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BETTER TOGETHER: MICROBOARDS AND SUPPORTED DECISION-MAKING IN SOUTH AUSTRALIA

Abstract

The concern for the welfare of persons living with disabilities is not a new ethical or moral consideration for our society. Microboards are a relatively new development in Australia and operate to enhance supported decision-making through placing a supportive network of interested persons around an individual with impaired decision-making capacity to assist their realisation of wishes and support their needs. This article critically examines South Australia's laws which provide for disability support frameworks and argues that the current laws do not reflect best practice. The article considers whether microboards offer a potential solution to the many practical issues faced by persons living with disabilities. The potential legal, policy and practical issues associated with the use of microboards are identified and a number of recommendations for legal reform are proposed. With these reform measures implemented, a strong case is made that microboards can offer persons living with disabilities a significant increase in their quality of life and autonomy whilst simultaneously strengthening local communities and reducing government responsibility.

I Introduction

Microboards are a form of incorporated association which operate to support and care for a person living with a disability ('principal'). A microboard typically consists of a small group of people, often close family or friends, who work together to support the principal with decision-making. Microboards are a novel, grassroots concept that align with current best practice in providing autonomy, longevity and protection to some of society's most vulnerable people.

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The law does not always reflect best practice, and in South Australia, there is a strong need to examine existing disability support frameworks for their suitability and efficacy. This article argues that microboards offer a potential solution to many practical issues faced by persons living with disabilities. There are, however, a number of relevant and pressing issues which prevent microboards from being properly implemented in South Australia. These include: the entrenched nature of existing disability support mechanisms; a lack of clarity in legally defining a microboard; legislative incompatibility; and long-term operational concerns about microboards themselves. Where properly facilitated, however, microboards can offer a significant increase in quality of life and autonomy, whilst simultaneously strengthening local communities and reducing government responsibility.

Part II of this article canvasses the current legal framework and how it applies to persons living with disabilities. Part III explains the concept of a microboard, including its features and functions. Part IV explores the potential legal, policy, and practical issues associated with the use of microboards as a mechanism for assisting persons with disabilities. Finally, Part V proposes a number of recommendations for legal reform, particularly in respect of the recognition and use of microboards for the purposes discussed.

II The Status Quo

A *Legal Background*

The concern for the welfare of persons living with disabilities is not a new ethical or moral consideration for society. Historically, legal systems have consistently provided for government control over the financial and private property interests of persons who were deemed to have impaired decision-making capacity.[1] Western

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[1] Brian Edward Cox, 'Guardianship for People with Mental Illness: Social Workers' Perspectives and Decisions' (PhD Dissertation, University of London, July 1993) 81; Terry Carney, 'Civil and Social Guardianship for Intellectually Handicapped People' (1982) 8(4) *Monash University Law Review* 199, 205. This article refers to the concept of capacity, particularly in the context of decision-making, and uses the term 'impaired decision-making capacity'. The *Advance Care Directives Act 2013* (SA) ('*ACD Act*') introduced a broad definition of decision-making capacity by defining clearly what constitutes *impaired* decision-making capacity. Section 7(1) of the *ACD Act* states:

> (1) For the purposes of this Act, a person will be taken to have impaired decision-making capacity in respect of a particular decision if —
>
> (a) the person is not capable of —
>
> (i) understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or
>
> (ii) retaining such information; or
>
> (iii) using such information in the course of making the decision; or
>
> (iv) communicating his or her decision in any manner; …

notions of guardianship are thought to have originated in the early Roman Empire and later developed in medieval England, where the sovereign took control with the aim of protecting persons with mental illnesses or intellectual disabilities from exploitation by feudal lords.[2] Laws and codes of ethics governing personal relationships and family relationships provided additional safeguards.[3]

The traditional conception of 'disability' had seen the Western world often treat disability as being 'inherently and inevitably pathological'.[4] This led to the growth of institutions which gave medical professionals the power to detain people against their will 'for their own good' or for community safety without considering the view of the patient.[5] These professionals generally held the ability to determine the most appropriate form of treatment irrespective of the patient's views. These institutional powers were often premised on the underlying assumption that persons being detained lacked sufficient capacity to make decisions for themselves.[6] This was a very unsophisticated treatment of the question of legal capacity which was oppressive and ignored the will, preferences and rights of persons with impaired decision-making capacity. Subsequent advances in medical thinking led to changing attitudes about how persons living with disabilities should be treated.[7] The decline in the use of institutions to confine persons living with disabilities in the 1970s coincided with the emergence of the international disability rights movement.[8] This growing global movement led to widespread recognition that all people, regardless of disability, had a right to equal treatment and protection from discrimination.[9]

It should also be noted that the definition of 'impaired decision-making capacity' applies *in respect of a particular decision* — so capacity is decision-specific, not all or nothing. For case law reflecting the decision-specific nature of capacity, see: *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449; *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290; *Re T (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 782; *Re MB (Medical Treatment)* [1997] 2 FLR 426, 432. One of the underlying principles in the administration, enforcement and operation of the *ACD Act* is that 'a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs': *ACD Act* (n 1) s 10(c).

