,⁹¹⁵ and each role should be explored with relevant considerations.

- (i) Role of a control tower to design the overall concept of community support for legal advocacy and manage and coordinate promotion of the adult support and protection system.
- (ii) Role of a secretariat to supervise the ‘local council’ in the community for community support.
- (iii) Role of management to provide ‘data-professional consideration and analysis’ in the community.

Point (i) is the main function of a core agency, primarily in accordance with the Basic Plan to promote the adult guardianship system. A core agency should have the control tower roles not only for the promotion of the adult guardianship system but also for community support in adult support and protection.⁹¹⁶ The community support function of a core agency in adult support and protection will contribute to various respects, including the promotion of local advocacy measures available, monitoring local advocacy activities in the community, sharing local advocacy information among parties concerned, and reporting to the authorities.

Point (ii) implies that a core agency should provide community support with people, formulating the ‘local council’ meeting comprising relevant local experts when it is deemed necessary. The local

⁹¹³ Refers to ‘1.1.1 (2) c. Community Support.’

⁹¹⁴ Refers to the Ministry of Health, Labour, and Welfare of Japan, ‘Regarding the Basic Plan for Promoting the Adult Guardianship System’ (Web Page, March 24, 2017) 13 (in Japanese) <<https://www.mhlw.go.jp/file/06-Seisakujouhou-12000000-Shakaiengokyoku-Shakai/keikaku1.pdf>>.

⁹¹⁵ Ibid.

⁹¹⁶ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Chapter 2: Roles of Core Agencies* (Web Page, n/a) 14 (in Japanese) * <<https://www.mhlw.go.jp/content/000503191.pdf>>.

council is a collegial body that promotes a system for voluntary cooperation by strengthening the relationship among practitioners' associations and related institutions in each jurisdiction.⁹¹⁷ In the local council meeting, legal, welfare, and relevant experts may provide necessary support to the 'team.' To properly demonstrate the roles of a community support, relevant experts, such as legal and welfare practitioners, will have to collaborate and share a platform to discuss advocacy issues in the community and produce solutions. This collaboration between legal and welfare practitioners can be made even on individual basis, not limited to the local council meeting, but on the ground of a core agency.⁹¹⁸ This is in order to support and protect vulnerable people in the community, such as information exchange, providing consultation and advice, relay or dual appointment of the supporter for SDM activities or the adult guardian.

Point (iii) includes data collection and analysis projects in the jurisdiction.⁹¹⁹ Through the day-to-day duties of a core agency, relevant information on adult support and protection becomes available to the core agency, which can be analyzed in due course. Such data can be consolidated on a broader scale by community, municipality, prefecture, and country. The consolidated data and analysis will be worthwhile for fact-finding and policymaking, which will cover relevant information on informal arrangements and SDM cases. The situation of these people is not known by third parties and potential risks of abuse of principals are expected. If a core agency can watch informal arrangements and SDM cases directly or indirectly in a community and collect information on informal arrangements and SDM

⁹¹⁷ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Chapter 2: Roles of Core Agencies* (Web Page, n/a) 15.

⁹¹⁸ How relevant institutions may share their duties in the community is determined according to the social resources and support needs available in the community, and the organization and function of community support are specified based on the basic plan and welfare plan prepared by each prefecture and municipality. In response to such local government's plans, citizens are expected to participate in advocacy activities such as social workers, community guardians, and welfare supporters in the community.

⁹¹⁹ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Chapter 2: Roles of Core Agencies* 14.

cases with the consents of principals, then some transparency can be established in the community and safeguards to abuse risks will be provided to some extent.⁹²⁰

Artificial intelligence (AI) may support such data consolidation and analysis in the near future. Big data analysis conducted with subsidy from the Ministry of Health, Labour, and Welfare of Japan or its related institution could be useful for monitoring any scientific progress in adult support and protection.⁹²¹ This data collection and analysis project would contribute to not only business efficiency of core agencies but also related fields, such as dementia studies and its international co-research. It is therefore essential that core agencies keep personal information strictly confidential to maintain privacy, including possible technical protection to cyber-attack, in accordance with the relevant laws and regulations.⁹²²

C. Additional Delegation to a Core Agency

In the State of Victoria (Australia), the Victorian Civil and Administrative Tribunal (VCAT) refers investigations to the Office of the Public Advocate (OPA) under the *Victorian Civil and Administrative Tribunal Act 1998* (section 94 to 96, Division 6—Referral to experts) to assist in determining guardianship and administration applications. In 2020–21, VCAT referred 425 cases of investigations to the Victorian OPA mainly for the reasons of ‘evidence of need for order (53.0 per cent),’ ‘evidence of capacity or disability (27.1 per cent)’ and ‘conflicts between individuals (19.6 per

⁹²⁰ Legislative design is discussed in ‘5.2.3 A Preliminary Idea of Supported Decision-Making Legislation,’ which covers informal arrangements and SDM cases. It is noted in ‘1.3.1 (1) Adult Guardianship System in Japan’ that Japan has many elderly people with informal arrangements.

⁹²¹ It could be an idea that a department or an institution ‘core agency support center’ be established as a central control office under the supervision of Ministry of Health, Labour, and Welfare of Japan in order to take care of data processing, analysis, and feeding back to policymaking.

⁹²² There are general guidelines for municipalities to work on effective data utilization services. Ministry of Internal Affairs and Communications of Japan, Information Distribution Administration Bureau, *Guidebook for Data Utilization in Local Governments Version. 2.0* (Web Page, May 2019). (in Japanese) *

cent)’ and the Victorian OPA reported back to the VCAT.⁹²³ According to Victorian OPA, almost one third of these investigations completed in 2020–21 resulted in VCAT applications being withdrawn or dismissed, reducing the number of the public guardianship cases.⁹²⁴

In Japan, investigations are basically carried out by the family court investigators in compliance with Article 58 (Investigation of facts by family court investigators) of the *Domestic Relations Case Procedure Act* (Act No. 52 of May 25, 2011). According to Article 62 (Commissioned investigation, etc.) of the same Act, it can be understood that the family court can commission the necessary investigations directly to a core agency or indirectly to a core agency via local government to request the necessary investigation reports.⁹²⁵ The practical detail must be clarified on site, but a core agency may contribute to the family courts as an outsourced investigator by law.

When the specific authority of the local government is additionally delegated to the core agency, the core agency will be engaged in such additional duties on top of its normal duties. It can be assumed that each municipality may decide what specific authority of the municipality it delegates to the core agency in due course, according to the local needs in the jurisdiction. It should be noted that the scope of outsourcing by a municipality is limited by law, such that Article 72 of the *Attorney Act* (Act No. 205 of June 10, 1949) and Article 73 of the *Judicial Scrivener Act* (Act No. 197, 1950) prohibit unqualified persons from performing certain professional legal tasks. Such duties cannot be outsourced by a municipality to a core agency.

⁹²³ Refers to the Victorian Office of the Public Advocate (Victorian OPA), *Annual Report 2020–21* (Victorian OPA Report, 2021) <<https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/359-opa-annual-report-2020-2021>> 21.

⁹²⁴ Refers to the Victorian Office of the Public Advocate (Victorian OPA), *Annual Report 2020–21*, 22.

⁹²⁵ Article 62 (Commissioned investigation, etc.) of the *Domestic Relations Case Procedure Act* stipulates that ‘the family court may commission the necessary investigations to government agencies, public offices or other persons deemed appropriate, and (...) request the necessary reports.’

One idea of such additional delegation would be a ‘clearing’ function, which is addressed at the Austrian law reform in Chapter 3.⁹²⁶ A core agency with a clearing function would consult with an applicant seeking to petition to the family court for adult guardianship, examine whether the adult guardianship system would suit the principal, and, if the system is deemed unsuitable, suggest that the applicant does not make a petition for adult guardianship but instead should use a less restrictive and more suitable alternative measure. This ‘clearing’ function would help people in the community make the best law or policy measure selection while reducing any burden on the family courts.⁹²⁷

The other idea of additional delegation would be a municipal mayor's petition for the adult guardianship system.⁹²⁸ This system, pursuant to Article 32 of the *Act on Social Welfare for the Elderly* (Act No. 133 of 1963), is an administrative process prescribed by law. If the clerical work concerning the request by the mayor of a municipality is referred to in the preparation of draft documents, and the preparatory actions themselves are performed by the municipal staff and the applicant is the mayor of the municipality, then the municipality will be able to outsource a part of the clerical work to a core agency through a delegation agreement.

(2) Legal Status of a Core Agency

a. A Core Agency as a Quasi-Public Institution

A core agency is not always a public entity. Thus, the legal entity of a core agency is not always the same as that of an Office of the Public Advocate (OPA) or Office of the Public Guardian (OPG), which is the public entity under the Attorney-General of the state or special territory in Australia.⁹²⁹ A core agency, however, must share personal information with the family court as a duty. Thus, a core agency must be either a public entity under the municipality's supervision or a private entity that has

⁹²⁶ Refers to ‘3.2 (3) Austrian Adult Protection Law.’ In Austria, the Adult Protection Associations (*VertretungsNetz*) oversee clearing, delegating from the Federal Ministry of Justice.

⁹²⁷ Ibid.

⁹²⁸ Refers to ‘1.2.1 (1) Adult Guardianship System in Japan.’

⁹²⁹ Refers to ‘4.2.2 (2) Public Agencies.’

a delegation agreement with the municipality to carry out public duties. In other words, the core agency must functionally work as a public agency for public duties and keep any personal information strictly confidential with the family court and the municipality, regardless of its legal entity. Therefore, a core agency is regarded as a quasi-public institution with an obligation of accountability to the public.

b. An Idea of Public Guardian Agency

To cope with difficult cases of the guardianship in which the principal is being abused or is a victim of antisocial forces, there is an opinion for a local government to establish a public guardian agency to directly take care of these vulnerable people, not through a NPO or a welfare corporation receiving subsidy. This is the administrative direct control (public guardianship) type among the Suga-classified public guardianship types.⁹³⁰ This idea is assumed to be eligible by a local government's discretion within the current law framework.⁹³¹ If such a public guardian agency is established in an area where principals are frequently abused or are victims of antisocial forces, the public guardian agency may act as a public guardian, being appointed by the family court upon the mayor's petition, for these vulnerable people. A public guardian should collaborate with the core agency in the community, the police, and the municipality who is in charge of abuse and social welfare assistance. It can be assumed that candidate areas where a public guardian agency is established may be limited to some specific areas of large cities, such as Tokyo, Osaka, and Nagoya where difficult cases frequently happen far beyond the national average. The roles of a core agency may be further empowered with such collaboration of a public guardian agency.

⁹³⁰ Suga-classified five public guardianship types: (i) judicial direct intervention type, (ii) administrative direct control (public guardianship) type, (iii) public sector type, (iv) private organization formation (corporate guardianship) type, and (v) individual type. Fumie Suga, *The Doctrine of Autonomous Support in the English Adult Guardianship System: Towards a Society Pursuing the Best Interests* (Minerva Shobo, 2010) 258. (in Japanese) *

⁹³¹ Makoto Arai states that 'I am proposing that local governments may establish "public guardians" and I think it possible to establish them within the current law system' at the 11th Expert Commission meeting. Ministry of Health, Labour, and Welfare of Japan, *Expert Commission Meetings: The Minutes of the 11th Session* (Web Page, October 25, 2021) (in Japanese) * <<https://www.mhlw.go.jp/stf/shingi2/0000212875.html>> 20.

(3) Characteristics of a Core Agency

a. A Core Agency as a Multi-Functional Shop

From users' viewpoint, a core agency should explicitly provide information on community support, such as support for monitoring watch, informal arrangements, welfare assistances, supported decision-making, and adult guardianship with people in the community. Thus, a core agency is a kind of a multi-functional shop that serves more than the adult guardianship system. In this respect, a core agency differs from the existing 'guardianship support center' or the like, which is a mono-functional agency that provides an assistance to the adult guardianship system.

b. Collaboration between a Core Agency and a Community-based General Support Center

A core agency also differs from a 'community-based general support center' (herein after referred to as 'general support center') in such respects as purpose, human resources, and the law, which is an agency of the community-based integrated care system in the welfare policy. Most general support centers are operated by welfare corporations or NPOs in a delegation agreement with the municipality.⁹³² A general support center is a welfare agency mainly established by a municipality and is required to manage the health of the elderly in the community through a 'team approach' of three kinds of practitioners, namely public health nurses, licensed social workers, and care support specialists.⁹³³ The purpose of a general support center is to comprehensively support the health care, aged care (long-term care), and any welfare of the elderly by providing such assistances based on the Paragraph 1, Article 115–46 of the *Long-Term Care Insurance Act 1997*. Through the amendments to the *Social Welfare Act* in 2020, the methods of a general support center are renewed to offer

⁹³² Refers to the Ministry of Health, Labour, and Welfare of Japan, *Establishing 'the Community-Based Integrated Care System'* (Web Page, n/a) <https://www.mhlw.go.jp/english/policy/care-welfare/care-welfare-elderly/dl/establish_e.pdf>.

⁹³³ Ibid.

‘consultation assistance’ in welfare measures to people with disabilities in the community.⁹³⁴ A general support center has a relationship with the municipality but not with the family court. Therefore, the judicial relationship with the family court and legal practitioners in a community is another characteristic of a core agency.⁹³⁵

As a core agency and a general support center may ‘aim at realizing a diverse society where people cohabit in [the] community,’ they can collaborate with each other to develop community support system.⁹³⁶ It can be assumed that a possible merger of or sharing of office by these two agencies in the community would be a choice if there is no obstacle with the subsidy system in each proper scheme and no conflict of interests.⁹³⁷ Such collaboration of these two agencies can be assumed to be eligible on a prefecture and/or a municipality basis if this plan is properly authorized and incorporated in the basic plan and the welfare plan of the prefecture and/or the municipality.⁹³⁸ This attempt will contribute to establish ‘one-stop shop’ with multiple functions to support and protect vulnerable adults in community to meet the users’ convenience to access.⁹³⁹

⁹³⁴ Article 4 (community-based welfare) was added to the *Social Welfare Act 2020*, which states that the ‘[p]romotion of community-based welfare must be carried out with the aim of realizing a community where residents can participate and coexist while mutually respecting personality and individuality.’

⁹³⁵ Michihiro Osawa, ‘Cooperation of the Judiciary, Welfare Administration, and the Private in Adult Guardianship System Utilization Promotion’ (2020) 15 *The Study of Social Well-Being and Development, Nihon Fukushi University Graduate Schools* 21, 32. (in Japanese)

⁹³⁶ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Establishing ‘the Community-Based Integrated Care System.’*

⁹³⁷ From the online interview of an Expert Commission member by the author on September 7, 2020.

⁹³⁸ ‘Municipal welfare plans’ and ‘prefectural plans for supporting community welfare’ are regulated by Articles 107 and 108 of the *Social Welfare Act of Japan*.

⁹³⁹ From a field-specific support based on application, principles to a comprehensive support with an emphasis on prevention is to be attempted. Masaki Harada, ‘Comprehensive Support System and Community-Based Welfare Plan: Conversion to Community-Based Welfare Administration’ (Conference paper at Japan Community Welfare Society 2017 Public Research Forum, 2018); Shoichi Ogano, ‘The Role of Adult Guardianship System and Community Comprehensive Care: Community Symbiosis Society’ (2020) 12 *Review of Social Security Law* 23, 48. (in Japanese)

(4) Contributions of Civil Society for Community Support

a. Participation and Assistance of Civil Society

At this stage, adult support and protection is an imaginary legal architecture and will only materialize if relevant legislation, law reforms and policies are enacted with the people's consent in a democratic process. The significant momentum needed to implement a new regime is people's participation in and support of the architecture.⁹⁴⁰ Participation means that people take part in community activities to assist one another in the spirit of mutual aid.⁹⁴¹ Indeed, it is a challenge to get people to participate in and assist the architecture. It can, however, be assumed that people's as well as civil society's understanding of relevant law and public policy of adult support and protection are vital for realizing the consumer choice⁹⁴² and people's voluntary participation in the system.

Legal systems are enforced equally across the country based on uniform standards. This approach ensures that the minimum requirements for the values needed by the elderly and people with disabilities remain diverse. This approach is far from the achievement based on the underlying value of adult support and protection legislation. For this reason, voluntary activities rooted in community characteristics by civil society should be activated.⁹⁴³ Support by public agencies is essential to the

⁹⁴⁰ Wataru Omori, 'Significance and Promotion Measures of Participatory Administration' (2019) 11 *Journal of Urban Social Studies* 1, 13. (in Japanese) *

⁹⁴¹ People's participation is advocated: Yu Nagata, 'Progress and Issues of "Participation of Citizens" in Social Welfare' (2015) 123 *Social Welfare Studies* 19–27, 26. (in Japanese) *; Jun Nishimura, 'Legal System of the Personal Social Services in terms of Participation Support' (2018) 15(1) *Journal of Kanagawa University of Human Services* 1, 13. (in Japanese)

⁹⁴² John Chesterman emphasizes on 'consumer choice' or 'consumer directed care' to meet individual needs even in adult protection programs. John Chesterman, 'Modernising Adult Protection in an Age of Choice' (2014) 73(4) *Australian Journal of Public Administration* 517–524, 519; John Chesterman, 'The Future of Adult Safeguarding in Australia' (2019) 54(4) *Australian Journal of Social Sciences* 360–370, 362–363.

⁹⁴³ Consequently, the border between voluntary activities and the social security law sphere becomes ambiguous. It is believed that the first step toward the realization of an inclusive society will be for the national and local governments to properly demonstrate their responsibility to secure financial resources, secure and train human resources, and then seek the cooperation of local people. Toshiro Ishibashi, 'The Community Comprehensive Care System, Mutual-aid Society and the

system because public agencies are key players in the architecture even to intervene private autonomy area by law in case of necessity. Municipalities should support civil society by providing preferential benefits, administrative guidelines, and training opportunities to people. Then, the Ministry of Health, Labour, and Welfare of Japan may consolidate the local activities, analyze the performance and data, and decide on the national policy and the guidelines.

Civil society should be able to take leadership in such multi-agency mechanisms which comprise the core agency, the municipality, the court, the government of Japan. In a modern democracy, any legislation and policy can be enacted and implemented with people's participation and assistance. Moreover, people's understanding is crucial not only for the government to provide subsidies or grants for the policy but also for people to positively participate, with fees or no fees, to support vulnerable adults at risk of harm. In this sense, people are required to participate in the political and social process. In other words, the participation and assistance of civil society is essential to the conduct of social activities in a community, such as acting as a monitor, community supported decision-maker, staff of a welfare NPO, community guardian, staff of a public trustee (to be established).⁹⁴⁴ In addition, it is also essential to activate judicial social work and ensure judicial access of vulnerable adults through the intermediary of core agencies in a regional collaboration network based on the Basic Plan.⁹⁴⁵

Academic Sphere of Social Security Law' (2019) 68 *Bulletin of the Faculty of Education Kumamoto University* 163, 171. (in Japanese); Ishibashi, Toshiro et al, 'Development of a System to Support the Elderly, People with Disability, and People Living in Poverty in the Community' (2019) 26(1) *Administration* 1, 48. (in Japanese) *

⁹⁴⁴ These are articles that address civil society assistance available in Japan and Australia: Kohei Tsuchiya, 'Citizen Guardian and Welfare Administration' (2016) 29(2) *Chuo Gakuin University Law Review* 211, 235. (in Japanese); Jenny Onyx, Sue Kenny and Kevin Brown 'Active Citizenship: An Empirical Investigation' (2012) 11(1) *Social Policy and Society* 55, 66.

⁹⁴⁵ Ryo Hamano, 'Access to Justice in a Super Aging Society: Structure and Reform' (2020) 103 *Rikkyo Law Review* 129, 184. (in Japanese)

b. Registration of Informal Arrangement with a Core Agency

Informal arrangement has been discussed in Chapter 1 and Chapter 4.⁹⁴⁶ In Asia, the family is a social unit, and even if the legal system is not in place, it is customary for people to help each other based on their kinship.⁹⁴⁷ The research program known as the Protecting Elders' Assets Study (PEAS) by Monash university examines rural and multi-cultural responses to intra-familial and inter-generational asset management in the State of Victoria.⁹⁴⁸ This research implies gaps of behavior of older Victorians for asset management according to their cultural background. The research shows the fact that non-English speaking country origin Australians, such as Vietnamese origin people, do not use EPAs as English-speaking country origin Australians. It can be said that Asian origin people do not use EPAs but to rely on their kinship. In Asia, EPAs have become common in Singapore. Approximately 3.4 per cent population of the Singapore nationalities and permanent residents concluded the LPAs by the initiatives of Singapore Government, but mostly with relatives as counter contracting parties (i.e., 96 per cent).⁹⁴⁹ This behavior pattern may be related to national culture and a tendency that shows how much people rely on law and their kinship.

In Japan, most adults who do not use the adult guardianship system, including the voluntary guardianship, but rely on informal arrangements with relatives, close friends, or nursing home managers in relation to personal affairs and property management.⁹⁵⁰ In fact, the number of adult

⁹⁴⁶ Refers to '1.1.2 Function-based Review' and '4.3.3 (1) Comparisons between Amendments to Victoria and NSW State Acts.'

⁹⁴⁷ Stella Quah, *Families in Asia* (Routledge, 2nd ed. 2008).

⁹⁴⁸ King C, Wainer J, Lowndes G, Darzins P, & Owada K, "For love or money: intergenerational management of older Victorians' assets, Protecting Elders' Assets Study" (Monash University, Eastern Health Clinical School, Melbourne, 2011) <https://www.eapu.com.au/uploads/research_resources/VIC-For_Love_or_Money_JUN_2011-Monash.pdf>.

⁹⁴⁹ Office of the Public Guardian, Singapore, "Indicators of Activities" <<https://www.msf.gov.sg/opg/Pages/Indicators-of-Activities.aspx>>.

⁹⁵⁰ Carry and Singer take up three different types of support model: a 'legalistic model (guardianship),' a 'welfare model,' and a 'developmental model' to deal with people with intellectual disabilities and discuss which is the best model among

guardianship users is estimated to be equivalent to 2 to 3 per cent of the potential users with insufficient mental capacity and the remaining 97 to 98 per cent people are estimated to be supported in informal arrangements.⁹⁵¹ Those who are in informal arrangements may have risk for abuse, particularly financial abuse, or financial exploitation. Elder abuse is regulated by the elder abuse prevention laws and the annual statistics shows how many elder abuses happened. However, the statistics does not grasp the whole picture but recognizes the limited parts of elder abuses that are reported by public agencies.⁹⁵²

In Australia, informal arrangement is recognized as no need to change informal means if they work well (section 31, the Victorian Act 2019).⁹⁵³ Informal arrangements, including family agreements,⁹⁵⁴ are common but they also use EPAs, supported decision-making, or guardianship as far as it is necessary. Australia is a contract-based society and even family members use supported decision-making or guardianship with one year or shorter self-revocation term for a crucial decision of the principal. In contrast, most Japanese people simply rely on informal arrangement and do not use

them. Informal arrangement is the third type of a development support model. Terry Carney and Peter Singer, ‘Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People’ (Australian Government Publishing Service, Human Rights Commission 3 Monograph Series No. 2, 1986) 1–124, 113–117.

⁹⁵¹ Refers to ‘1.2.1 Adult Guardianship System and the Promotion Act.’

⁹⁵² The number of elder abuses by nursing home care workers was 595 cases in 2020 (vs. 644 in 2019 and 621 in 2018) and the number of elder abuses by caregivers was 17,281 cases in 2020 (vs. 16,928 in 2019 and 17,249 in 2018). Ministry of Health, Labour, and Welfare of Japan, “Elderly Abuse Annual Survey in FY2020” (in Japanese) <https://www.mhlw.go.jp/stf/houdou/0000196989_00008.html>.

⁹⁵³ Refers to ‘4.3.3 (1) Comparisons between Amendments to Victoria and NSW State Acts.’

⁹⁵⁴ Family agreements are not typically put in writing between the principals and its relatives, and the relatives take care of the principals in exchange of the principals’ property transfer or the like. Such agreements are fragile, and the principals’ interests are not guaranteed by law. The ALRC recommends that the tribunal be given jurisdiction over disputes within families, but an access to the tribunal is another challenge for vulnerable adults. Australian Law Reform Commission (ALRC), “Elder Abuse – A National Legal Response Final Report” (ALRC Report No. 131, 2017) <<https://www.alrc.gov.au/publications/elder-abuse-report>> 203-230.

law system such as guardianship. Because Japan's adult guardianship system has no guardianship eligible with one year or shorter self-revocation term.

It can be recommended that guardianship eligible with one year or shorter self-revocation term should be introduced in Japan and that stakeholders, including principals and their relatives or nursing-home managers, should register any informal arrangement with the core agency by their own accord. Adults with insufficient mental capacity who have no relatives or close friends and have no financial assets may consult with the core agency to seek measures for his/her support, including welfare assistance of the municipality, and the core agency may give them advice accordingly.⁹⁵⁵

c. Alternatives to Guardianship

Alternatives to guardianship are developing in a unique way.⁹⁵⁶ First, the municipality provides elderly adults with seminars to encourage them to keep personal notes regarding their property, a wish list for healthcare treatment and aged care, and a wish list of their end-of-life process. Whilst these personal notes have no binding legal effect as advanced directives, they are useful as a reference to family members or relatives to understand what and how they should support the elderly adult at the appropriate time. These personal notes are called 'ending notes' in Japan.⁹⁵⁷ Ending notes are regarded as part of informal arrangements as an alternative to guardianship. These notes were originally created as a simple planning note as to how to end the elderly's life. These notes have developed to include supplementary personal notes regarding their creed, property management, healthcare treatment, aged care, end-of-life process, and even post-mortem affairs, considering users' needs. As a background, Japan has no legislation to regulate a third party's medical consent, advanced directives, and voluntary

⁹⁵⁵ Refers to '5.2.3 (1) Main Contents of SDM Law.'

⁹⁵⁶ Refers to '3.2. (5) U.S. Guardianship and Supported Decision-Making Acts.' Alternatives to guardianship in the U.S. is mentioned.

⁹⁵⁷ Refers to the Nara City, 'Nara City-Version Ending Notes Will be Distributed Free of Charge' (Web Page, *Japan NEWS*, May 27, 2021) <<https://re-how.net/all/1113919/>>.

assisted dying, which are legislated in the State of Victoria.⁹⁵⁸ Instead, the relevant guidelines guide medical practitioners to deal with such sensitive issues as a form of soft law and case law on passive euthanasia serves as a guideline.⁹⁵⁹ Norio Higuchi states that ‘Since the law is regarded as formalistic, uniformly applied, and inflexible in Japan in general term, this [death with dignity] act if enacted may not help the development of medical ethics in the end-of-life situation.’⁹⁶⁰ Property management is assumed to be dealt with in the same manner as these sensitive issues.⁹⁶¹

Second, financial institutions in Japan started from few years ago to provide bank deposit services in which relatives (within two degrees) can register as an agent for managing the principals’ deposit accounts.⁹⁶² Recently, they started providing financial support of property management in their internet banking with adult guardians who take care of adults with insufficient mental capacity.⁹⁶³ Japanese elderly owns approximately 60 per cent of the national household financial assets in Japan, which is worth a total of 2,005 trillion yen (US\$ 17.4 billion) as of June 2022.⁹⁶⁴ The report of the Dai-ichi Life Economic Research Institute estimates the financial assets held by elderly adults with dementia is projected to increase from 143 trillion yen (US\$ 1.1 trillion) in 2017 to 215 trillion yen

⁹⁵⁸ Refers to ‘4.2.2 (4) Victorian Unique Legislations.’

⁹⁵⁹ Refers to ‘1.2.1 (4) Measures and Theory for Updating the Adult Guardianship System in 2000–2022.’

⁹⁶⁰ Norio Higuchi, ‘Legal Issues on Medical Interventions in Terminally Ill Patients’ (2015) 25(1) *Medical Care and Society* 21–34, 34. (in Japanese); Norio Higuchi, ‘Current Status and Challenges of End-of-Life Care Legal Issues’ (2020) 2(5) *Geriatrics* 579, 584 (in Japanese) *

⁹⁶¹ The guidelines are flexibly used, but have no binding power to any people, and can give no legal power in case of dispute.

⁹⁶² Refers to ‘1.1.2 Functional Review.’ Sumitomo Mitsui Banking Corporation (SMBC), *Agent Nomination Procedure* (Web Page, n/a) (in Japanese) <<https://www.smbc.co.jp/kojin/otetsuduki/sonota/dairi/>>.

⁹⁶³ Refers to the Sumitomo Mitsui Banking Corporation (SMBC), *Adult Guardianship System SMBC Support Service* (Web Page, July 2022) (in Japanese) <<https://www.smbc.co.jp/kojin/kouken-support/>>.

⁹⁶⁴ Refers to the Bank of Japan, *Money Circulation in the First Quarter of FY2022* (Web Page, June 2022) (in Japanese) * <<https://www.boj.or.jp/statistics/sj/sjexp.pdf>>.

(US\$ 1.59 trillion) in 2030.⁹⁶⁵ If these amounts are left in banks, the deposits will be frozen and transferred to the national treasury. Financial institutions, including banking corporations, can contribute to elderly adults and its stakeholders through their service provisions.

Another alternative is for the elderly adults to settle a family trust for succession planning purposes.⁹⁶⁶ Special needs trust, adopted in the U.S. and Singapore, is also worth considering. If a social business to look after vulnerable adults becomes successful, such industry would generate much employment in Japan. Social business and social responsibilities related to adult support and protection legislation and values of community support would be important.⁹⁶⁷ This is based on people's compassion and benevolence to support and protect vulnerable adults by their own initiatives even without state control.⁹⁶⁸

5.2.2 Combined Models of Guardianship and Supported Decision-Making

Supported decision-making will be reviewed in this part. The status of supported decision-making (SDM) in Japan has been mentioned in Chapter 1 as follows:⁹⁶⁹ (i) The term of SDM was additionally inserted into some disability/welfare laws after the Government of Japan signed the CRPD

⁹⁶⁵ Refers to the Dai-ichi Life Economic Research Institute, Economic Trends (Web Page, 2018) (in Japanese) <<http://group.dai-ichi-life.co.jp/dlri/>>.

⁹⁶⁶ All measures need safeguards of the principals' interests. Masayuki Tamaruya, 'Japanese Wealth Management and the Transformation of the Law of Trusts and Succession' (2019) 33 *Trust Law International* 147, 168.

⁹⁶⁷ For example, financial institutions, particularly small-and-medium-sized banks in Japan, will become surplus, and an unemployment risk will arise from radical rationalization. In such a case, one idea would be to establish a public agency on local basis that specializes in financial management for the elderly or people with disabilities, like the Victorian State Trustees Limited (STL) that is wholly owned by the state of Victoria in Australia.⁹⁶⁷ Such public corporation may employ personnel with financial business experience, but their salary level would be considerably less. The other idea is that small-and-medium-sized banks may participate in the financial management and welfare business for elderly people through their subsidiary corporations based on the recent amendments to the *Banking Act* (November 2021).

⁹⁶⁸ Refers to '2.4.1 (2) Autonomy.' Jonathan Herring's statement that 'In the caring relationships we are all in there merging of interests and selves' implies importance of the notion of relational autonomy. It is believed that people have empathy and ethics of care for vulnerable adults at risk of harm.

⁹⁶⁹ Refers to '1.2.2 Supported Decision-Making (SDM).'

in September 2007. The term SDM was additionally inserted into disability/welfare laws. The establishment and practice of SDM methods that respect the individual's will and preferences were expected. However, no welfare legislation has defined what SDM should be or is like. (ii) The Ministry of Health, Labour, and Welfare of Japan has published three SDM guidelines for nursing managers, for managers of the elderly with dementia, and for adult guardians.⁹⁷⁰ (iii) The main contents of SDM guidelines for adult guardians, particularly seven principles, were reviewed. (iv) The pros and cons of SDM guidelines were examined.

(1) Combined Models of Guardianship and SDM in Australia, Europe and Japan

Article 12 of the CRPD combined with its General Comment No.1 recommends that state parties should proceed with a paradigm shift from substituted decision-making to SDM in order to respect the 'rights, will and preferences of the principals.'⁹⁷¹ Since then, state parties of the UN have considered how to accommodate the values of the CRPD in their laws and policies. They have adopted different models by way of law reforms, legislation, or establishing guidelines. Some states, such as Switzerland and Austria, renamed their adult protection law and no longer use the term 'guardian/guardianship.'⁹⁷²

This part reviews three types of combined models of guardianship and supported decision-making (SDM) in Australia, Europe, and Japan.⁹⁷³ This is in order to clarify how they integrate guardianship and SDM into their laws, policies or reports and compare similarities and differences between models. With this conceptual comparison, the stance of the Government of Japan regarding SDM will be reconfirmed. Australian law is examined because the implications of Australia's

⁹⁷⁰ The three SDM guidelines refer to the 'SDM Guidelines for the Provision of Disabilities Welfare Services (March 2017),' 'SDM Guidelines for People with Dementia in Daily Life and Social Life (June 2018),' and 'Guidelines for Adult Guardians Based on SDM (October 2020).'

⁹⁷¹ Refers to '1.2.1 (2) The CRPD and the General Comment No.1.'

⁹⁷² Refers to '3.2 (2) Switzerland Adult Protection Law' and '3.2 (3) Austrian Adult Protection Law.'

⁹⁷³ This part is an updated version of the previously published article by the author: Yukio Sakurai 'The Idea of Adult Support and Protection Legislation in Japan: Multiple Options for Vulnerable Adults to Make Their Own Choices' (2021) 12(1) *The Journal of Aging & Social Change* 31,47. <doi:10.18848/2576-5310/CGP/v12i01/31-47>.

legislation of guardianship and administration as well as elder abuse, which are addressed in Chapter 4,⁹⁷⁴ are of help in consideration of Japan's adult support and protection legislative system. The reason Europe, and not the U.S., is taken up is because Europe includes civil law and common law systems, Australia includes common law, and Japan include civil law system, and Europe's legal systems can be balanced among the three models. Below, the three combined models of guardianship and SDM in Australia, Europe, and Japan are examined.⁹⁷⁵

a. Victorian Model

The State of Victoria has the most advanced guardianship laws and policies in Australia.⁹⁷⁶ The legislation, *Guardianship and Administration Act 2019 (Victoria)* (hereinafter referred to as 'Victorian Act 2019'), incorporates SDM in supportive guardian and supportive administrator system while keeping the guardianship system as a last resort. The Victorian Act 2019 was enacted in May 2019 and came into force in March 2020. It will be sometimes referred to as the 'Victorian model.' For legislative acceptance of the CRPD, which was ratified by Australia with a declaration of reservation in July 2008,⁹⁷⁷ uniform national legislation that respects the autonomy and right to self-determination of persons with disabilities is required.⁹⁷⁸ Australian legislative project by states and special territories are being carried out to improve the domestic legislation in compliance with the values of the CRPD.

⁹⁷⁴ Refers to '4.5.2 Implications from Australian Legislative Project.'

⁹⁷⁵ Refers to '3.2 (7) Other Statutory Developments.' In addition to three types of combined models of guardianship and SDM in Australia, Europe, and Japan, Peruvian model is eligible, which incorporates 'support' function in their civil code while staying status quo of the adult guardianship, needs further study for comparison.

⁹⁷⁶ Refers to '4.2.1 Australian Laws and its Guardianship.'

⁹⁷⁷ The Government of Australia declared its understanding of several points at the ratification of the CRPD on July 17, 2008, including that the CRPD allows substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only when such arrangements are necessary, that is, as a last resort and subject to safeguards. UN, *Treaty Collection: Australia: 15. Convention on the Rights of Persons with Disabilities* (Web Page, February 2022) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4#EndDec>.

⁹⁷⁸ John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66(1) *Australian Social Work* 26, 38.

Australian legislative project by states and special territories other than the State of Victoria are still ongoing.

They recognize that the current guardianship law may be partially in conflict with Article 12 of the CRPD. Consequently, their legislative reforms would be designed to position substituted decision-making as a last resort and, instead, encourage SDM.⁹⁷⁹ Thus, SDM is positioned as a legal system that will replace substituted decision-making with limitation. Substituted decision-making will be used only when the tribunals acknowledge with evidence that the principal has no capacity to make decisions. Australians are said to think highly of relationships with others, known as ‘mateship.’⁹⁸⁰ Rather than relying on lawyers to protect their interests, they help each other in community or within the same group of relatives and cultural backgrounds and utilize public institutions when necessary.

The summary of the Victorian Act 2019 is in part cited from Chapter 4⁹⁸¹ as follows:

- (i) The Victorian Act 2019 indicates that ‘a person is presumed to have decision-making capacity unless there is evidence to the contrary’ (section 5(2)) and recognizes that ‘a person has capacity to make a decision in relation to a matter (decision-making capacity)’ (section 5(1)).
- (ii) The purpose of the Victorian Act 2019 is ‘to promote the personal and social wellbeing of a person’ (section 4). For that reason, ‘the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person’ (section 8).
- (iii) Even when some support is needed for the principal, it is not always the case that the supportive guardian and the supportive administrator are appointed by the Victorian Civil and Administrative

⁹⁷⁹ Australian welfare practitioners have practiced SDM in pilot programs since 2010. This article summarizes the results of these SDM pilot practices conducted between 2010 and 2015. Christine Bigby et al, ‘Delivering Decision Making Support to People with Cognitive Disability — What Has Been Learned from Pilot Programs in Australia from 2010 to 2015’ (2017) 52 *Australian Journal of Social Issues* 222, 240.

⁹⁸⁰ ‘An Australian code of conduct that emphasizes egalitarianism and fellowship.’ Merriam-Webster, *Mateship* (Web Page, n/a) <<https://www.merriam-webster.com/dictionary/mateship>>.

⁹⁸¹ Refers to ‘4.3.1 Amendments to Victorian State Act.’

Tribunal (VCAT). If a close relative plays such a role properly, there is no need to change (section 31).

- (iv) The appointment of adult guardians will be limited by the VCAT as a last resort. Thus, the adult guardian and the administrator must respect the will and preferences of the principal, substitute the principal's decision as far as necessary, and explain the substituted decision so that the principal can understand the content (sections 41 and 46).
- (v) Supported decision-making is incorporated into the legislative system (sections 79 to 98, Part 4—supportive guardianship orders and supportive administration orders). The principal can appoint a supportive attorney who has the legal authority to make supportive decisions on personal affairs or financial management (Part 7—Power of Attorney Appointments, *Power of Attorney Act 2014*). Also, on behalf of the principal, the VCAT may appoint the supportive guardian and supportive administrator (section 87). A supportive guardian and a supportive administrator are not entitled to any remuneration for acting in that role (section 95).

b. Alzheimer Europe Model

There is no unified guardianship and SDM laws and policies in Europe except for some EU Recommendations to member countries on adult protection.⁹⁸² European countries individually consider where and how they accommodate the values of the CRPD in their laws and policies. Currently, the *Mental Capacity Act 2005* (England and Wales) and the *Assisted Decision-Making (Capacity) Act 2015* (Ireland) incorporate SDM in the respective country laws, and other European countries still consider where and how to accommodate SDM.

As stated in Chapter 3,⁹⁸³ a European NGO, Alzheimer Europe, published a report in December 2020, entitled *Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia* (hereinafter referred to as 'Alzheimer Europe 2020

⁹⁸² Refers to '3.2. (1) 2000 Protection of Adults Convention and the Following Developments.'

⁹⁸³ Ibid.

report’),⁹⁸⁴ of a study funded under an operating grant from the EU’s Health Program (2014–2020). The Alzheimer Europe 2020 report was drafted by European interdisciplinary experts in the working group, which proposes the combined SDM model developed by Scholten and Gather (2018).⁹⁸⁵ This model combines SDM with competence assessment ‘is based on the view that it is sometimes permissible to deny people the right to make their decisions but that this should only be the case for people whose functional decision-making capacity is substantially impaired and if all resources of SDM have been exhausted.’⁹⁸⁶

The combined SDM model has not been legislated in a specific law or policy of any European country. This model has ethical implications based on the understanding that ‘the main role of ethics is to question the most important practices and procedures and to open the way to finding better solutions (‘Preface’ of the Alzheimer Europe 2020 report).’⁹⁸⁷ Thus, it is worthwhile to consider the model as an ethical framework for guardianship and SDM in Europe, regardless of whether or not it falls into civil law or common law jurisdiction. Here, it is called the ‘Alzheimer Europe model.’

The Alzheimer Europe model comprises the following six steps addressed in the Alzheimer Europe 2020 report,⁹⁸⁸ viz.: (i) presumption of decision-making capacity, (ii) rebuttal of this presumption, (iii) assessment of decision-making capacity, (iv) supported decision-making, (v) monitoring, and (vi) substitute decision-making as a last resort. This model, which agrees with the

⁹⁸⁴ Refers to the Alzheimer Europe, *Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia* (Alzheimer Europe, December 2020) <<https://www.alzheimer-europe.org/resources/publications/2020-alzheimer-europe-report-legal-capacity-and-decision-making-ethical>>.

⁹⁸⁵ Scholten and Gather predict ‘adverse consequences of CRPD Article 12 for the persons with mental disabilities’ and propose the combined supported decision-making model. Matthé Scholten and Jakov Gather, ‘Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward’ (2018) 44 *Journal of Medical Ethics* 226, 233.

⁹⁸⁶ Refers to the Alzheimer Europe, *Legal Capacity and Decision Making* 22.

⁹⁸⁷ Ibid.

⁹⁸⁸ Ibid.

CRPD's general principles of equality and non-discrimination,⁹⁸⁹ promotes autonomy of people with dementia, on one hand, and supports and protects these vulnerable people due to insufficient mental capacity against abuse and undue influence, on the other hand.⁹⁹⁰ This model can be materialized by law reform, legislation, or guidelines, according to the European country's legislative intention.

c. Japanese Model

As discussed in Chapter 1,⁹⁹¹ Japan promotes the adult guardianship system by establishing a regional collaboration network and improving guardianship practices, unlike in other developed countries, while providing guidelines for implementing SDM. Here, we refer to this Japanese system as the 'Japanese model.' In Japan, the adult guardianship system is underutilized. The Japanese model includes the voluntary guardianship system, which is similar to a lasting power of attorney (LPA) with involving the voluntary guardian's supervisor to be appointed by the family courts, but few people use this system. In most cases, relatives or nursing-home managers of the principal provide informal arrangements for the principals. It is apparent that Japanese older adults largely rely on family and relatives or nursing home managers. Principals in informal arrangements do not receive legal protections provided by the adult guardianship system, where the risk of abuse may exist. Elder abuse is regulated by the elder abuse prevention law, and the annual statistics shows how many elder abuses happen, although it does not capture the whole picture as only a few cases of elder abuse are

⁹⁸⁹ Refers to the Alzheimer Europe, *Legal Capacity and Decision Making* 15; Matthé Scholten, Jakov Gather and Jochen Vollmann, 'Equality in the Informed Consent Process: Competence to Consent, Substitute Decision Making, and Discrimination of Persons with Mental Disorders' (2021) 46(1) *Journal of Medicine and Philosophy* 108, 136.

⁹⁹⁰ Ibid [Matthé Scholten, Jakov Gather and Jochen Vollmann]; This is a clinical and ethical studies' review article in Italy: Marina Gasparini et al, 'The Evaluation of Capacity in Dementia: Ethical Constraints and Best Practice. A Systematic Review' (2021) 57(3) *Ann Ist Super Sanità* 212, 225.

⁹⁹¹ Refers to '1.2.1 Adult Guardianship System and the Promotion Act.'

reported.⁹⁹²

The guidelines encourage adult guardians to go through the process of supported decision-making based on Article 858 of the Civil Code even in limited cases. Namely, an adult guardian is required to participate in SDM for legal acts of the principal that will have a significant impact on the principal (i.e., decisions on the principal's residence, sale of the principal's assets, and gifts and expenses of the principal to a third party) and incidental factual acts.⁹⁹³ An online training program on the basic SDM practice has started for the staff of municipalities and core agencies since December 2020. In Japan, there is seen a tendency to rely on guidelines instead of law particularly for a bioethical issue.⁹⁹⁴ Positive aspects of guidelines are seen as non-rigid, flexible, and easy to amend as far as it is necessary. A guiding principle of the SDM guidelines as a soft law would be practical and ethical regulation on SDM at the initial stages, because regulating SDM through a hard law at this stage might be unworkable when an SDM method has not yet been clearly fixed.⁹⁹⁵ On the other hand, issues of the SDM guidelines have been discussed in Chapter 1,⁹⁹⁶ namely vague legal effects, little or no effective safeguards, no standardized SDM practices, and SDM as a support method rather than a legal system. The relationship between guardianship and SDM is indicated by the SDM guidelines for adult guardians. The SDM guidelines suggest that the adult guardians should practice SDM with principals

⁹⁹² Refers to '1.2.3 (1) Elder Abuse Prevention Act.' The number of elder abuses by nursing home care workers was 595 in 2020 and the number of elder abuses by caregivers was 17, 281 in 2020. Ministry of Health, Labour, and Welfare of Japan, "Elderly Abuse Annual Survey in FY2020" (in Japanese) <https://www.mhlw.go.jp/stf/houdou/0000196989_00008.html>.

⁹⁹³ Refers to the Ministry of Health, Labour, and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* (Online, October 30, 2020) (in Japanese) * <<https://www.mhlw.go.jp/content/000750502.pdf>>.

⁹⁹⁴ Norio Higuchi, 'Legal Issues on Medical Interventions in Terminally Ill Patients' (2015) 25(1) *Medical Care and Society* 21–34, 34. (in Japanese); Norio Higuchi, 'Current Status and Challenges of End-of-Life Care Legal Issues' (2020) 2(5) *Geriatrics* 579, 584 (in Japanese) *

⁹⁹⁵ Yukio Sakurai, 'The Role of Soft Law in the Ageing Society of the Twenty-First Century' (2018) 13(1) *The International Journal of Interdisciplinary Global Studies* 1–10, 7.

⁹⁹⁶ Refers to '1.2.2 (4) Developments and Challenges of the SDM Guidelines.'

as a priority, only opting for substituted decision-making if SDM does not function. However, this suggestion is based on the guidelines without enforcement and thus it is unclear how much the said guidelines will be respected and implemented by the adult guardians on site. In this sense, the adult guardians have discretions whether or not to follow the guidelines, which cannot guarantee the equality to give same standardized SDM and guardianship services to the principals. Furthermore, the issues of the SDM guidelines may occur a certain risk for undue influence of the adult guardians to the principals. Therefore, the guidelines can be useful for the time being, but legislation will be an option to the equality of operation and for protection of rights of the principals.

(2) Comparison of the Three Models

a. Similarities

Principles and Values

A similarity can be seen in the principles and values of the three models, all of which combine guardianship and SDM to deal with adults with insufficient mental capacity. The Victorian model has as its background the Victorian Law Reform Commission (VLRC) report, *Guardianship: Final Report No. 24* (VLRC Report 24) in the state level, and the Australian Law Reform Commission (ALRC) report, *Equality, Capacity and Disability in Commonwealth Laws: Final Report No. 124* (ALRC Report 124) in the national level. The former state report proposed reform proposals that included 440 items in 2012 before the General Comment No.1 was adopted by the UN Committee. The latter national report mainly examined in 2014 ‘equal recognition before the law’ and ‘legal capacity’ in Article 12 of the CRPD and provides the four National Decision-Making Principles, viz.: *the equal right to make decisions; Support; Will, preferences and rights; and safeguards*.⁹⁹⁷ The Victorian model is based on above state and national reform reports, including these National Decision-Making Principles.⁹⁹⁸

⁹⁹⁷ Refers to ‘4.3.4 (2) What are the Common Values?’

⁹⁹⁸ Refers to ‘4.3.4 (2) What are the Common Values?’

The Alzheimer Europe model is based on the combined SDM model developed by Scholten and Gather in their bioethics studies (2018).⁹⁹⁹ The Alzheimer Europe 2020 report emphasized non-discrimination, respect for individual autonomy, and the values of the CRPD, including reasonable accommodation.¹⁰⁰⁰ The Alzheimer Europe model is based on these principles and values of the report. The Japanese model is based on the Promotion Act and the Basic Plan, which emphasize the values of the adult guardianship system, viz.: respect for the right to self-determination, emphasis on personal protection, and normalization in order to attain a diverse society where people cohabit in the community.¹⁰⁰¹ All these principles and values of the three models, including the Japanese model, are positive and share a similar purpose of respecting the will and preferences of vulnerable people.

Decision-Making Capacity

Another similarity is seen in the legal concept of decision-making capacity. It is important to note that the presumption of decision-making capacity is shared by the Victorian and Alzheimer Europe models, such that, according to the Victorian Act 2019, ‘a person is assumed to have decision-making capacity unless there is evidence to the contrary.’ The presumption of decision-making capacity is adopted in common law jurisdictions, but this legal concept can be used in civil law jurisdictions as the Alzheimer Europe model suggests. With the assumption of decision-making capacity, SDM of the principal with a third party’s assistance can make sense.

In the Japanese model, the guardianship system adopts the capacity doctrine in the Civil Code, although the SDM guidelines for adult guardians include the term ‘decision-making capacity’ and

⁹⁹⁹ Matthé Scholten and Jakov Gather, ‘Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward.’

¹⁰⁰⁰ Refers to the Alzheimer Europe, *Legal Capacity and Decision Making* 22.

¹⁰⁰¹ A ‘diverse society’ refers to a society in which the community and various local actors participate, and the people are connected to other people and social resources across generations and fields for better living and purpose. Ministry of Health, Labour, and Welfare, *Toward the Realization of a ‘Diverse Society in Community’* (Web Page, February 7, 2017). (in Japanese) *

suggest that the adult guardians should adopt SDM in decision-making process of principals and apply substituted decision-making as a last resort. The SDM guidelines state that ‘decision-making capacity is not a concept stipulated by law and is different from mental capacity and capacity to act [in the Civil Code]. The SDM guidelines adopt the idea that decision-making capacity is not an alternative to having or not having but varies according to the presence or absence and degree of support.’¹⁰⁰² In this respect, the SDM guidelines for adult guardians seem to require additional duties on the Civil Code of Japan. Consequently, all three models more or less adopt the legal concept of decision-making capacity.

b. Differences

Legal Basis

The purpose of the three models is the same as mentioned above, which is respecting the will and preferences of principals, but their bases are different. The Victorian model is enshrined in the Victorian Act 2019 while the Japanese model is based on a combination of existing guardianship laws and separate SDM guidelines. The Alzheimer Europe model is an ethical framework based on the Alzheimer Europe 2020 report and can be materialized by law reforms, legislation, or establishing guidelines, according to the individual country’s legislative intention.

SDM as a Legal System or a Support Method

The difference between the three types of models lies in where and how they accommodate SDM in their laws and policies. The Victorian model accommodates SDM in the supportive guardian and supportive administrator system of the Victorian Act 2019. The principal can appoint a supportive attorney who has the legal authority to make supportive decisions on personal affairs or financial

¹⁰⁰² It is understood that the SDM Guidelines were drafted by the SDM-WG largely based on the *Mental Capacity Act 2005* (MCA 2005) of England and Wales and the CRPD. Ministry of Health, Labour, and Welfare of Japan, *Guidelines for Adult Guardians Based on Supported Decision-Making* (Web Page, October 2020) 3. (in Japanese) *; There is a view that ‘presumption of patient’s will’ in health care system be recognized by a civil law scholar. Shoichi Ogano, ‘Development of Adult Guardianship Systems in Japan’ (2013) 50(5) *Nihon Ronen Igakkai Zasshi (Journal of the Japan Geriatrics Society)* 638–640, 640. (in Japanese) *

management (Part 7—Power of Attorney Appointments, *Power of Attorney Act 2014*). Also, on behalf of the principal, the tribunals may appoint the supportive guardian and/or supportive administrator, with appointment of an adult guardian as a last resort. Many people use enduring power of attorneys (EPAs). The Alzheimer Europe model comprises the six steps in the guardianship and SDM framework as mentioned before, which is similar to the Victorian model.¹⁰⁰³ Both Victorian and Alzheimer Europe models share a similar combined mechanism of SDM and guardianship. In the Victorian and Alzheimer Europe’s models, SDM is positioned as a ‘legal system’ that will in part replace substituted decision-making. In other words, SDM and guardianship are theoretically independent, and SDM is prioritized over guardianship.

The Japanese model applies SDM guidelines to change the way that adult guardians are encouraged to go about discharging their responsibilities. Yasushi Kamiyama states that there are two theoretical views on the relationship between the adult guardianship and SDM in Japan: one is that guardianship and SDM are independent, and the other is that they are interlinked.¹⁰⁰⁴ In the former view, SDM is regarded as a ‘legal system’ that will replace the adult guardianship system. In the latter view, SDM is regarded as a ‘support method’ for substituted decision-making. As far as the guidelines for adult guardians are concerned, SDM is regarded as a ‘support method’ to Article 858 (respect for the will of the adult ward and consideration for their personality) of the Civil Code. In other words, SDM as a support method is not theoretically independent but is subordinated to Article 858 of the Civil Code under the SDM guidelines.

¹⁰⁰³ Refers to ‘3.2. (1) 2000 Protection of Adults Convention and the Following Developments.’; From email correspondence of John Chesterman and the author on June 21, 2021.

¹⁰⁰⁴ Yasushi Kamiyama, ‘Recent Policy Trends regarding Supported Decision-Making in Japan’ (2020) 72(4) [414] *The Doshisha Law Review* 445–467, 447–448. (in Japanese)

Non-Remuneration Policy

Another difference between the Victorian and Japanese models is that the Victorian model does not recognize remuneration for acting in SDM or guardianship except for cases involving Victorian State Trustees Ltd (STL) and other professional administrators (section 175, Victorian Act 2019).¹⁰⁰⁵ The Victorian model expects principals' supportive guardians and supportive administrators or guardians and administrators to be relatives, friends, or public advocates, but not legal/welfare practitioners receiving remuneration. This non-remuneration policy is established in the Victorian Act 1986 based on the Cocks Report 1982¹⁰⁰⁶ and has been applied to other jurisdictions over Australia. This principle is in order to avoid the conflict of interest associated with payment.¹⁰⁰⁷ The Victorian model recognizes that principals' supportive guardians and supportive administrators or guardians and administrators are 'supporters for decision-making' or 'decision-makers' of the principals, there does not often arise a situation where they need to have specialist skills.¹⁰⁰⁸ Instead, principals' supportive guardians and supportive administrators or guardians and administrators must have sufficient skills to seek advice or arrange care by specialists. Staff in the Office of the Public Advocate (OPA) are people with a social welfare background, such as a social worker, lawyer, or nurse etc., which assists supportive guardians or guardians to know where to seek such advice and how to evaluate that advice in making their decisions.

The Japanese model largely relies on remuneration for acting guardians, which is decided by the family courts case by case and paid by the principal. In fact, the ratio of non-relative guardian cases in

¹⁰⁰⁵ Refers to '4.3.4 (2) d. Non-Remuneration Policy.'

¹⁰⁰⁶ The Cocks Report 1982 is the final report made by the Victorian Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons headed by Errol Cocks. Victoria. Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons and Errol Cocks, *Report of The Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons* (Victorian State Government, 1982).

¹⁰⁰⁷ This view was addressed by Terry Carney in email correspondence on December 6, 2021.

¹⁰⁰⁸ From email correspondence of a VCAT member with the author on September 2, 2021.

December 2021 was approximately 80 per cent, with most non-relative guardians and legal/welfare practitioners receiving remuneration.¹⁰⁰⁹ The Alzheimer Europe model does not deal with remuneration, thus allowing for individual European countries. The issue of remuneration suggests the difference between the Victorian and Japanese models in ‘who will act as supporters or guardians and for what purpose.’ Namely, the Victorian model adopts relatives, friends, or public advocates or STL/professional administrators as supporters for decision-making or decision-makers of the principals. The Japanese model adopts mainly legal/welfare practitioners as adult guardians receiving remuneration. Without remuneration, it is anticipated that legal/welfare practitioners will not accept guardianship in Japan.

c. Discussion

By examining the three types of models, we have reviewed how countries go for a combination of guardianship and SDM to deal with adults with insufficient mental capacity. The comparison of the three types of models is summarized by item in Table 11. It can be understood that these three types of models imply a possible legislative development of the combined model of guardianship and SDM laws and policies. There is a diversity of laws and policies in countries or reports that share the same values of the CRPD and democratic procedures. The difference between the Japanese model and the Victorian and Alzheimer Europe’s models can be assumed to be based on how they prioritize the requirements of Article 12 of the CRPD, including an understanding whether or not the current guardianship law meets these requirements, and how seriously they understand the necessity to legislate or reform law. In fact, the Basic Plan, Japan’s adult guardianship promotion policy, does not refer to the CRPD.¹⁰¹⁰ In contrast, the Alzheimer Europe 2020 report agrees with the CRPD’s general

¹⁰⁰⁹ Refers to the Courts of Japan, *The Annual Overview of Adult Guardianship Cases in 2021* (Web Page, March 2022) (in Japanese) * <https://www.courts.go.jp/toukei_siryou/siryo/kouken/index.html>.

¹⁰¹⁰ Japan Federation of Bar Associations, ‘Written Opinion on Items to be Included in the Draft Basic Plan for Promoting the Adult Guardianship System’ (Web Page, January 19, 2017) 1. <https://www.nichibenren.or.jp/library/ja/opinion/report/data/2017/opinion_170119_2.pdf>.

principles of equality and non-discrimination.¹⁰¹¹ The ALRC Report 124, 2014, which demonstrates the basic principles of guardianship and supported decision-making in Australia, is based on the Terms of Reference referring to the CRPD.¹⁰¹²

As mentioned in Chapter 1,¹⁰¹³ the Ministry of Justice of Japan expresses the view that Japan's adult guardianship system does not conflict with Article 12 of the CRPD. Based on this understanding, the deliberations of the Expert Commission are being carried out to stay status quo of the adult guardianship laws. It appears that the understanding of the Ministry of Justice of Japan makes the Japanese model less developed in legislation or the relevant law reform. It is therefore anticipated that the UN Committee review of the Japan Report in 2022 or later will trigger a fundamental review of the Japanese model.¹⁰¹⁴ It can be concluded that the Japanese model has room for legislative improvements, particularly due to the SDM guidelines without enforcement nor judicial norms for dispute solutions, comparing with the Victorian and Alzheimer Europe's models.

Table 11: Comparisons of the Three Types of Models

	<i>Japanese Model</i>	<i>Alzheimer Europe Model</i>	<i>Victorian Model</i>
<i>Basis of the statutory guardianship law, policy, or report</i>	The Civil Code, Promotion Act, and the Basic Plan	Alzheimer Europe 2020 Report	Victorian Act 2019 (incorporating supported decision-making)
<i>Status of the statutory guardianship</i>	To promote guardianship for advocacy support	Guardianship as a last resort	Guardianship as a last resort
<i>Principles and Values</i>	Values of Promotion Act: Self-determination, personal protection, normalization	Non-discrimination, respect for autonomy, and values of the CRPD	National Decision-Making Principles in the ALRC Report 124

¹⁰¹¹ Refers to '5.2.2 (1) b. Alzheimer Europe Model.'

¹⁰¹² ALRC, ALRC Report 124, 2014. 5.

¹⁰¹³ Refers to '1.2.1 (2) The CRPD and the General Comment No.1.'

¹⁰¹⁴ Osamu Nagase, 'The First Review of the Japan Report and Parallel Reports' (2021) 461 *New Normalization* (in Japanese) * <<https://www.dinf.ne.jp/d/2/424.html>>.

Capacity	Capacity doctrine (Civil Code), presumption of decision-making capacity (SDM guidelines)	Presumption of decision-making capacity	Presumption of decision-making capacity
Guardians	Legal/welfare practitioners, welfare corporations/NPOs, or relatives	-----	Guardians: Relatives, friends, or public advocates Administrators: Relatives, friends, or Victorian STL and other professionals
Remuneration	The family courts decide yearly remuneration ex. post case by case	-----	No remuneration except for cases involving Victorian STL and other professional administrators
Lasting or Enduring Power of Attorney or Voluntary guardianship	Voluntary Guardianship System based on the <i>Act on Voluntary Guardianship Contract 1999</i>	LPA/EPA based on an individual European state law or common law	EPA based on the <i>Power of Attorney Act 2014</i>
Basis of SDM law, policy, or report	Guidelines, the welfare laws, or Article 858 of the Civil Code	Alzheimer Europe 2020 Report	Victorian Act 2019 (incorporating supported decision-making)
The purpose of SDM	To respect the will and preferences of a person	To respect the will and preferences of a person	To promote social and personal wellbeing of a person
The Role of SDM	A support method based on the welfare laws or Article 858 of the Civil Code	A legal system that will in part replace substituted decision-making	A legal system that will in part replace substituted decision-making
Supporter	Nursing-home manager, social worker, and adult guardian	Any supporter appointed by the mutual agreement	Supportive guardian and/or supportive administrator appointed by the tribunals or by the mutual agreement, supportive attorney appointed by the mutual agreement

Source: Made by the author

5.2.3. A Preliminary Idea of Supported Decision-Making Legislation

(1) Main Contents of SDM Law

a. Scope of SDM Law: legal acts and its associated non-legal acts for personal protection

In order to explore the discussion for Japan's adult support and protection, how SDM will be placed and framed in Japan's legislation must be clarified in the middle to long-term. SDM will be potentially an important legal instrument as an alternative to the adult guardianship system to protect

the human rights of these people.¹⁰¹⁵ On the same time, SDM must be secured by safeguards because SDM might be involved in undue influence due to its characteristic.¹⁰¹⁶ Given the existence of many vulnerable adults, including elderly people with dementia, and some challenges to indefinitely maintain SDM guidelines as discussed in Chapter 1,¹⁰¹⁷ it is time the Government of Japan considered legislation on SDM that would respond to the needs of principals.¹⁰¹⁸ After reviewing process of the SDM guidelines as a soft law, it will be possible for Japan to legislate SDM to match the advanced model, such as the Victorian model or Alzheimer Europe model.

With regard to the scope of SDM law, it specifically focuses on SDM for legal acts of the principal that will have a significant impact on the principal (i.e., decision on the principal's residence, sale of the principal's assets, and gifts and expenses of the principal to a third party) and its associated non-legal activities.¹⁰¹⁹ Therefore, it can be assumed that the scope of SDM legislation at the initial stage will be narrowed to the legal acts and its associated non-legal activities, as the SDM guidelines for adult guardians define. In addition, the scope of SDM legislation at the initial stage will be further narrowed to the 'personal protection' only (i.e., excluding property management) in an agreement between the principal and the supporter. This is because the remaining area, including property

¹⁰¹⁵ Nina A. Kohn, Jeremy A. Blumenthal, and Amy T. Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2013) 117(4) *Pennsylvania State Law Review* 1111, 1157; Thomas F. Coleman, 'Supported Decision-Making: My Transformation from a Curious Skeptic to an Enthusiastic Advocate' (Online, 2017) <<https://tomcoleman.us/publications/sdm-essay-2017.pdf>>.

¹⁰¹⁶ Yasushi Kamiyama states that in the process of narrowing down the options presented to the principal, there should be 'some kind of supporter-inducing element (paternalism element)' potentially available, regardless of whether it is intentional or not. Yasushi Kamiyama, 'Recent Policy Trends regarding Supported Decision-Making in Japan' (2020) 72(4) [414] *The Doshisha Law Review* 445–467, 460–463. (in Japanese)

¹⁰¹⁷ Refers to '1.2.2 (4) Developments and Challenges of the SDM Guidelines.'

¹⁰¹⁸ Japan Federation of Bar Associations published the 2015 Declaration to call for the establishment of a comprehensive SDM system, including legislation. Japan Federation of Bar Associations, *Declaration Calling for the Establishment of a Comprehensive System for Supported Decision-Making* (Web Page, October 2, 2015) (in Japanese) * <https://www.nichibenren.or.jp/document/civil_liberties/year/2015/2015_1.html>.

¹⁰¹⁹ The scope of SDM in this dissertation is the same as stipulated in the SDM guidelines for adult guardians.

management and welfare activities, needs further consideration to legislate and maintain the guidelines on them.¹⁰²⁰ With an assumption that the scope of SDM legislation is narrowed to the legal acts and its associated non-legal activities, and is further narrowed to the personal protection, one preliminary idea of SDM legislation framework will be proposed below.

b. Legal Status of SDM Law

SDM in a Specific Law

The legal status of SDM will be regulated by either a specific law or the Civil Code, according to the relevant legislation policy in the National Diet of Japan. In the process of legislation of SDM, it will be feasible to have a combination of the law (i.e., a specific law or the Civil Code) and the guidelines to regulate SDM. Discussion goes on in this dissertation with the assumption that the Civil Code and relevant laws concerning the adult guardianship system will stay status quo, as is set out in Introduction.¹⁰²¹ Therefore, an idea of a specific law regulating SDM will be mentioned.

SDM can be based on a mutual agreement between a principal and a supporter.¹⁰²² In this scheme, a principal needs the capacity to understand the contents of the agreement in order to conclude it. An SDM agreement between the principal and the supporter given the power of support for supported decision-making is prepared notarized contract by a notary public.¹⁰²³ An adult may

¹⁰²⁰ To secure protection of the principal from undue influence risk, safeguarding measures must be established by law attached with a judicial or public supervision for SDM activities in property management.

¹⁰²¹ Refers to ‘2 (1) Methodology’ in the ‘Introduction.’

¹⁰²² Refers to ‘3.2 (5) U.S. Supported Decision-Making Acts.’ *TITLE 16, Health and Safety, Individuals with Disabilities, CHAPTER 94A Supported Decision-Making* in the State of Delaware.

¹⁰²³ A notary public system in Japan has a uniqueness. A notary is appointed by the Ministry of Justice of Japan under Article 11 of the *Notary Act* (Act No. 53 of 1908) among qualified legal professions who have more than 30 years of work experience under Article 13. The notary examinations under Article 12 of the law are repealed by Supplementary Provisions 2, *Notary Personnel Capacity Rules* (the Ministry of Legal Affairs Ordinance No. 10 of 1949) and the number of notary personnel capacity is fixed in the attached Table of the Rules: 688. The actual number of appointments is less than the notary personnel capacity. (In contrast, there were 9,355 notaries in Germany even as of 2004.) Notaries, shall be subject

participate in an SDM agreement with the relevant conditions that are separately determined. A notary public will assess the capacity of the principal as in voluntary guardianship. Discussions concerning the effective capacity in which SDM could be legally accepted will be carefully examined after accumulating empirical data on site.

Consequently, this may narrow the scope of the principals who can participate in the SDM scheme due to a capacity assessment by the notary public. People with mild cognitive impairment (MCI) are assumed to be potential users of SDM law.¹⁰²⁴ Nevertheless, at an initial stage, it could be acceptable to carefully implement and supervise practice based on an SDM. With the agreement, supporters can assist principals to make decisions and communicate these decisions on behalf of the principals, but this must not be called substituted decision-making for the principals.

One of key issues of SDM is finding the right supporter. It will be ideal if the supporter is one who knows the principal well, can properly support the principal in line with the agreement, and will have no conflict of interests in dealing with the principal, such as relatives or close friends. A pair of

to the supervision of the Minister of Justice of Japan and affiliated with each Legal Affairs Bureau, are treated as quasi-civil servants. Notaries are not in a position directly indemnify them for business mistakes. In the event of a misconduct that causes significant damage to the user, the *State Redress Act* (Act No. 125 of 1947) provides a way for the user to claim damages against the state. In the event of a misconduct of notary that causes great damage to the user, the Ministry of Justice of Japan can request the notary public suspension of business or resignation (Articles 79, 80, and 81). Japan Federation of Bar Associations, *German Notary System Survey Report* (Japan Federation of Bar Associations, Consumer Affairs Committee, 2004). (in Japanese) *

¹⁰²⁴ Out of 36.17 million elderly people in September 2020, 6 million had dementia and 4 million had MCI. By 2025, the population of elderly people is expected to rise to 36.57 million, and 7.30 million of those are forecast to have dementia and another 5.89 million are expected to be afflicted with MCI. Some of the elderly people with MCI will develop dementia. Cabinet Office of Japan, *Estimating the Number of the Elderly with Dementia (Figure 1–2–11), Annual Report on the Ageing Society FY 2018* (Web Page, 2019) (in Japanese) * <https://www8.cao.go.jp/kourei/whitepaper/w-2017/html/gaiyou/s1_2_3.html>.

law and welfare practitioners as co-supporters would be preferable if they trust each other.¹⁰²⁵ This combination will be a type of support to the principal, sharing knowledge and skill in a good balance, although the remuneration becomes double. This SDM scheme will not require any judicial involvement of the courts but will require public involvement through core agencies. It proposes to provide support and protection for vulnerable¹⁰²⁶ adults whose SDM agreement is registered at a core agency at the principal's approval. The SDM law is envisaged to establish a mechanism that provides a certain level of support and protection for the principal and the principal's stakeholders, even in an informal arrangement where the principal is supported by relatives or a nursing-home manager.

Target of SDM Law

For the basic principles, the target of SDM is defined as vulnerable adults who do not need an adult guardian or other substitute decision-maker for their activities, but who will benefit from SDM. SDM will thus be in place mainly for people with MCI who may not need the adult guardianship system and can understand the contract. Therefore, SDM and the adult guardianship system can theoretically co-exist without any legal conflict between them.¹⁰²⁷ SDM should include the implications from Australia with respect to its purpose and basic principles. The Victorian State Act 2019, for example, has the purpose to '[p]romote the personal and social wellbeing of a person' (section

¹⁰²⁵ For example, some members of the Elder Law Society Japan excise the guardianship with a combination of legal/welfare practitioners in Yokohama, Japan. Elder Law Society Japan (Web Page, n/a) <<https://elderlawjapan.ynu.ac.jp/>>.

¹⁰²⁶ 'Vulnerable' means a state in which one is at risk in terms of social and physical conditions, and to require support and protection from a third party in daily life. This includes not only adults with insufficient mental capacity, such as the elderly with dementia, but also those who cannot manage their daily lives by themselves due to physical disabilities, brain dysfunction, alcoholism, drug addiction, and the likes. This is because SDM is based on the vulnerability approach as addressed in '2.3.2 Vulnerability Approach.'

¹⁰²⁷ Refers to '3.2 (5) U.S. Supported Decision-Making Acts.' Delaware State Act (2016) provides the legal status of 'supported decision-making agreements' for the target of SDM, namely 'adults who would benefit from decision-making assistance.' If the capacity of the principal becomes insufficient, either the enduring power of attorney (EPA) or the adult guardianship system will prevail.

4) and a basic principle that is based on a '[p]resumption of decision-making capacity' (section 5). 'An adult has the capacity to make decisions in relation to a matter if the adult can fulfill some specific conditions that are separately determined.' 'Adults are presumed to have decision-making capacity unless there is evidence to the contrary' (section 5(2)).

c. Characteristics of SDM Law

Considering the characteristics of the relevant legal devices, such as welfare assistance, SDM, and the adult guardianship system, people's understanding of legal devices and their participation in the policy will be essential as a consumer choice. It can be assumed that SDM has no legal enforcement but provides preferential benefits to people in the community, asking for their participation in the policy through their own initiatives. In other words, SDM needs to be a legal device for people in the community to understand its purpose, methods, and legal effects in accordance with the SDM agreement. In this sense, SDM legislation must be a part of a collaboration agreement type of law between people in the community and the municipality.¹⁰²⁸ The municipality can include such private areas under its administrative control if the people consent. Therefore, it can be assumed that the individualism or privacy may voluntarily permit some social norms by law in exchange for the user's consent.¹⁰²⁹ Bearing such a legal function in individualism or privacy area in mind, SDM will be proposed to adapt to the diversity and changing environment of people in a super-aged society.

¹⁰²⁸ 'Collaboration' refers to '[a] collaborative effort to coordinate, plan and execute activities [in order] to achieve a common aim or goal by those who include two or more supporters (including professional and non-professional supporters) and sometimes clients belonging to different professions, institutions and disciplines.' (translated into English by the author) Masafumi Nakamura, Asuka Okada and Chizuko Fujita, 'Review on "Cooperation" and "Collaboration" in the Field of Clinical Psychology: Focusing on the Differences in the Definitions and Concepts' (2013) 7 *Journal of Graduate School of Human Science, Kagoshima Jyunshin University* 1, 13. (in Japanese) *; Madoka Miwa, 'The Concept of "Partnership" from a Legal Perspective' in Japanese (2015) 8 *Academia Social Sciences* 99, 114. (in Japanese) *

¹⁰²⁹ The relationship between a core agency and people in the community can be seen similarly in the Pacte Civil de Solidarité (PaCS) in France. The PaCS has established a 'give and take' relationship between couples in marriage in fact and the local government, making use of the PaCS in an area where privacy and individualism should dominate. Michihiro

d. Summary: Main Contents of SDM Law

The main contents of the SDM law that have been discussed are summarized below.¹⁰³⁰

- (i) The core agency, regardless of whether it is a public or private entity, should be established in the community as directed by the Basic Plan. It should be responsible for multiple functions stipulated in the Basic Plan, including confidentiality involving individual information and its privacy. Some public functions may be delegated to the core agency based on ordinances or regulations created by the relevant local parliament or government.
- (ii) The scope of SDM legislation at the initial stage will be narrowed to the legal acts and its associated non-legal activities, as the SDM guidelines for adult guardians define, and be further narrowed to the personal protection only (i.e., excluding property management) in an agreement between the principal and the supporter. This is because the remaining area, including property management and welfare activities, needs further consideration to legislate and maintain the guidelines on them.
- (iii) To simplify this discussion, an idea of a specific law regulating SDM will be mentioned. In such a case, SDM can be based on a mutual agreement between a principal and a supporter.¹⁰³¹ In this scheme, a principal needs the capacity to understand the contents of the agreement in order to conclude it.

Tanaka, 'Commentary on the French Civil Code: Family Law (5)' (2012) 62(4) *Journal of Law and Politics* 173, 195. (in Japanese) *; Noriko Sato, 'Adoption du Pacs et Transformation de la Relation Intime Comme Lutte Symbolique' (Adoption of the PaCS and Transformation of the Intimate Relationship as a Symbolic Struggle) (2004) 112 *Philosophy* 1, 12. (in Japanese) *

¹⁰³⁰ Refers to the 'Draft Bill on Supported Decision-Making for Vulnerable Adults' in Japanese and English in the previously published article by the author: Yukio Sakurai, 'An Essay on the Adult Protection System in Japan: Referring to Delaware State Law and the Revision of European Law' (2018) 8 *Quarterly Comparative Guardianship Law* 3, 21. (in Japanese)

¹⁰³¹ Refers to '2.2 (5) U.S. Supported Decision-Making Acts.' *TITLE 16, Health and Safety, Individuals with Disabilities, CHAPTER 94A Supported Decision-Making* in the State of Delaware.

- (iv) Principals and supporters in the community are recommended to conclude a supported decision-making agreement prepared by a notary public and register it at the core agency. Stakeholders, including principals and supporters, may consult with the core agency and the core agency may give advice, forming a local council meeting comprising relevant local experts if necessary.¹⁰³²
- (v) It is recommended that people in the community register any informal arrangement with the core agency. Stakeholders, including principals and their relatives or nursing-home managers, may consult with the core agency and the core agency may give advice accordingly.
- (vi) The target of SDM is defined as vulnerable adults who do not need an adult guardian or other substitute decision-maker for their activities, but who will benefit from SDM. SDM and the adult guardianship system can theoretically co-exist without any legal conflict between them.
- (vii) SDM legislation must be a part of a collaboration agreement type of law between people in the community and the municipality, based on people's voluntary participation in the policy. It can be assumed that the individualism or privacy may voluntarily permit some social norms by law in exchange for the user's consent.

(2) Issues of SDM Legislation

Five issues need to be reformed for empowering SDM legislation in the future.

First, the roles of the core agency will be extended to 'monitoring and supervision' in addition to providing 'consultation and advice' if the municipality delegates any specific authority by an ordinance or a regulation. An ordinance or a regulation created by the local parliament or municipality

¹⁰³² Regardless of before or after the commencement of adult guardianship, the practitioners' institutions and related associations in each community should cooperate each other so that legal and welfare practitioners' institutions and related associations can provide necessary support to the 'team.' This is a local committee that promotes the system in which each practitioners' institution and each related association cooperate voluntarily. For the functions and roles of the 'regional collaboration network' to be properly demonstrated and developed, local parties, such as practitioners' institutions, should collaborate and formulate a place for series of discussions regarding the examination, coordination, and resolution of community issues. The core agency serves as the secretariat and are responsible for monitoring the community activities. Ministry of Health, Labour, and Welfare of Japan, *Chapter 2: Roles of Core Agencies* (Web Page, n/a) (in Japanese) * 15.

would be an important justification to empower the role of the core agency based on the consensus of the local people in the jurisdiction. The monitoring and supervisory function of the core agency is expected to prevent fraudulent acts by supporters and adult guardians in the jurisdiction, and to effectively respond to the unlikely event of fraudulent acts. In such a case, the power of the core agency will be expanded to some extent, which may turn to restrict freedom of community people. Thus, the governance of the core agency must be improved to ensure accountability, transparency, and social responsibilities for the stakeholders.¹⁰³³ Any performance inspection by a third party, such as ad hoc auditing and community monitoring, should be implemented by the municipality or its delegates.

Second, an idea of establishment of a public guardian agency by a prefecture is worth considering. A public guardian agency established by a prefecture should have local offices to delegate municipalities to run core agencies. These core agencies are public-run entities to ensure accountability, transparency, and a sense of social responsibilities on the part of stakeholders. A public guardian agency and public-run core agencies will directly take care of principles, as far as no conflict of interest is recognized, when the family courts nominate as an adult guardian upon a municipal mayor's petition for the adult guardianship system. This style of management would empower community support for vulnerable adults and contribute to expand and strengthen core agency network particularly in large cities where difficult cases, including abuse, are frequently found.

Third, when SDM is legislated to cover legal acts and their associated non-legal activities for personal protection only, the societal impacts of the legislation will not be that great. Theoretically, empowering the societal influence at the next stage of SDM legislation could expand the scope of support and protection for vulnerable adults. For example, if the scope of SDM legislation covers the whole legal activities, including property management, then further consideration for safeguarding the principal's interests will be required. Safeguarding measures may include regulations of supporter's

¹⁰³³ Terry Carney et al, 'Paternalism to Empowerment: All in the Eye of the Beholder?' (Online, 2021) *Disability and Society* 1–21, 2–3. <<https://doi.org/10.1080/09687599.2021.1941781>>.

fiduciary obligation, and code of practice to give guidance to the supporter's procedures in detail.¹⁰³⁴ Any performance inspection by a third party, such as ad hoc auditing and community monitoring, should be implemented by the municipality or its delegates. The importance would be practices on site in the SDM pilot projects where issues of SDM for property management are clarified by examining empirical data. The SDM pilot project, including that of Toyota city, must be promoted.¹⁰³⁵

Fourth, the Ministry of Health, Labour, and Welfare of Japan inaugurated online SDM trainings in December 2020 to provide officers and staff at municipalities and core agencies with basic knowledge and skills about SDM. Such trainings are important for sharing knowledge and skills with relevant parties, including stakeholders such as medical care, aged care, financial institutions, etc., and improving the level of understanding of SDM throughout Japan. As mentioned in Chapter 4,¹⁰³⁶ 'supported decision-making counselors' will be trained through a national qualification system because day-to-day assistance from knowledgeable and skilled professionals will be important to cope with various types of cases.¹⁰³⁷ The SDM training programs should be improved to offer necessary skills and knowledge at a higher level based on the analysis of data on practice at the SDM pilot projects.¹⁰³⁸

¹⁰³⁴ The *Mental Capacity Act 2005* has the 'Code of Practice' giving guidance for decision in detail under the MCA 2005. The Code of Practice can be updated flexibly to meet the needs of people and show the best practice. GOV. UK, Code of Practice (Web Page, October 14, 2020) <<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>>.

¹⁰³⁵ Toyota City (Aichi prefecture), 'The Promotion of Advocacy Support and Supported Decision-Making in the Toyota City' (Web Page, June 2, 2021) (in Japanese) <<https://www.mhlw.go.jp/content/12000000/000790684.pdf>>.

¹⁰³⁶ Refers to '4.5.1 (1) Australian Adult Support and Protection Legislation.'

¹⁰³⁷ One of the impressive things in supported decision-making facilitation training program (eight days course), conducted by Cher Nicholson (ASSET SA) in Adelaide (South Australia) on February 23 to March 4, 2016, was that professional practitioners voluntarily taught social workers and helpers on site in the community. That human relationship is essential for social workers to maintain the quality of advocacy activities.

¹⁰³⁸ The commissioned research on how to organize the decision-making support system, focusing on information technology: The Japan Research Institute Limited, *Research Report on Contact-Building by Using Information Technology to Support Decision-Making of Older People* (Commissioned by the Ministry of Health, Labour, and Welfare of Japan in 2020) (Web Page, April 9, 2021) (in Japanese) * <<https://www.jri.co.jp/page.jsp?id=38656>>.

For a future review, the SDM law should be re-examined, including the legal framework and methods of SDM, after three years of the enforcement of the law. The re-examination will provide an opportunity to improve the legal framework and practice of SDM with the policymakers, lawmakers, and practitioners in due course.

Fifth, it would be decided in the future whether SDM will be incorporated into the Civil Code or the other law of Japan. In such a case, judicial involvement of the family courts or their alternative is perhaps required to appoint supporters. A question then will be raised whether or not the family courts are suitable to appoint supporters to vulnerable adults for personal protection, considering that personal protection includes welfare of support that are not familiar with the family courts. The tribunal system and its members' background in the State of Victoria (Australia) would be of reference.¹⁰³⁹ Reorganization of the family courts and their associated institutions or reform of judicial institution system is required to deal with the SDM business, including appointment, monitoring and supervision, and dismissal of supporters. Amendments to the Civil Code at the legislative debates in the National Diet of Japan after the full deliberations by the Legislative Council as ordered by the Minister of Justice of Japan are necessary. The project may bring a possibility, as a legislative policy, to transform adult guardianship system to adult protection law, as Teruaki Tayama suggests in Chapter 1,¹⁰⁴⁰ or to stay status quo based on the capacity doctrine. In any case, the legal status of 'decision-making capacity,' which comes from the common law and stays at the SDM guidelines, and the capacity doctrine, which stays in the Civil Code of Japan, will be issues. Namely, it must be deliberated on how to accommodate the legal concept 'decision-making capacity' in the Civil Code where the capacity doctrine stays as a basic principle.

¹⁰³⁹ In the State of Victoria (Australia), the tribunal members with practitioners' background issue the supportive guardian and supportive administrator orders. This mechanism based on practitioners' experience leads to an administrative arrangement rather than a judicial decision.

¹⁰⁴⁰ Refers to '1.1.1 (1) g. Future Developments.'

(3) Review of the second term Basic Plan and the Study Group

The second term Basic Plan is expected to expand the scope of deliberations of the Expert Commission under the concept of ‘advocacy support.’ Based on this understanding, the issues of the Expert Commission deliberations will be examined. First, the direction to make the Basic Plan that ‘fits the users’ perspectives’ has been reiterated in the deliberations. In order to formulate an effective Basic Plan that ‘fits the users’ perspectives,’ it is important to hear the opinions of adults with insufficient mental capacity and their relevant institutions and ensure their opinions to be reflected in the Basic Plan.¹⁰⁴¹ Of those with insufficient mental capacities, elderly people with dementia have the largest in number, but it is practically hard to grasp their actual situations and their opinions. The phrase ‘*Nothing about us without us*,’ emphasizing autonomy and right to self-determination of people with disability, is a principle embodied in the CRPD. With this phrase, it would be an idea for the Ministry of Health, Labour, and Welfare of Japan to conduct nationwide research of elderly people with dementia and their supporters.¹⁰⁴² Such large-scale research survey and its analysis would give some suggestions on what to better focus the discussion.

Second, it is essential to consider the legal relationship between the adult guardianship system and Article 12 (equal recognition before the law) of the CRPD. Developed countries, which understand the necessity to legislate or reform law to meet the requirements of the CRPD, encourage the use of supported decision-making as an alternative to the adult guardianship system and makes policies to

¹⁰⁴¹ Fumie Imura points out to the importance of listening to the ‘voices’ of those who have difficulties in making autonomous decisions and suggests reforming the system into one that respects the subjective efforts of its users and tries to involve them in the decision-making process. Fumie Imura, ‘Reviewing the Adult Guardianship System from the Standpoint of its Users’ (2016) 4 *Bulletin of Rikkyo University Community Welfare Research Institute* 149, 169.

¹⁰⁴² There is a questionnaire survey report of 2,000 relatives who support the elderly with dementia. According to this survey, 6.4 per cent respondents are the users of the adult guardianship system and 55.4 per cent respondents answer that, “[they] know about the adult guardianship system, but [they] do not want to use it.” Mizuho Information & Research Institute, Inc., ‘Survey Results on Management Support of Deposits and Savings, Property for People with Dementia’ (Web Page, May 19, 2017) (in Japanese) * <<https://www.mizuho-ir.co.jp/company/release/2017/ninchisho0519.html>>.

reduce the use of the adult guardianship, positioning it as a last resort. The attachment resolutions of the National Diet of Japan adopted in 2016 and 2019¹⁰⁴³ require the Government of Japan to implement policies that meet the requirements of Article 12 of the CRPD. The review of the Japan Report by the UN CRPD Committee is under way in 2022.¹⁰⁴⁴ The Expert Commission is requested to deliberate on the issues to be raised by the UN CRPD Committee concerning the adult guardianship system and Article 12 of the CRPD and its relevant issues together with the Policy Committee.¹⁰⁴⁵ It is recommended to consider the legal status and the issues of supported decision-making, based on the international consensus views on supported decision-making and the CRPD.¹⁰⁴⁶

The Ministry of Justice of Japan delegated the study group (chair Akio Yamanome) to deliberate on the ideal adult guardianship system on June 7, 2022.¹⁰⁴⁷ This study group was formed based on the policy of ‘reviewing the adult guardianship system’ mentioned in the second term Basic Plan. This implies that the Ministry of Justice of Japan is considering amendments to the Civil Code and relevant

¹⁰⁴³ Refers to the Attachment Resolutions in 2016 and 2019. House of the Councillors, *Attachment Resolutions* (Web Page, April 5, 2016) (in Japanese) *; House of the Councillors, the National Diet of Japan, *Attachment Resolutions* (Web Page, June 6, 2019). (in Japanese) *

¹⁰⁴⁴ The review session was held by the UN CRPD Committee (Geneva) on August 22 and 23, 2022 and the UN report would be issued later.

¹⁰⁴⁵ The Policy Committee submitted their updated observation report to the UN Committee before the Japan report review in August 2022, including their remarks toward Article 12, the CRPD. Cabinet Office of Japan, *Policy Committee* (Web Page, 66th Session Survey No. 6, June 14, 2022) <https://www8.cao.go.jp/shougai/suishin/seisaku_iinkai/index.html>.

¹⁰⁴⁶ Emiko Kiguchi states that the legal interpretation of supported decision-making has been divided into these two i.e., ‘supported decision-making as an alternative to the adult guardianship system’ and ‘decision-making support from the perspective of operating the adult guardianship system.’ The idea of community-based welfare policy has not been unified, which cause confusion on site. Emiko Kiguchi, ‘Trends in Domestic Debates over Decision Support’ (2017) 9 *Welfare and Social Development Research* 5, 12.

¹⁰⁴⁷ Refers to the Japan Institute of Business Law, *The Study Group on the Ideal Adult Guardianship System* (Web Page, 2022) (in Japanese) <<https://www.shojihomu.or.jp/kenkyuu/seinenkoukenseido>>.

laws related to the adult guardianship system later.¹⁰⁴⁸ Some comments are addressed to the study in the adult support and protection context, acknowledging that amendments to the Civil Code is out of the scope of this dissertation.

First, the study group should deliberate on the essential points of discussion related to the adult guardianship system. As for future developments of the adult guardianship system, there are two different opinions of civil law scholars: one opinion is to expect the progress of the guardianship promotion project initiated by the Government of Japan and the other opinion is to consider transforming the adult guardianship system into a generous [adult protection] system with an emphasis on social welfare measures.¹⁰⁴⁹ In the second term Basic Plan, these two opinions have become closer and almost synchronized into one direction through five-year deliberations of the experts under the concept of advocacy support that demonstrates ‘comprehensive support measures including adult guardianship system.’¹⁰⁵⁰ To clarify the policy direction easy to understand for people, it is recommended that the Government of Japan should promote transforming the adult guardianship system into the adult support and protection law.

Second, the study group should deliberate on the issues from broader and the long-term perspective. Namely, one is to clarify what roles the adult guardianship system will play in legal advocacy to comply with the requirements of the CRPD, including the recommendations to be issued by the UN CRPD Committee later. This discussion includes the legal relationship between the capacity doctrine and the notion of decision-making capacity. The other is to consider how the Ministry of

¹⁰⁴⁸ This is a preliminary study by researchers, practitioners, and disability associations for law reform. Amendments to the Civil Code at the legislative debates in the National Diet of Japan after the full deliberations by the Legislative Council as ordered by the Minister of Justice of Japan are necessary. The recent news reports possible amendments to the Civil Code in FY2026 (*Yahoo News*, August 12, 2022.).

¹⁰⁴⁹ Refers to ‘1.1.1 (1) g. Future Developments.’

¹⁰⁵⁰ Refers to the Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System* (Web Page, 2022) 4 (in Japanese)

<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html>.

Justice, which oversees legislative policy of the Civil Code and relevant laws, will coproduce the legislative policy with the Ministry of Health, Labour, and Welfare, which is charge of the second term Basic Plan.¹⁰⁵¹ This discussion includes how advocacy support is organized in community support, including welfare and elder abuse prevention measures.

Based on these two essential points of discussion, further deliberations on what measures would be introduced and improved in the adult guardianship system should be conducted, such as an introduction of limited guardianship for a temporary use, replacement of the adult guardian requested by the principal, and remuneration policy.¹⁰⁵² These three measures are practical topics for operation in the short and middle term but cannot be said essential in the long term.

(4) Step-by-Step Approach

Legislation on the development of SDM may require the step-by-step approach addressed in Table 12. In these Options, Japan is positioned at ‘Option A–The current legal framework with an enhanced focus on SDM guidelines’ and is anticipated to proceed to ‘Option B–Functional approach to legal capacity, where some law and policy recognize the role of SDM in practice.’ It will be a challenge for Japan to jump from Option A to ‘Option C–Phased-in fully inclusive SDM in the guardianship and welfare laws to recognize the role of SDM’ because SDM is not a complete legal system and requires further review in practice. Namely, review of SDM guidelines based on practices and experiences in support is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards for risk of the principals.¹⁰⁵³

¹⁰⁵¹ Yasushi Kamiyama, ‘Memorandum on the Medium to Long-Term Issues of Adult Guardianship: Toward Revision of Adult Guardianship Law’ in Nobuhiro Oka et al (eds), *Development in the Civil Code and Trust Law in an Aged Society* (NIPPON HYORON SHA CO., LTD., 2022) (in Japanese) *

¹⁰⁵² Refers to the Japan Institute of Business Law, *The Study Group on the Ideal Adult Guardianship System* (Web Page, June 2022) <<https://www.shojihomu.or.jp/kenkyuu/seinenkoukenseido>>. (in Japanese) *

¹⁰⁵³ Refers to ‘1.2.2 (4) Developments and Challenges of the SDM Guidelines.’

Table 12: Step by Step Approach

<p>• Option A—The current legal framework with an enhanced focus on SDM guidelines:</p> <p>This will not change the capacity doctrine of the Civil Code, but will introduce SDM guidelines, information resources, and training to maximize provision of SDM to meet the requirements necessary for the exercise of legal capacity within the current framework of the welfare laws and the Civil Code. SDM guidelines for adult guardians suggest that the adult guardians should practice SDM with principals as a priority, only opting for substituted decision-making if SDM does not function.</p>
<p>• Option B—Functional approach to legal capacity, where some law and policy recognize the role of SDM in practice:</p> <p>This will establish consistent functional assessments for legal capacity, mainly for dementia tests, across main statutes in decision-making capacity and recognize SDM, making it possible for people to exercise legal capacity on that basis. Some laws, regulations, ordinances, policy and guidelines will be developed to support SDM implementation. Review of SDM guidelines based on practices and experiences in support is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards for risk of the principals.</p>
<p>• Option C—Phased-in fully inclusive SDM in the guardianship and welfare laws to recognize the role of SDM:</p> <p>A comprehensive approach to legally recognize SDM in a specific law or in the Civil Code, with supports as required, will be adopted. Policy, guidelines, training, and community support system will also be developed. The legal status of ‘decision-making capacity’ and the capacity doctrine in the Civil Code will be one of the issues to be deliberated on by the Legislative Council.</p>

Source: Made by the author¹⁰⁵⁴

The SDM guidelines as a soft law would be practical and ethical regulation on SDM at the initial stage because regulating SDM through a hard law might be unworkable when an SDM method has not yet been clearly fixed.¹⁰⁵⁵ This process would gradually formulate the social norms that may encourage the use of supported decision-making through guidelines and legislation, with the adult

¹⁰⁵⁴ These are created by the author, referring to the report: Michael Bach and Lana Kerzner, *Supported Decision Making: A Roadmap for Reform in Newfoundland & Labrador Final Report* (A Legal Capacity Research Report from IRIS — Institute for Research and Development on Inclusion and Society, 2020) 43–46.

¹⁰⁵⁵ Yukio Sakurai, ‘The Role of Soft Law in the Ageing Society of the Twenty-First Century’ (2018) 13(1) *The International Journal of Interdisciplinary Global Studies* 1–10, 7.

guardianship to be used only as a last resort. In such law system, supported decision-making may coexist with and complement the adult guardianship system, and both devices may prevent vulnerable adults from abuse. The legislative process and experiences in the State of Victoria (Australia), which took a decade to legislate the guardianship law that incorporates SDM on it, while practicing SDM projects in communities would be of reference to Japan. In particular, the process of accumulating empirical research on supported decision-making, which has been conducted by universities and NPOs in various parts of Australia since around 2010, forms a social consensus and reaches legislation.¹⁰⁵⁶ Bach and Kerzner state that ‘this re-balancing [of autonomy and safeguarding] will not be accomplished without substantial legislative and institutional reform in legal capacity law, adult protection law and mental health law.’¹⁰⁵⁷ Indeed, legislation or law reform is vital to pave a way forward for Japan’s adult support and protection.

5.3 The Idea of Adult Support and Protection in Japan

5.3.1 Illustration of Adult Support and Protection Legislation and Framework

(1) Adult Support and Protection Legislation

The legislation and policy framework of adult support and protection for vulnerable adults is summarized in Table 13. It is understood that an adult support and protection framework in Japan refers to a combination of laws and policies that comprise multi-laws, such as the adult guardianship system, supported decision-making, abuse prevention law, relevant policy measures for adults with insufficient

¹⁰⁵⁶ This is the reason Gooding and Carney address that Australia has adopted ‘a *reformist* and *incrementalist* reform approach to legal capacity, equality and disability,’ following global standard. Piers Michael Gooding and Terry Carney AO, ‘Australia: Lessons from a Reformist Path to Supported Decision-Making’ in Michael Bach and Nicolás Espejo Yaksic (eds), *Legal Capacity, Disability and Human Rights: Towards A Comprehensive Approach* (Supreme Court of Mexico, Human Rights Division, Online, 2021); Shigeaki Tanaka, *Contemporary Jurisprudence* (Yuhikaku Publishing Co., Ltd., 2011) 442. (in Japanese)

¹⁰⁵⁷ Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy, and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (The Report commissioned by The Law Commission of Ontario, 2010) 183.

mental capacity. The importance is that the framework of the laws and policies are explained with people in the community support centered by a core agency for consumer choice of vulnerable adults and are utilized as safety protection for vulnerable adults.

Table 13: Legislation and Policy of Adult Support and Protection

<p>First, there are five laws related to the adult guardianship system enacted in Japan.</p> <ul style="list-style-type: none"> ● <i>Act for the Partial Revision of the Civil Code, Act No. 149 of 1999.</i> ● <i>Act on Voluntary Guardianship Contract, Act No. 150 of 1999.</i> ● <i>Act on Coordination, Act No. 151 of 1999.</i> ● <i>Act of Guardianship Registration, Act No. 152 of 1999.</i> ● <i>Act on Promotion of the Adult Guardian System, Act No. 29 of 2016.</i> <p>Second, we have the SDM guidelines and an idea on SDM legislation.</p> <ul style="list-style-type: none"> ● The Guidelines for Supported Decision-Making for Nursing-Home Managers, Managers for the Elderly with Dementia, and Adult Guardians, which will be unified into single guidelines. ● One Preliminary Idea on SDM Legislation. <p>Third, we have two laws related to elder abuse and abuse of people with disabilities.</p> <ul style="list-style-type: none"> ● <i>Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons and Other Related Matters, Act No. 124 of November 9, 2005.</i> ● <i>Act on the Prevention of Abuse of Persons with Disabilities and Support for Caregivers, Act No. 79 of June 24, 2011.</i> <p>Fourth, we have three public policy measures for adults with insufficient mental capacity.</p> <ul style="list-style-type: none"> ● ‘Subsidies for Expenses Related to Use of the Adult Guardianship System’ is granted by the local government. ● ‘Voluntary Watch Service’ conducted by volunteers based on an ordinance or local regulation. ● ‘Support Program for Self-Reliance in Daily Life’ conducted by the Councils of Social Welfare. <p>Fifth, relevant legal advocacy policies in the social security law.</p>

Source: Summarized by the Author

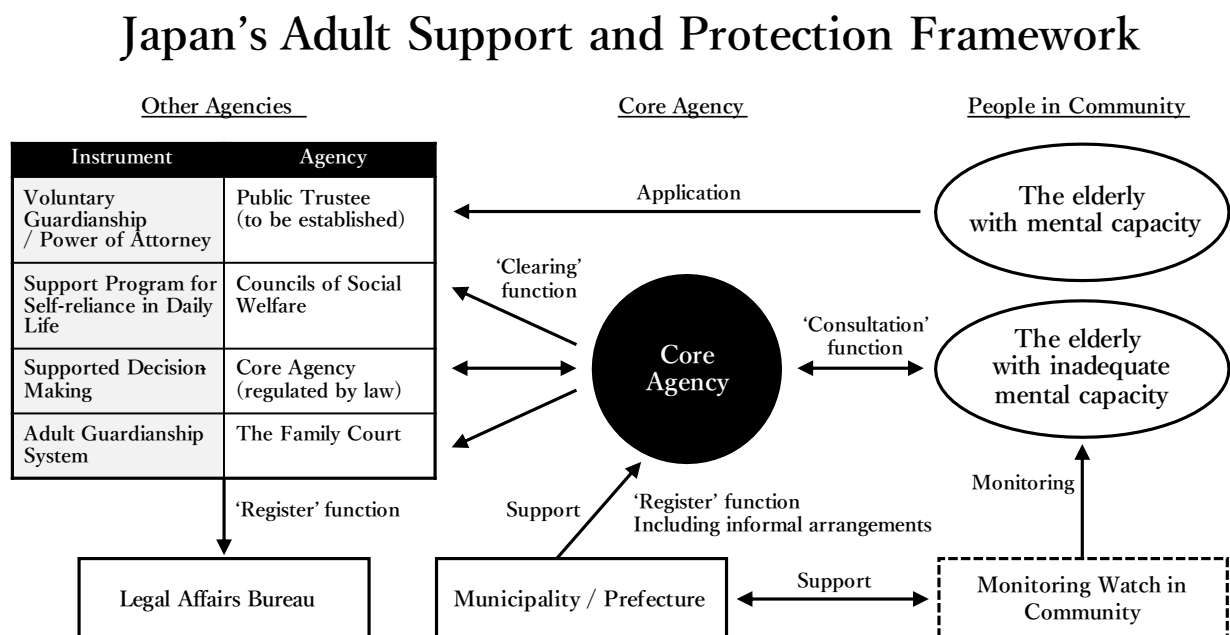
As a fundamental principle, it is essential that a comprehensive package of adult support and protection measures be provided so that people may make their own decisions (*principle of presumption of decision-making capacity*) when choosing whatever is suitable and necessary (*principle of necessity*). These measures should aim at protecting vulnerable adults by including the least restrictive measures (*the least restrictive alternative*) as much as possible, taking the will and preferences of the adults into consideration (*respect for an adult's will and preferences*). It is also

important to strike a balance between state responsibility and people's rights (*self-determination*). State responsibility, including police power, should exist if clear evidence-based procedures are provided and the human rights of people are not violated.

(2) Adult Support and Protection Framework

Figure 3 is an illustration of the relevant agencies and their interrelations with people in the community who apply to participate in adult support and protection and the core agency tasked with responding to these people. This is an attempt to show a conceptual illustration, simplifying the mechanism and interrelations between relevant agencies and people in community. Some comments on this illustration follow.

Figure 3: Illustration of the Japan's Adult Support and Protection Framework



Source: Made by the Author

First, a core agency will offer 'clearing' function in a community to sort the guardianship applicants before petitioning.¹⁰⁵⁸ This is an attempt to make a fair distribution of relevant people to

¹⁰⁵⁸ Refers to '5.2.1 (1) c. Additional Contributions of a Core Agency.'

less restrictive support measures that best suits the situation among the multi-optional laws and policies in community support and consequently reduce the number of the adult guardianship users rather than to promote the adult guardianship system. This policy may meet the international standard to use adult guardianship as a last resort and, instead, encourages the use of SDM or less restrictive support measures while reducing or not increasing the office and financial burden of the family courts.

Second, as illustrated in Figure 3, a public trustee is a public corporation, which is not available now in Japan but can be established by the government in the future, that takes care of financial management for some fees.¹⁰⁵⁹ People may conclude a lasting power of attorney (LPA) more easily since a public trustee may be regarded as a corporate voluntary guardian if the principal has no conflict of interests with the public trustee. These functions of the public trustee will contribute to the value of autonomy and right to self-determination of people in financial management and estate planning. As long as a public trustee is available in the community, a shortage of adult guardian candidates in financial management will not occur. A public trustee will be able to assist the family court with office work, including evaluating and reporting the annual reports of adult guardians to the family court, by a delegation agreement if the relevant law permits.

Third, people in the community may consult with the core agency and other relevant agencies to choose the measure that best suits the situation among the multi-optional laws and policies in community support.¹⁰⁶⁰ Even people in informal arrangement may consult with such agencies for consultation and advice, registering at a core agency.¹⁰⁶¹ As a core agency and a community-based general support center may aim at realizing a diverse society where people cohabit in [the] community, they should collaborate to develop community support system.¹⁰⁶² Even in dispute cases, the principal

¹⁰⁵⁹ Refers to '4.5.2 Possible Implications from Australian Legislative Project.'

¹⁰⁶⁰ Refers to '5.2.1 (1) Roles of a Core Agency.'

¹⁰⁶¹ Refers to '5.2.3 (1) b. Legal Status of SDM Law.'

¹⁰⁶² Refers to '5.2.1 (3) Characteristics of a Core Agency.'

and relevant persons may use alternative dispute resolution provided by the core agency or a corresponding agency outside the court. The core agency and other relevant agencies may provide an opportunity for local employments and the development of relevant social businesses over Japan. civil society had better function positively in their community. There is a view proposing to create a ‘cooperative society’ in each region where people in a community participate and collaborate by empowering people’s autonomy through consultations among them.¹⁰⁶³ The key is how to create the mechanism for ‘consultations among people in a community.’

Fourth, welfare measures are not prepared enough for advocacy support so that they need reconsideration. There are contemporary issues that cannot be solved by the existing legal measures of the social security law (i.e., community-based integrated care system, support program for self-reliance in daily life, etc.), and revisions of current legal measures and other legal measures that address contemporary issues should be examined. These measures are not only within the framework of advocacy in a broad sense¹⁰⁶⁴ (i.e., an auditing and self-inspection/third-party evaluation system, and a complaint resolution system) but also within the scope of human rights institutions (i.e., the ombudsman,¹⁰⁶⁵ A national human rights institution¹⁰⁶⁶). This is the issue for study in the future.

¹⁰⁶³ Keiji Shimada, ‘Participation and Coproduction’ (2016) 42(457) *Monthly Review of Local Government* 1–36, 31–33. (in Japanese)

¹⁰⁶⁴ Refers to ‘1.1.1 (2) a. What is Advocacy in the Japanese Context?’

¹⁰⁶⁵ The ombudsman has diversity in the scope, such as the ombudsman that oversees the parliament, the administration (central and local), or the courts. Any complaint or claim can be dealt with outside the courts. Kiyohide Yamatani, ‘A Reconsideration of the Ombudsman System in Administrative Control Theory’ (2021) 173 *Public Administration Review Quarterly* 37, 49. (in Japanese)

¹⁰⁶⁶ A national human rights institution that advocates for human rights where people in the community can file a direct claim would be an idea. Theresia Degener, the former chair of the UN CRPD Committee, made a proposal at a public lecture in Tokyo (December 9, 2019), urging Japan to establish a national human rights authority, an independent body from the Government, in accordance with the *Paris Principles*. United Nations, Human Rights Office of the High Commissioner, *Principles Relating to the Status of National Institutions (The Paris Principles)* (Web Page, December 20, 1993). <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>>.

5.3.2 Function-based Review of Transactions in a Community

(1) People in a Community Applying to Participate in the Process

For people in a community to take advantage of the laws and policies for the support and protection of vulnerable adults at risk of harm, the application process, outlined in Step 1 to Step 8 by category, must be followed.¹⁰⁶⁷

Step 1: *Vulnerable adults in the community are under the supervision of welfare practitioners monitoring activities.* Welfare practitioners in the community, such as local welfare officers, aged care managers, helpers, and social workers, who frequently meet with elderly people are said to easily grasp changes in the life of the elderly. Based on the awareness of local welfare and other relevant officers, a system can be set up for reporting to the local aged care support center, the core agency, the municipality, the consumer service center, and the police, according to the problem in question.¹⁰⁶⁸

Step 2: *People in the community contact the core agency for consultation.* The applicant, i.e., the principal and the principal's stakeholders, needs to have some records of the principal's daily behavior, particularly what is out of the ordinary, and how and when this behavior appears. With these personal records of the principal, the applicant's consultation process with the core agency will progress more smoothly. Upon consultation, the applicant will be informed about the policy measures and legal instruments that are available, and which among them would best suit the principal.¹⁰⁶⁹ In preparation for a future decline in cognitive capacity, it is possible for the principal to designate a relative (within two degrees) as an agent of himself/herself in the deposit account of a financial institution.¹⁰⁷⁰ If the principal is suspected to have dementia or other mental illness, the core agency will suggest that the principal sees a doctor at the earliest convenience. For further consideration, if necessary, the applicant

¹⁰⁶⁷ Refers to '5.3.1 (2) Adult Support and Protection Framework.'

¹⁰⁶⁸ Refers to '1.2.3 (2) (a) Monitoring in the Community-based Integrated Care System.'

¹⁰⁶⁹ Refers to '5.2.1 (1) a. Roles of a Core Agency.'

¹⁰⁷⁰ Refers to '1.1.2 Function-based Review.'

will have to obtain a medical report from a doctor certifying the mental capacity of the principal, but this is not obligatory at this stage.

Step 3: *The applicant's registration at the core agency.* If the applicant will not apply to take advantage of any policy or legal instrument but desires to maintain contact with the core agency for further consultation, it is recommended that the applicant registers either a copy of the supported decision-making agreement, if available, or provides relevant information on an informal arrangement to the core agency.¹⁰⁷¹ Telephone or online communication with the core agency will be possible once it is registered.

Step 4: *The applicant is interested in a welfare program.* If the applicant desires to apply to be a part of the 'support program for self-reliance in daily life' or other alternative welfare programs, the applicant will need to contact the office of the social welfare council located nearest to the principal's residence for procedures.¹⁰⁷² However, the approval of the office of the social welfare council will be subject to an assessment process by the council.

Step 5: *The applicant is interested in supported decision-making.* If the applicant applies to participate in supported decision-making, the applicant will have to make a supported decision-making agreement in a notary deed in line with the relevant law or guidelines.¹⁰⁷³ The core agency will assist the applicant by providing a standard agreement format, and the applicant will make their own agreement with the advice of the core agency. If necessary, the applicant will consult with a lawyer in attorney or another expert. After a notary has completed the agreement, the applicant will be suggested to register a copy of the agreement at the core agency.¹⁰⁷⁴ When the agreement is registered, the applicant will be

¹⁰⁷¹ Refers to '5.2.3 (1) b. Legal Status.'

¹⁰⁷² Refers to '1.2.3 (2) (c) Support Program for Self-Reliance in Daily Life.'

¹⁰⁷³ Refers to '5.2.3 (1) b. Legal Status.'

¹⁰⁷⁴ Ibid.

advised by the core agency to participate in seminars and training programs related to supported decision-making that are sponsored by the municipality.

Step 6: *The applicant is interested in voluntary guardianship System.* If the applicant desires to apply to the notary public for voluntary guardianship, the applicant will contact the notary public with the support of the core agency to conclude the voluntary guardianship contracts.¹⁰⁷⁵ The applicant can consult on the standard format of the agreements and relevant matters on voluntary guardianship with the core agency. The most important point other than the contracts is who will be a voluntary guardian to suit the principal among candidates, such as relatives or third-party practitioners.

Step 7: *The applicant is interested in adult guardianship System.*

- (a) If the core agency, after their assessment, does not agree with the adult guardianship application, the core agency will advise the applicant to use a less restrictive alternative measure, such as supported decision-making or relevant welfare measure.¹⁰⁷⁶ If the applicant wants to apply to the family court for adult guardianship, and the core agency agrees with the proceeding, the applicant will have to obtain a medical doctor's report certifying that the principal has a mental disability or the like.¹⁰⁷⁷
- (b) The applicant will prepare a personal information sheet to be filled by the social worker who takes care of the principal, considering the mental capacity and lifestyle of the principal.¹⁰⁷⁸ At the next

¹⁰⁷⁵ Refers to '1.2.1 (1) b. Voluntary Guardianship System.'

¹⁰⁷⁶ Refers to '5.2.1 (1) Roles of a Core Agency.'

¹⁰⁷⁷ The medical doctor's report includes the following items in line with the official format: (i) medical diagnosis; (ii) opinion about mental capacity of the principal; (iii) basis for judgment in various respects; (iv) signature of the doctor and the name of the hospital. The Courts of Japan, *Medical Certificate Form and Its Guidelines* (Web Page, February 2022) (in Japanese) * <https://www.courts.go.jp/saiban/syurui/syurui_kazi/kazi_09_02/index.html>.

¹⁰⁷⁸ Refers to the Courts of Japan, *Personal Information Sheet Form and Its Guidelines* (Web Page, n/a) (in Japanese) * <https://www.courts.go.jp/saiban/syurui/syurui_kazi/kazi_09_02/index.html>.

step, the applicant will organize petition documents and lodge a petition at the family court.¹⁰⁷⁹

The core agency will assist the applicant in preparing such documents before the petition is lodged.

After this is done, a hearing might be held at the family court. During the hearing, the principal will be accompanied by the principal's stakeholders. Evidence required by the family court will need to be shown. The hearing will possibly confirm who or what entity will act as a guardian and the duties of the guardian.

- (c) Once the principal's adult guardian is appointed by the family court, the adult guardian will have their duties to the principal stipulated.¹⁰⁸⁰ The statement of the family court to appoint the adult guardian will be registered with the Legal Affairs Bureau by the family court. The registrar will disclose the registration information by issuing a registration certificate at the Legal Affairs Bureau over Japan.
- (d) The adult guardianship will continue unless otherwise revoked by the family court or the principal dies. The guardian's position will be cancelled only if the guardian fails to fulfill the guardianship duties provided in the Civil Code, or misconduct is confirmed. The principal and the principal's stakeholders or even the guardian may consult with the core agency regarding the guardian's activities for advice if necessary.

Step 8: *The applicant is in trouble or abused.* In case of elder consumer trouble, elder abuse or financial exploitation, the principal or the principal's stakeholders should contact the public agency or the police

¹⁰⁷⁹ Refers to the Courts of Japan, *Petition Formats for Adult Guardianship* (Web Page, n/a) (in Japanese) *
<https://www.courts.go.jp/saiban/syosiki/syosiki_kazisinpan/syosiki_01_01/index.html>.

¹⁰⁸⁰ The main duties of the adult guardian are: (i) preparing a guardian financial management plan and filing this plan with the court within 60 days of signing letters of guardianship. (ii) assessing and releasing confidential records of the principal. (iii) visiting the principal to ensure that their personal needs are met. (iv) deciding on an appropriate living environment. (v) reporting annual guardian activities by documents to the family court.

in charge of elder abuse.¹⁰⁸¹ But if the principal or the stakeholders do not want to do so, they can contact the core agency to arrange a consultation. The core agency will then contact the public agency in charge of elder abuse to consult about how to deal with the case.¹⁰⁸² If it is an emergency case, the principal or the principal's stakeholders should directly contact the public agency or the police for an emergency rescue by phone.

(2) Core Agency Responding to People in a Community for Support

The core agency as a multi-functional shop should respond to the application steps of people in a community in (1) above with the following Response 1 to Response 8 in community support.¹⁰⁸³

Response 1: *Watching people in the community.* The core agency can quickly resolve issues in the community through an immediate response system for reporting abuse or the like to the public agency.¹⁰⁸⁴ This is, however, a post-treatment response system after the damage must have happened and will not lead to safeguards. In the future, a core agency will have to carry out welfare function in addition to legal advocacy and collaborate with the local elderly care management center on its initiative.

Response 2: *Responding to people in the community upon consultation.* The core agency may respond case by case to the principal and stakeholders, including supporters, relatives, and nursing-home managers, on policy measures and legal instruments that are available and assumed to best suit the

¹⁰⁸¹ 'The main factors identified as reasons elder abuse happens are related to the nature of the issue (the inherent complexity of elder abuse, pervasive ageism, insufficient awareness and doubts about prevalence estimates, and the intractability of the issue), the policy environment (the restricted ability in the field of elder abuse to capitalise on policy windows and processes), and the capabilities of the proponents of prevention of elder abuse (disagreements over the nature of the problem and solutions, challenges in individual and organisational leadership, and an absence of alliances with other issues).' Christopher Mikton et al, 'Factors Shaping the Global Political Priority of Addressing Elder Abuse: A Qualitative Policy Analysis' *The Lancet Healthy Longevity* (Online, July 08, 2022) <[https://doi.org/10.1016/S2666-7568\(22\)00143-X](https://doi.org/10.1016/S2666-7568(22)00143-X)>.

¹⁰⁸² Refers to '5.3.2 (3) Dispute Response Mechanism.'

¹⁰⁸³ Refers to '5.3.1 (2) Adult Support and Protection Framework.'

¹⁰⁸⁴ Refers to '1.2.3 (2) (a) Monitoring in the Community-based Integrated Care System.'

principal.¹⁰⁸⁵ If the principal is suspected to have dementia or other mental illness but the stakeholders cannot say for sure, the core agency will suggest that the principal and the principal's stakeholders see a doctor for a dementia test or mental illness as soon as possible.

Response 3: *Keeping contact with people in the community.* The core agency will register the principal and the stakeholders for a supported decision-making agreement or an informal arrangement and maintain contact for further advice.¹⁰⁸⁶ Telephone or online communication between the principal/the stake holders and the core agency will be possible once the relevant information is registered. The core agency will monitor the situation of the principals in their jurisdiction by telephone or face-to-face meeting if the principal or the principal's stakeholders may consent.

Response 4: *Advice on welfare programs.* The core agency will advise potential users of the 'support program for self-reliance in daily life' or other welfare programs of the necessary procedures and the location of the council of social welfare.¹⁰⁸⁷ The core agency will provide advice to the user from a third party's perspective. By the dignity of risk as a process of positively taking risk within established safeguards, people with disability seek a possibility to overcome certain risk factors by advocating the risk.¹⁰⁸⁸

Response 5: *Advice on supported decision-making agreement.* The core agency will show the principal and the stakeholders a standard supported decision-making agreement format so that they can make their own agreement accordingly, and then register a copy at the core agency.¹⁰⁸⁹ If the applicant has no candidate among relatives and close friends who can act as a supporter, the core agency will introduce some candidates from third parties or NPOs that are listed in the core agency.¹⁰⁹⁰ After the

¹⁰⁸⁵ Refers to '5.2.1 (1) a. Roles of a Core Agency.'

¹⁰⁸⁶ Refers to '5.2.3 (1) b. Legal Status.'

¹⁰⁸⁷ Refers to '1.2.3 (2) (c) Support Program for Self-Reliance in Daily Life.'

¹⁰⁸⁸ Refers to '4.2.2 (5) Victorian Interdisciplinary Research and Practices.'

¹⁰⁸⁹ Refers to '5.2.3 (1) b. Legal Status.'

¹⁰⁹⁰ Refers to '5.2.1 (1) a. Roles of a Core Agency.'

agreement in the notary deed is concluded by a notary public, the core agency will monitor supported decision-making activities and provide advice or training program for SDM practice when requested by the principal or supporter.

Response 6: *Advice on voluntary guardianship.* The core agency will support the applicant in their procedures with the notary public for voluntary guardianship.¹⁰⁹¹ The core agency will provide the principal with necessary information on the voluntary guardianship contract, including the merits and demerits of voluntary guardianship and points to carefully consider prior to the procedures. If the applicant has no candidate among their relatives and close friends who can act as a voluntary guardian, the core agency will introduce some candidates from third parties or NPOs that are listed in the core agency.¹⁰⁹² After conclusion of the contract in the notary deed by the notary public, the core agency will monitor activities of the voluntary guardian and provide advice at the request of the voluntary guardian, the principal or the principal's relative.

Response 7: *Advice on the adult guardianship system.* The core agency will support the applicant's petition to the family court as a third party. The core agency will monitor activities of the adult guardian and provide advice at the request of the guardian, the principal or the principal's stakeholders. There is subsidy for expenses (e.g., lodging fees, registration fees, certificate cost) to support low-income elderly people who need to use the adult guardianship system.¹⁰⁹³ The subsidy is granted by the local government based on a regional support project. The core agency will support application for the grant to the municipality if it is deemed necessary. After the adult guardian is appointed, the core agency will advise any enquiry available from the principal, the principal's stakeholders, or the adult guardian.

Response 8: *Response to trouble or abuse.* The core agency, after it has been contacted by the principal or the principal's stakeholders, will contact the local government or relevant agency, including the

¹⁰⁹¹ Refers to '1.2.1 (1) b. Voluntary Guardianship System.'

¹⁰⁹² Refers to '5.2.1 (1) a. Roles of a Core Agency.'

¹⁰⁹³ Refers to '1.2.3 (2) (b) Subsidies for Expenses Related to the Use of the Adult Guardianship System.'

police in charge of elder abuse, to consult on how to deal with elder abuse cases.¹⁰⁹⁴ As the prompt reaction is sometimes required to respond elder abuse, 24 hour's emergency contact service by telephone will be vital. If there is an urgent and pressing need – such as someone badly neglected or at high risk of abuse or exploitation, an emergency rescue support system should urgently function in a community by the relevant agencies, including the core agency to take necessary steps.

(3) Dispute Response Mechanism

How should a dispute between a principal and the principal's stakeholders be resolved? If the core agency can set up a dispute response mechanism, like the Victorian Civil and Administrative Tribunal (VCAT) in the state of Victoria, Australia,¹⁰⁹⁵ for consultation, complaint resolution, mediation, and sending appeals to the family court or reports to the police, the principal and stakeholders may contact the core agency for consultation. Then, the core agency will suggest the solution that will best suit the applicant. Even a mere comment or a complaint expressed by people in the community should be recorded by the core agency as a possible suggestion. Such casual communication between people in the community and the core agency will be important in order to build trust and a sense of care.

For mediation,¹⁰⁹⁶ the issue of who would be the mediator would arise. There are two ideas. One, the mediator can be selected from the members of the local council on an ad hoc basis. The core agency will conclude an agreement with any existing certified ADR (alternative dispute resolution) institution overseen by an attorney or judicial scrivener. The other idea is that the core agency can

¹⁰⁹⁴ Refers to '1.2.3 (1) Elder Abuse Prevention Act.'

¹⁰⁹⁵ Refers to '4.2.2 (3) Dispute Response Mechanism.'

¹⁰⁹⁶ The number of mediation filings in FY2020 in Japan was 1,027, and the number of the acceptances was 1,023. The number of resolution cases was 381. Most of the resolution cases were due to settlement and mediation. Out of the cases settled at dispute resolution centers nationwide in FY2020, 59.6 per cent of cases involved financial damage to the tune of less than 1 million yen (US\$ 8,700), and 40.4 per cent to the tune of 1 million yen or more. Japan Federation of Bar Associations, *Statistical Annual Report of Arbitration ADR in FY2020* (Online, September 2021) (in Japanese) * <https://www.nichibenren.or.jp/document/statistics/adr_statistical_yearbook.html>.

apply directly to the ADR certification system.¹⁰⁹⁷ Whether an ad hoc or a permanent mediation formula is used, it is important for the core agency to demonstrate sympathy with people in the community and keep all relevant information strictly confidential. It is important for a party in the dispute not to feel that the core agency may side with the other party. In case of any legal issue, the services of a lawyer in attorney may be required, and a suitable mediator needs to be arranged. Therefore, skill training and experience are important in mediation.¹⁰⁹⁸ The core agency should keep records of dispute cases, mediations, and analyses so that such data can be consolidated. If the principal or the principal's stakeholders feel that the dispute cannot be resolved by mediation, they can appeal to the family court, or report the issue to the police if it is considered a criminal case. A consultation with a lawyer in attorney may be important.

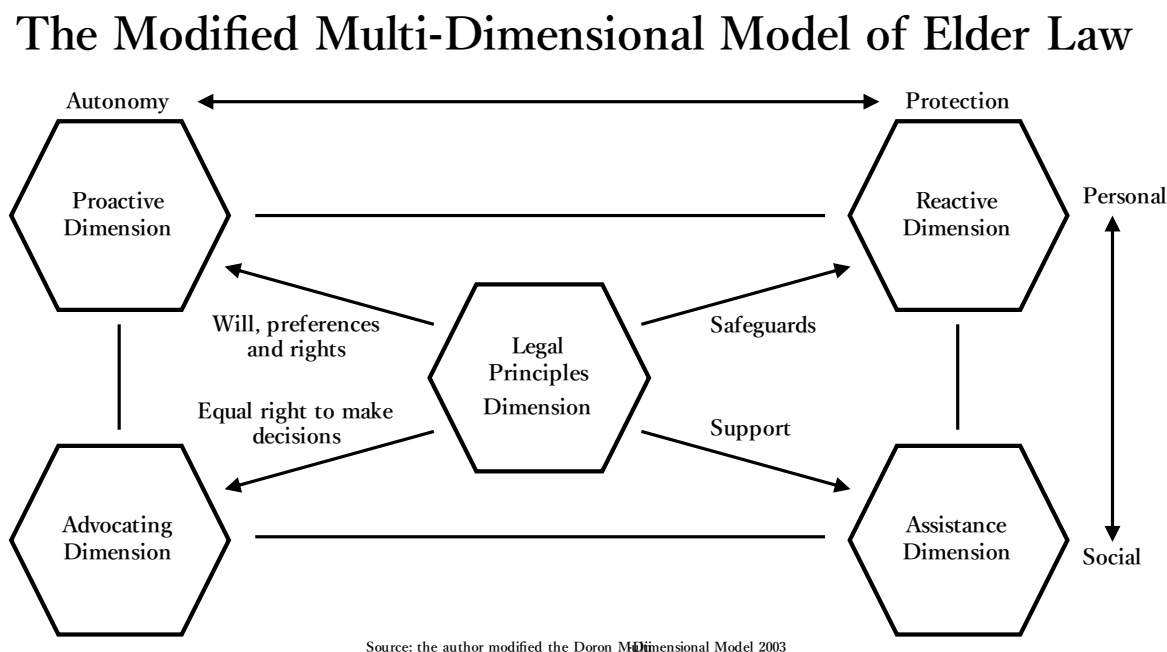
5.3.3 Values of Adult Support and Protection to Global Application

Now that the legislation and operational mechanism have been clarified, the discussion turns to the framework of values that needs to be established for adult support and protection. The framework of values related to the adult support and protection legislation system is shown in Figure 4. This is the modified multi-dimensional model of elder law (hereafter referred to as 'modified model'). The modified model is adapted by the author from the multi-dimensional model of elder law created by Israel Doron. Some comments on principle values, indicators, and dimensions are provided below.

¹⁰⁹⁷ This is based on the stipulation in the *Act on Promotion of Use of Alternative Dispute Resolution* (Act No. 151 of 2004) to have a permanent ADR unit within the core agency. The principal or the stakeholders will participate in mediation to resolve the issue.

¹⁰⁹⁸ From the interview of Ann Soden, an elder law clinic practitioner in Montreal, Canada, by the author on May 6, 2019. Ann Soden has been an elder law mediator for 16 years, looking after the elderly who have lost their property management rights due to mismanagement by adult guardians, courts, etc. She noted that a mechanical use of the existing legal system cannot solve the elderly disputes effectively. The Elder Law Clinic holds a family conference where people, family members, welfare/medical/legal practitioners, civil servants etc. meet to discuss how to guarantee the rights of the elderly.

Figure 4: The Modified Multi-Dimensional Model of Elder Law



Source: Partly modified by the Author based on the Model of Doron 2003/2009¹⁰⁹⁹

(1) Principal Values of the Legal Principles Dimension

As was reviewed in Chapter 1,¹¹⁰⁰ the adult guardianship system in Japan upholds respect to right to self-determination, emphasis on personal protection, and normalization in statutory guardianship, and autonomy and right to self-determination in voluntary guardianship as its principal values. The Promotion Act was implemented with the following key values: *support, diverse society* (Article 1), *equality, dignity of an individual*, and *will and preferences* (Article 3). The Basic Plan, which is based on the Promotion Act, has policy objectives aimed at improving systems and practices

¹⁰⁹⁹ This is an open model that anyone can comment and modify by his/her own responsibility, which was confirmed by Israel Doron in his online lecture at the Elder Law Society Japan meeting held on February 26, 2022. The multi-dimensional model of elder law was originally introduced in the article in 2003 with some amendments afterward. Israel Doron, 'A Multi-Dimensional Model of Elder Law: An Israeli Example' (2003) 28(3) *Ageing International* 242, 259; Israel Doron, 'A Multi-Dimensional Model of Elder Law' in *Theories on Law and Ageing* (Springer, Berlin, Heidelberg, 2009) 59–74.

¹¹⁰⁰ Refers to '1.2.1 Adult Guardianship System and the Promotion Act.'

that enable the users to realize benefits, create a regional collaboration networking for the advocacy of human rights, prevent fraud, and maintain social harmony through easy access to the core agency in the community. The second term Basic Plan, which was inaugurated in April 2022, emphasizes on ‘advocacy support’ as the main principle in a community support system. The term ‘advocacy support’ is defined as ‘support activities which have a common foundation for support and activities centered on the person, which are support for exercising their rights through supported decision-making and support for recovering from infringement of their rights in dealing with abuse and unfair property transactions, for adults with insufficient mental capacity to participate in the community and live independent lives.’¹¹⁰¹

The legal principles dimension in Australia refers to the four principles already discussed in Chapter 4,¹¹⁰² namely: principle 1, *equal right to make decisions*; principle 2, *support*; principle 3, *will, preferences and rights*; and principle 4, *safeguards*. These principles are as suggested by the ‘National Decision-Making Principles’ addressed in the ALRC Report 124.¹¹⁰³ The ALRC Report 124 also states five framing principles to guide recommendations for reform, namely: *dignity, equality, autonomy, inclusion and participation*, and *accountability*. There has been wide support by stakeholders for these principles, which are reflected in a Commonwealth decision-making model developed in the Report. The said values have been adopted in Australia, which may correspond to the universal values stipulated in Article 12 (equal recognition before the law) of the CRPD.¹¹⁰⁴

It can be observed from the examples of both Japan and Australia that international consensus has almost reached on the CRPD, which 185 states/areas have ratified as of May 2022. The Australian

¹¹⁰¹ Refers to the Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System* (Web Page, 2022) (in Japanese)

<https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html>.

¹¹⁰² Refers to ‘4.5.1 (3) Theoretical Framework.’

¹¹⁰³ Refers to the ALRC Report 124, 2014, 12.

¹¹⁰⁴ From the interviews of Terry Carney and Victorian OPA by the author on March 14 and March 5, 2019.

National Decision-Making Principles clearly reflect some principal values—namely, principle 1, *the equal right to make decisions*; principle 2, *support*; principle 3, *will, preferences and rights*; and principle 4, *safeguards*—that could be applied to the legal principles dimension of other countries, including Japan.

(2) Indicators' Matrix

What does it mean to have the indicators' matrix of *autonomy* and *protection* on a horizontal level and that of *personal* and *social* on a vertical level? First, the indicators' matrix of *autonomy* and *protection* on a horizontal level is reviewed. The necessity of protection for vulnerable adults or adults at risk of harm has been discussed in Chapter 2;¹¹⁰⁵ there is a general view that 'vulnerable adults at risk of harm must be protected by law and public policy from abuse.'¹¹⁰⁶ This general view may change people's perceptions of the 'vulnerability approach' as a criterion for the adult protection system—since vulnerability is a human characteristic regardless of mental capacity—and, instead, encourage respect for human rights as a universal value that affects the law and public policy. Thus, there is the need to have legal safeguards as a reactive dimension to *protect* vulnerable adults or adults at risk of harm. *Autonomy* and *right to self-determination*, two universal values that need to be respected, have also been discussed in Chapter 2.¹¹⁰⁷ The capability approach is valued for its respect for individual autonomy and right to self-determination and the freedom given to the person to choose a process. This notion respects the diversity of people and gives them the opportunity to think about a way of life that suits their individual characteristics. This idea, as a *proactive* dimension, leads further to respect for a person's will and preferences, and promotes the right to *individual autonomy*. The

¹¹⁰⁵ Refers to '2.3.2 Vulnerability Approach.'

¹¹⁰⁶ Ibid.

¹¹⁰⁷ Refers to '2.4.1 Capability Approach and Autonomy.'

vulnerable approach and autonomy, which have been discussed in Chapter 2,¹¹⁰⁸ are the foundation of the indicator's matrix of *autonomy* and *protection* on a horizontal level.

Second, now the indicators' matrix of *personal* and *social* on a vertical level is reviewed. The discussions so far have focused on the internal motives of human beings because humans have been the main player in modern philosophical studies. This is due to the *personal* value. We live in an aged society with diverse people and cultures. It has been pointed out in Chapter 2¹¹⁰⁹ that, regarding human relations around a person, the notion of *relational autonomy* is assumed to be particularly important in practice because one's pattern of human conduct and decision-making is largely influenced by one's family, community, and society. This suggests that the *social* aspect must be considered in addition to the *personal*. For example, a diverse society is considered as the objective by Article 1 (purpose) of the Promotion Act. This shows the importance of interdependent relationship between various agencies, such as people, institutions, government, and other relevant players, with mutual assistance on an equal footing.¹¹¹⁰ The *social* aspect includes not only an equal and horizontal transactions between the parties in private autonomy but also an imbalanced relationship between the parties where vertical intervention by public agencies to private autonomy as necessary is designed by law, as is discussed on the consumer contract law in Chapter 1.¹¹¹¹ As an *assistance* dimension, this marrying of the *social* with the *personal* aspects leads to support for vulnerable adults or adults at risk of harm, legislative and policy measures in *reactive* and *proactive* dimensions are utilized to support and protect their interests according to their personal needs, and, as an *advocating* dimension, vigorously emphasizes not only their right to make decisions but also protection of their safety.

¹¹⁰⁸ Refers to '2.3.2 Vulnerability Approach' and '2.4.1 Capability Approach and Autonomy.'

¹¹⁰⁹ Refers to '2.4.1 Capability Approach and Autonomy.'

¹¹¹⁰ Ibid.

¹¹¹¹ Refers to '1.1.1 (1) d. Research on the Mental Capacity Act 2005 (England and Wales)' for the discussion on the consumer contract law.

(3) Four Dimensions

a. Reactive Dimension

The term *reactive* refers to a response to properly react a vulnerable adult when he/she is identified or deserved a suspect.¹¹¹² Depending on the awareness of commissioned welfare volunteers, social workers, and helpers, a *reactive* system for reporting concerns to the community-based general support center, the municipality, and the police may be eligible. For this, an immediate response system is needed to quickly resolve issues in the local community. By law, the adult guardianship system provides protective measures to principals with insufficient mental capacity. The municipality intervenes abuse cases for vulnerable adults at risk of harm with the assistance of a core agency. The community support for watching activities in the community and the adult guardianship system are *reactive* legal instruments, based on the vulnerability approach, which act as *safeguards* to protect vulnerable adults.¹¹¹³ They also ensure that the least restrictive alternative measures are taken. This is to avoid excess paternalism, which may violate the human rights of the principal. Agencies involved in the activities include the core agency, the family court, a public trustee (to be established), and other relevant agencies concerned with elder abuse, give careful attention to misconduct by supporters and other relevant persons.

b. Proactive Dimension

The term *proactive* refers to a response not only to properly react a vulnerable adult when he/she is identified or deserved a suspect but also to prevent from its risk by some measures.¹¹¹⁴ Day-to-day voluntary activities to monitor the community are basic and *proactive* and are based on the idea of an ordinance or local regulation. Supported decision-making and other relevant instruments, as well as

¹¹¹² The term ‘reactive’ refers to ‘reacting to events or situations rather than acting first to change or prevent something.’ Cambridge Dictionary (Web Page, n/a) <<https://dictionary.cambridge.org/ja/dictionary/english/reactive>>.

¹¹¹³ Refers to ‘1.2.3 (2) (a) Monitoring in the Community-based Integrated Care System.’

¹¹¹⁴ The term ‘proactive’ refers to ‘taking action by causing change and not only reacting to change when it happens.’ (Web Page, n/a) <<https://dictionary.cambridge.org/ja/dictionary/english/proactive>>.

the lasting power of attorney and the adult guardianship system, provide *proactive* measures, as estate planning and/or protection of the interests, to vulnerable adults at risk of abuse. Abuse includes financial exploitation, involving in family members, relatives, or close friends of the principal. It is desirable that the adults use these *proactive* measures at their own accord, including estate planning and advanced directive measures. In preparation for a future decline in cognitive capacity, it is possible for the elderly to designate a relative (within two degrees) as an agent of himself/herself in the deposit account of a financial institution.¹¹¹⁵ This is to ensure that the autonomy and self-determination of the principal, as well as their *will, preferences, and rights*, are respected. Agencies, such as the core agency, the family court, the public trustee (to be established), and other relevant agencies concerned with elder abuse, give careful attention to misconduct by supporters and other relevant persons. The core agency may serve as ‘consultation and advice’ activities to the community people, which may contribute to *proactive* effects.

c. Assistance Dimension

The term *assistance* refers to any kind of support by relatives or third parties, whom they are assumed appropriate to vulnerable adults.¹¹¹⁶ Support programs for self-reliance in daily life conducted by the social welfare council and other welfare programs may *support* the principal by providing them with *assistance* in using welfare and other related services in community support. This is to ensure that the principal may live independently in the community as possible. Supported decision-making and relevant measures are offered through some guidelines or legislation, such as the preliminary idea of SDM legislation that is advocated in this chapter.¹¹¹⁷ They are offered to principals with insufficient mental capacity or vulnerable adults on an agreement basis, or through informal

¹¹¹⁵ Refers to ‘1.1.2 Function-based Review.’ Financial institutions in Japan provide bank deposit services in which relatives (within two degree) can function as agents for managing the principals’ deposit accounts.

¹¹¹⁶ The term ‘assistance’ refers to ‘help, especially money or resources that are given to people, countries, etc. when they have experienced a difficult situation.’ (Web Page, n/a) <<https://dictionary.cambridge.org/ja/dictionary/english/assistance>>.

¹¹¹⁷ Refers to ‘5.2.3 A Preliminary Idea of Supported Decision-Making Legislation.’

arrangements if the principal is satisfied with the *assistance*. Agencies, such as the core agency, the family court, the public trustee (to be established), and other relevant ones, provide community support with people in the community. They are not always involved in supported decision-making activities but indirectly can assist it. The core agency serves as ‘consultation and advice’ to the community people. The local government may establish its own public guardian agency, if it is necessary, directly to take care of vulnerable adults in difficult cases.¹¹¹⁸

d. Advocating Dimension

The term *advocacy* refers to any action by an individual or a corporation, or any public policy to empower vulnerable adults on minimum conflict of interests between people or between people and society.¹¹¹⁹ Vulnerable adults should be *advocated* for and empowered to use, of their own accord, supported decision-making and other relevant measures, including an LPA. It is desirable that the adults use these *self-advocating* measures at their own accord, including estate planning and advanced directive measures. This is to respect the autonomy and right to self-determination of the principal by *advocating the equal right to making decisions*, focusing on his/her uniqueness as an individual. By the dignity of risk as a process of positively taking risk within established safeguards, people with disability seek a possibility to overcome certain risk factors by *advocating* the risk.¹¹²⁰ It is reminded that ALRC Report 124 considers an approach to autonomy as empowerment of people with disability (Paragraph 1.38). It can be assumed that ALRC Report 124 includes the notion of relational autonomy.¹¹²¹ Even in dispute cases, the principal and stakeholders may use alternative dispute

¹¹¹⁸ Refers to ‘5.2.1 (1) Roles of a Core Agency.’

¹¹¹⁹ Errol Cocks and Gordon Duffy, *The Nature and Purposes of Advocacy for People with Disabilities* (Edith Cowan University Publications, 1993) 121 <<https://ro.ecu.edu.au/ecuworks/7172>>.

¹¹²⁰ Refers to ‘4.2.2 (5) Victorian Interdisciplinary Research and Practices.’

¹¹²¹ Refers to ‘2.4.1 (2) b. Relational Autonomy.’ Regarding ‘autonomy,’ Paragraph 1.37 of the ALRC Report 124 states that ‘This Inquiry has been informed by autonomy in the sense of “empowerment”, not just “non-interference”. This involves seeing an individual in relation to others, in a “relational” or “social” sense and understanding that connects with respect for the family as the “natural and fundamental group unit of society” that is entitled to protection by State Parties.’

resolution provided by the core agency or another relevant agency besides the court, which refers to the section on the response system in the state of Victoria, Australia.¹¹²² People may choose the solution that best suits their circumstances in community support. The core agency may be empowered to serve as ‘monitoring and supervision’ activities, in addition to ‘consultation and advice,’ to the community people if any delegation agreement is concluded.¹¹²³ An idea of establishment of a public guardian agency by a prefecture, which delegates municipalities to run core agencies, is worth considering.

(4) Japanese Identity and Global Application

The value framework of Japan’s adult support and protection legislation and policy system, which is based on the modified multi-dimensional model, has been described. There is a view on two diverse types of principle of autonomy with diverse cultural background: ‘the Western principle of autonomy demands self-determination, assumes a subjective conception of the good and promotes the value of individual independence, whilst the East Asian principle of autonomy requires family-determination, presupposes an objective conception of the good and upholds the value of harmonious dependence.’¹¹²⁴ Although this may be a stereo-type argument to contrast between the Western principle of autonomy and the East Asian principle of autonomy, such argument demonstrates part of the truth regarding different approaches to autonomy in two jurisdictions.¹¹²⁵

From Japanese people’s viewpoint, it would be ideal to establish an adult support and protection framework based on Japanese people’s identity. How can we achieve such a goal? Japanese people must consider how relationship between vulnerability and autonomy be balanced in the Japanese

¹¹²² Refers to ‘4.2.2 (3) Dispute Response Mechanism.’

¹¹²³ Ibid.

¹¹²⁴ Ruiping Fan, ‘Self-determination vs. Family-determination: Two Incommensurable Principles of Autonomy’ (1997) 11(3/4) *Bioethics* 309-322, 309.

¹¹²⁵ Emiko Ochiai, ‘Why Does the “Japanese-style Welfare Regime” Remain Familial? 4. Comments on the Report’ (2015) 27(1) *Japanese Journal of Family Sociology* 61, 68. (in Japanese)

context by adopting some measures related to the advocating dimension of the modified multi-dimensional model, taking the Japanese principle of autonomy into consideration. In other words, Japanese people should consider by their own accord which measures will be good for them, informal arrangement, law and policy measures, or the combination of these two. They should also consider what law and policy measures will be adopted, to which extent vulnerable adults will be protected, and to which extent individual autonomy of vulnerable adults will be secured. In the process of taking such steps, the Japanese principle of autonomy can be clarified.¹¹²⁶ In any case, the balancing point between vulnerability and autonomy in the Japanese context will be a point of discussion. It can be said that no general principle can be found in the discussion regarding the balancing point between vulnerability and autonomy, and this point of discussion must be examined case by case for a specific person in a specific situation. Another point of discussion may concern how relational autonomy will complement individual autonomy in the Japanese context.¹¹²⁷

It is natural that there would be a variety of differences in legislative developments by country. During the opening address at the fourth World Congress of Adult Guardianship in Berlin in 2016, Adrian D. Ward of Scotland addressed that ‘We should not start with a concept which is at best one answer, and an uncertain one, until we have formulated the question, and the destination for which –

¹¹²⁶ Hang Wu Tang, a scholar in Singapore, raises a question whether the Singapore’s *Mental Capacity Act 2008*, respecting individual autonomy, suits to Singaporeans, considering their local culture, namely ‘the family functions as the primary unit of care for persons who lack capacity and vulnerable persons.’ The article reviews the process of how Singapore’s *Mental Capacity Act 2008* was adapted and fine-tuned to operate in a jurisdiction with different culture conditions, religions, familial norms, and social institutions. Hang Wu Tang states that ‘adult guardianship law is a particularly complex and challenging area of law to transport from a foreign jurisdiction because it operates at the crossroads of familial, social, cultural, and religious context.’ Hang Wu Tang, ‘Singapore’s Adult Guardianship law and the Role of the Family in Medical Decision-Making’ (2022) 36(1) *International Journal of Law, Policy and the Family* 1–21, 3.

¹¹²⁷ Refers to ‘2.4.1 (2) b. Relational Autonomy.’

for each individual – we may want to find the most appropriate vehicle.’¹¹²⁸ The important viewpoint is not law as a vehicle but is an effective law framework that relevant citizens are satisfied with in practice. It can be assumed that this viewpoint for the adult guardianship law is applicable to the adult support and protection legislation. Behind legislation, value frameworks exist, which are not visible but would suit the needs of Japanese people.

In this chapter, the universal values related to the Australian and the CRPD frameworks have been discussed on the ground of Japan’s adult support and protection framework. It can be observed from the viewpoint of the value frameworks of both Japan and Australia that international consensus on the legal principles dimension has almost reached on the CRPD as the universal values. In this regard, it can be said that Japan’s adult support and protection legislation system are based on a combination of the universal values, which are stipulated in the Australian and the CRPD value frameworks, and the law and policy measures that would suit the needs of Japanese people. Therefore, the focus of discussion on the modified multi-dimensional model, particularly regarding support and protection measures in community support, is on Japan, nevertheless the essence of discussion would be relevant to global application, sharing the universal values.

5.4 Summary: Japan’s Adult Support and Protection Legislation Framework

Chapter 5 explored the possibilities of Japan's adult support and protection legislation, mainly based on the principles and implications of Australian law and policy as discussed in Chapter 4.

First, the roles and legal status of a core agency are reviewed. A core agency is an agency in a community that works for the promotion of the adult guardianship system, but its function should be expanded to cover adult support and protection. A core agency is thus accessible to elderly people with

¹¹²⁸ Adrian D. Ward, ‘Legal Protection of Adults – An International Comparison’ (Opening Address to the fourth World Congress on Adult Guardianship held at Erkner near Berlin on 14-17 September 2016) 16(10) *The Journal* <<https://www.lawscot.org.uk/members/journal/issues/vol-61-issue-10/legal-protection-of-adults-an-international-comparison/>>

insufficient mental capacity, the family court, and the municipality. A core agency must work as a public institution regardless of its entity and keep confidential any personal information to be shared with the family court and the municipality. The consolidated data and its analysis can be useful for fact-finding and policymaking, which will cover informal arrangements and supported decision-making cases. From users' viewpoint, a core agency should explicitly provide information on community support to people in the community, such as support for monitoring watch, informal arrangements, welfare assistances, SDM, and adult guardianship. Thus, a core agency is a kind of a multi-functional shop that serves in community support.

Second, by examining the three types of models in Australia, Europe, and Japan, we have reviewed how state parties go for a combination of guardianship and SDM to deal with adults with insufficient mental capacity. It can be understood that there is a diversity of laws and policies in countries that share the same values of the CRPD and democratic procedures. This is because the Japanese model has room for legislative improvements, comparing with the Victorian and Alzheimer Europe models. SDM must be secured by safeguards because SDM might be involved in undue influence due to its characteristic. The difference between the Japanese model and the Victorian and Alzheimer Europe's models can be assumed to be based on how they prioritize the requirements of Article 12 of the CRPD and how seriously they understand the necessity to legislate or reform the relevant law. The Ministry of Justice of Japan expresses the view that Japan's adult guardianship system does not conflict with Article 12 of the CRPD. It appears that this understanding makes the Japanese model less developed in legislation or law reform.

Third, to create a legal architecture of Japan's adult support and protection, a preliminary idea of SDM has been proposed. It can be assumed that an SDM law is the specific law to be applied to the relevant parties. The specific law should have no legal enforcement but may provide some preferential benefits to people in a community, asking for their participation in the system by their own initiatives. The SDM will provide support and protection for vulnerable adults whose SDM agreement or even an

informal arrangement will be voluntarily registered at the core agency. The roles of the core agency can be upgraded from ‘advice and consultation’ to ‘monitoring and supervision’ if any delegation agreement is concluded by the municipality. The significance of the study lies in having clarified the path that review of SDM guidelines based on practices and experiences in support is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards for risk of the principals, referring to the legislative experience of the State of Victoria for a decade.

Fourth, this chapter illustrates how an adult support and protection framework can be designed and reviews the principles and values behind the relevant legislation and policy. It addresses the framework of the legislation and the functional transactions between a core agency and people in a community. The significant momentum needed to implement a regime of community support is presumably people’s participation and assistance in the architecture. In this regard, the contributions of the civil society are advocated.

Fifth, the value framework of Japan’s adult support and protection legislation system, based on the modified multi-dimensional model, has been described. The model comprises four dimensions, namely, *reactive*, *proactive*, *assistance*, and *advocating*—and a legal principles dimension at the center to connect with each of the four other dimensions. These dimensions are placed on an indicator matrix of *autonomy* and *protection* on the horizontal level and an indicator matrix of *personal* and *social* on the vertical level. A vulnerable approach is the foundation of these values. It can be said that Japan’s adult support and protection legislation and policy system are based on a combination of the universal values, which are stipulated in the Australian and the CRPD value frameworks, and the law and policy measures that would suit the needs of Japanese people. The focus of discussion on the modified multi-dimensional model, particularly regarding support and protection measures in community support, is on Japan, nevertheless the essence of discussion would be relevant to global application, sharing the universal values.

Conclusion

The purpose of this dissertation is to research the possibility of the adult support and protection legislation becoming part of the complex law of the adult guardianship system, supported decision-making, and elder abuse against vulnerable adults, based on issues related to Japan's adult guardianship system. For this purpose, the concept of legal advocacy for vulnerable adults, covering the adult guardianship system, supported decision-making, elder abuse prevention, and relevant policies, is first clarified to establish the scope of the law and policy in question, where the legal domains of the civil law and the social security law intersect. The study then uses an analytical axis to examine the theoretical frameworks that constitute the vulnerability approach and autonomy in the common law jurisdictions, on the one hand, and the perspective of comparative law studies between Japan and Australia on legislation that supports and protects vulnerable adults, on the other hand.

The dissertation explores the legal policy for adult support and protection, including supported decision-making. The main question addressed by this dissertation is ‘What is the framework and value of the adult support and protection legislation that respects the will and preferences of vulnerable adults with insufficient mental capacity, and how can this legislation be made effective for community support?’ To answer this question, five research questions are outlined in ‘Introduction’ and reviewed in the subsequent chapters. This study clarifies the basic framework of the adult support and protection legislation and policies in respect of the legal concept, legislative process, and operational mechanism in community support, through comparative law studies between Japan and Australia. To conclude this dissertation, let me summarize the three main focuses of discussion.

1. Conclusion

The first focus of the discussion is on finding a legal framework to support and protect vulnerable adults based on the aspect of vulnerability and autonomy in order to respect their will and preferences. This legal framework is in contrast with the capacity doctrine of the Civil Code of Japan that

indefinitely categorizes adults by capacity. The following four points have been clarified in Chapter 2 and Chapter 3: (i) From the vulnerability approach, a general view could be derived that vulnerable adults at risk of harm must be protected by law and policy; (ii) Based on the value and requirements of the *Convention on the Rights of Persons with Disabilities* (CRPD), the international tendency is to restrict the use of the guardianship system and encourage the use of supported decision-making; (iii) Some countries developed their own legislative systems or reform policy reports, which were considered in light of their own sociocultural background to balance the systems with the existing laws; (iv) The principles of necessity and of the less restrictive alternative can be found in the legislations and reform policy reports of some countries as the common principles.

An adult support and protection legislative system can be said to refer to a comprehensive package of laws for legal advocacy that aims to protect vulnerable adults through the least restrictive measures, as long as is necessary, by taking their will and preferences into consideration. In other words, an adult support and protection legislative system offers necessary support according to individual characteristics, minimizes restriction of a principal's rights, and takes less restrictive alternative measures.

The second focus is on the formulation of social norms that may encourage the use of supported decision-making, with adult guardianship to be used as a last resort. This formulation of social norms is based on the implications of the Victorian guardianship state law 2019, which incorporated supported decision-making on it after the process for a decade. The following five points have been clarified in Chapter 4 and Chapter 5: (i) If the adult support and protection legislative system is considered as a comprehensive legal system, the Australian amendments to the state guardianship laws and national legislative policy for elder abuse cited in Chapter 4 may reflect an example of legislation of adult support and protection; (ii) The implications of the Australian law can be summarized in the five points: (a) The Australian law reforms and legislation may reflect the values of the CRPD in the legal system, (b) The Australian guardianship law reforms aim at legislating supported decision-

making, (c) Australia has public agencies in states and special territories, including the Office of the Public Advocate or the Public Guardian, the tribunal, and the state or public trustees, that play significant roles within the law system, (d) A dispute response mechanism of the tribunal is important for the users, (e) Australia has many NPOs whose operations in communities are based on charity, grant, or welfare funding systems.; (iii) The Japanese model has room for legislative improvements, comparing with the Victorian and Alzheimer Europe's models. The difference between models can be assumed to be based on how they prioritize the requirements of Article 12 (equal recognition before the law) of the CRPD and how seriously they understand the necessity to legislate or reform the relevant laws; (iv) To create a legal architecture of Japan's adult support and protection, a preliminary idea of supported decision-making law has been proposed; (v) The value model for Japan's adult support and protection is composed of four dimensions, namely *reactive*, *proactive*, *assistance*, and *advocating*—and a legal principles dimension at the center to connect with each of the four other dimensions. These dimensions are placed on the indicators' matrix of *autonomy* and *protection* on a horizontal level and the indicators' matrix of *personal* and *social* on a vertical level.

Review of supported decision-making guidelines based on practices and experiences is required to improve the unified definition of supported decision-making, standardize supported decision-making methods, and develop adequate safeguards against risks to principals. The path to Japan's legislation of supported decision-making and the main content of the legislation have been clarified by finding normative enforcement through the practices of the supported decision-making guidelines as a soft law, in order to transform them into a hard law through a step-by-step approach.

The third focus of the discussion is on establishing a community support system for vulnerable adults. In community support, a core agency watches over vulnerable adults and provides 'consultation and advice,' etc. by combining adult support and protection and welfare measures. The following four points have been clarified in Chapter 1 and Chapter 5: (i) It is desirable to present multiple options in the legal system and policy which are not limited to the adult guardianship system but include the

social security measures at a ‘one-stop shop’ in the community; (ii) A core agency should explicitly provide information on community support to people in the community, such as monitoring watch, informal arrangements, welfare assistances, supported decision-making, and adult guardianship. Thus, a core agency is a kind of a multi-functional shop that serves need of community support; (iii) A core agency must work as a public institution regardless of its entity and keep confidential any personal information that would be shared with the family court and the municipality; (iv) The roles of the core agency can be upgraded from ‘advice and consultation’ to ‘monitoring and supervision’ if any delegation agreement is concluded by the municipality.

The dissertation clarifies a concept of community support and its mechanism for vulnerable adults conducted by a core agency as a community center with a quasi-public character. It clarifies the role of community support in which relevant information on vulnerable adults is collected at the core agency through daily communication between the core agency and people in the community. The core agency should respond to various requests for support from people in the community, and, when necessary, public agencies, which receive reports from the core agency, intervene for the protection of vulnerable adults.

2. Significance of the Study

This dissertation explores substantial aspects that related studies in Japan have not delved into. One significance of this study lies in its legal advocacy for a complex concept, called adult support and protection legislation, including its clarification of the definitions, scope, and roles of this legislation, which have been previously unclear. This study is based on a unique methodology. The concept of legal advocacy for vulnerable adults, covering the adult guardianship system, supported decision-making, elder abuse prevention, and relevant policies, is first clarified to establish the scope of the law and policy in question, where the legal domains of the civil law and the social security law intersect. The study then uses an analytical axis to examine the theoretical frameworks that constitute the vulnerability approach and autonomy in the common law jurisdictions, on the one hand, and the

perspective of comparative law studies between Japan and Australia on legislation that supports and protects vulnerable adults, on the other hand. The adult support and protection legislation is regarded as an interdisciplinary area of the civil law and the social security law because it is based on a concept of legal advocacy that straddles the legal areas of the civil law and the social security law. In addition, by using the complex legal concept of adult support and protection legislation, it will be possible to understand the complementary relationship and missing parts of the adult guardianship system, supported decision-making, elder abuse prevention, and relevant policies. As described above, the significance can be found in how the legal concept of adult support and protection legislation brings a new and useful perspective to the relationship between the legal area and the legal system, which has been clarified by an unprecedented analytical axis.

A second significance of this dissertation lies in its analysis of the process of legislation of the *Guardianship and Administration Act 2019 (Vic)* as an integrated law of guardianship and supported decision-making in the State of Victoria, Australia. The dissertation analyzes how Australian legislation demonstrates the necessity of Japan's supported decision-making legislation with a legislative strategy for the middle and long term. It then draws an outline for the supported decision-making legislation. This study is unique in that it has accumulated empirical research on supported decision-making practices, cultivated social norms from soft law called guidelines, and showed a step-by-step legislative process for the formation of hard law. The *Mental Capacity Act 2005* (MCA 2005) has been referred to in common law jurisdictions in England and Wales to study guardianship and supported decision-making. Australia's guardianship state laws have evolved independently since the 1980s and it has been possible to bring to Japan insights to bear on legal policies and the role of public agencies that differ from those outlined in the MCA 2005. In particular, the process of accumulating empirical research on supported decision-making, which has been conducted by universities and NPOs in various parts of Australia since around 2010, forms a social consensus and reaches legislation. This process is presumably suitable for Japan. As described above, the significance of this study concerns

how it has absorbed the knowledge on the implications and process of Australian legislative policy and its process and shown the legislative direction for Japan's supported decision-making.

A third significance of this study lies in its demonstration of the roles of community support as an operational framework of the adult support and protection legislation. In the guardianship promotion project organized by the Government of Japan, core agencies play a role in supporting the adult guardianship system. In this study, the core agencies are multifunctional entities that respond to support and protection measures of legal advocacy in the community. The core agencies play a central role in community support, being cross-sectional with relevant agencies, such as the municipality, the family court, practitioners' associations, the community-based general support center, medical care/aged care institutions, and the police. This study discusses how the core agencies can be merged with community-based general support centers or how they collaborate each other to ensure the support and protection of vulnerable adults. Core agencies have a monitoring function to grasp the current situation of people in a community who provide supported decision-making or informal arrangement through 'consultation and advice' activities, and report abuse cases to the relevant authorities. Vulnerable adults can choose the appropriate support system of their own accord through core agencies. The dissertation then clarifies how the role of community support is functionally demonstrated by the transactions between the core agency and people in the community.

3. Uniqueness of the Study

One unique contribution of this study concerns how it shows the path to Japan's legislation of supported decision-making. The main task of the legislation is clarified by finding normative enforcement through the practices of the supported decision-making guidelines as a soft law, in order to transform them into a hard law through a step-by-step approach. This study establishes a legal design for the coexistence of supported decision-making and the adult guardianship system with supported decision-making prioritized and the adult guardianship system to be considered only as a last resort. This legal design also functions as legal safeguards against elder abuse. The characteristics and

principles of the adult support and protection legislation have been clarified by an analytical axis of theoretical debate on the vulnerability approach and autonomy, on the one hand, and comparative law studies with the Australian legal policy, on the other hand. These legislative issues related to supported decision-making have not yet been discussed at the Expert Commission or in the academic field of the guardianship law in Japan, which shows the originality of this dissertation.

4. Remaining Issues

This dissertation does not examine some legal issues related to supported decision-making, including its safeguards, and contemporary measures of the social security law in the legal advocacy that has been adopted in other developed countries. Research on the former issues requires a certain amount of empirical data and derivation of problems through the practice of supported decision-making, but such information is not available in Japan. Therefore, the research results in Australia, where supported decision-making has been practiced since around 2010, will be monitored. Research on the latter issues require a comparative law study of legal measures (i.e., the ombudsman, representative payee (pension-receiving agent) etc.) that have a proven record. This is because there are contemporary issues that cannot be solved by the existing legal measures of the social security law (i.e., community-based integrated care system, support program for self-reliance in daily life, etc.), and revisions of current legal measures and other legal measures that address contemporary issues should be examined. The remaining two issues require further research. These issues will be the subject of a future study.

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Singapore

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Mental Capacity Act (Act 22 of 2008) <<https://sso.agc.gov.sg/Act/MCA2008>>

Mental Capacity (Amendment) Act 2016 (No.10 of 2016)

Vulnerable Adults Act 2018 (No. 27 of 2018) <<https://sso.agc.gov.sg/Act/VAA2018>>

Switzerland

Civil Code

The US

Older American Act 1965

Age Discrimination Act of 1975

Elder Justice Act 2009

Elder Abuse Prevention and Prosecution Act 2017

Senior Safe Act (Section 303, the Economic Growth, Regulatory Relief, and Consumer Protection Act)

Supported Decision-Making Agreement Act of Texas (Texas State Act 1357 of 2015)

<<https://law.justia.com/codes/texas/2005/hr/002.00.000048.00.html>>

2005 Texas Human Resources Code CHAPTER 48.

Title 16, Health and Safety, Individuals with Disabilities, Chapter 94A. Supported Decision-Making
(Delaware State Act, Chapter 94a of 2016)

<<https://delcode.delaware.gov/title16/c094a/index.shtml>>

Financial Industry Regulatory Authority (FINRA) Rule No. 2165 and No. 4512 in February 2018

California Welfare and Institutions Code

Financial Exploitation Prevention Act in the State of Michigan

UK-England

Care Act 2014 <<http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted>>

Mental Capacity Act 2005 <<http://www.legislation.gov.uk/ukpga/2005/9/contents>>

Code of Practice

Modern Slavery Act 2015 <<http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>>

UK-Scotland

Adults with Incapacity (Scotland) Act 2000

Mental Health (Care and Treatment) (Scotland) Act 2003

Adult Support and Protection (Scotland) Act 2007

<<http://www.legislation.gov.uk/asp/2007/10/contents>>

UK-Wales

Social Services and Well-being (Wales) Act 2014

<http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw_20140004_en.pdf>

D. Treaties

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms

<<https://rm.coe.int/1680063765>>

EU

Charter of Fundamental Rights of the European Union (2000/C 364/01)

<https://www.europarl.europa.eu/charter/pdf/text_en.pdf>

Convention for the Protection of Human Rights and Fundamental Freedoms

Recommendation CM/Rec (2009)11 of the Committee of Ministers to member states on principles concerning continuing power of attorney and advance directives for incapacity

Recommendation Rec (1999)4 on Principles concerning the Legal Protection of Incapable Adults

Organization of American States (OAS)

American Convention on the Protection of Human Rights for the Elderly

<http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp>

The Hague Conference on Private International Law (HCCH)

The Hague Convention of 13 January 2000 on the International Protection of Adults

<<https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>>

UN

Convention of 13 December 2006 on the Rights of Persons with Disabilities

Optional Protocol to the Convention on the Rights of Persons with Disabilities

<<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> <https://www.mofa.go.jp/mofaj/gaiko/jinken/index_shogaisha.html>

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REFERENCE SURVEY

The way law reform reports are processed in Australia: This text was written by Terry Carney AO, Emeritus Professor of the University of Sydney in email correspondence with the author and is included here with his approval on July 20, 2021.

1. The ‘reference’ to the Law Reform Commission (LRC) comes from the Attorney-General and until issued, no inquiry can be held (very occasionally LRCs have an ‘own motion’ ability).
2. The LRC nearly always have a consultative process that involves (i) issues papers; (ii) a discussion paper; (iii) a final report.
3. The final report is tabled in Parliament and then published but is not self-executing in any way. It is coming from an independent body ‘external to’ the government.
4. As a matter of Parliamentary procedure, it is common for there to be a time limit set for the Government to issue its ‘response’ to the recommendations (often bland/uninformative).
5. At that point, many LRC reports effectively ‘die.’ No action is taken to introduce a Bill to change the law in any of the ways recommended by the LRC.
6. It is not uncommon however for a LRC Report to be suddenly rediscovered and acted on many years later; if political pressure builds for some action and the only blueprint for action (or the ‘best’ one) is whatever the LRC proposed.
7. When the government introduces a Bill based on (or partially on) a LRC report, it is treated in the same way as any other proposed reform:
 - (1) There is an entirely formal ‘first reading’ of the Bill (takes a few minutes, is just its tabling).
 - (2) Sometime later, there will be a ‘second reading debate’ on the Bill. It is ‘at large’ and starts with the Minister’s ‘Second Reading Speech’ summarizing what the Bill is intended to achieve. There is usually also an ‘Explanatory Memorandum’ to the Bill which will detail what each clause is designed to do.
 - (3) At the end of the second reading debate (which is often adjourned and resumed), the House (or in upper chamber the ‘Legislative Council’) will go into ‘committee stage.’ This is where the Opposition and/or Government move and debate specific variations to the language of the original Bill.
 - (4) Once done, the second reading vote adopts, and
 - (5) There is a formal ‘third reading’ which clears passage in that chamber (ditto in upper chamber).
 - (6) The Bill is then law subject to it going to the Governor in Council (the head of state plus a couple of Ministers for what is a rubber stamp process—i.e., it cannot do other than accept/endorse the will of the Parliament, and
 - (7) Any proclamation of its date of effect (in many Acts [as the bill has now become] this is stipulated in a clause of the legislation; but all or some of those commencement dates may be devolved to the Executive and then published.