2 Carney (n 1) 205.

3 Cox (n 1) 81.

4 Luke Clements and Janet Read, 'Introduction: Life, Disability and the Pursuit of Human Rights' in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008) 1, 3–4; Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 15.

5 Carney and Tait (n 4) 15.

6 Ibid.

7 Victorian Law Reform Commission, *Guardianship* (Final Report No 24, 18 April 2012) 14 [2.6] ('*Guardianship*').

8 Ibid 15 [2.8].

9 Ibid 15 [2.9].

This movement culminated in the acceptance of the social model of disability which recognises a disability on the basis that it may hinder an individual's 'full and effective participation in society on an equal basis with others'.[10]

This movement has progressed further with the growing trend towards supported decision-making and movement away from substitute decision-making.[11] Substitute decision-making grants power to another person to make decisions on behalf of someone with impaired decision-making capacity. Schemes such as guardianship and powers of attorney are examples of this.[12] These schemes are utilised with the principal's needs and desires in mind. However, as discussed further in Part III, this does not always occur. Therefore, more genuinely collaborative schemes designed around the concept of supported decision-making are required. Supported decision-making is an 'interdependent'[13] process which aims to 'restore more choice and control to people with disabilities',[14] reflecting existing informal decision-making processes of consulting friends, family and professionals.[15] In doing so, it seeks to assist persons with impaired decision-making capacity to make decisions reflecting their will. Supported decision-making has been accused of being ill-defined, particularly in Australia, as the term has wide application and can be implemented in both informal and formal arrangements.[16] However, there is a substantial body of literature on the broader benefits of supported decision-making for the lives of

10 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('*CRPD*').

11 Whilst the concept is represented in international law and some domestic policy, its implementation within Australian law is much more limited. See, eg: Office of the Public Advocate (South Australia) and Office of the Public Advocate (Victoria), Submission No 95 to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (June 2014) 5; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report of the Victorian Parliament Law Reform Committee* (Parliamentary Paper No 352, August 2010) 117 ('*Inquiry into Powers of Attorney*'); 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, 35.

12 Whilst these two schemes are very different in their operation and would not ordinarily be discussed together, they both operate on a fundamental level to substitute decision-making powers to another person or entity.

13 *Guardianship* (n 7) 126 [8.1]–[8.6].

14 Mary-Ann De Mestre, 'Supported Decision-Making as an Alternative to Guardianship Orders: The South Australian Trial' (2014) 8(1) *Elder Law Review* 1, 1.

15 Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context: A Socio-Legal Journal* 44, 44.

16 Terry Carney and Fleur Beaupert, 'Public and Private Bricolage: Challenges Balancing Law, Services and Civil Society in Advancing *CRPD* Supported Decision-Making' (2013) 36(1) *University of New South Wales Law Journal* 175, 178.

persons living with disabilities.[17] It has been noted, for example, that supported decision-making can enhance 'autonomy … dignity … equality … [and] reflect[s] [modern] norms and developments'.[18]

The Committee on the Rights of Persons with Disabilities ('Committee'), in its *General Comment No 1 (2014): Article 12: Equal Recognition before the Law ('General Comment')* emphasised that there had been a failure to understand that the human rights-based model of disability implied a shift from the substitute decision-making paradigm to one based on supported decision-making.[19] Supported decision-making is promoted as a primary means of respecting the right to legal capacity without discrimination based on disability.[20] In the *General Comment*, the Committee suggested that substitute decision-making regimes must be replaced with supported decision-making regimes and alternative supported decision-making models be developed to ensure compliance with the *Convention on the Rights of Persons with Disabilities* ('*CRPD*').[21] The paradigm shift towards supported decision-making models has been endorsed by the Australian Law Reform Commission, which advocates for a movement from a 'best interests' standard to one based on the 'will, preferences and rights'[22] of the person, in line with the *General Comment*.[23] As later explained in Part III of this article, microboards operate to facilitate supported decision-making, with elements of substitute decision-making where necessary. Thus, microboards can be personalised based on individual 'will and preferences' and can function on a spectrum between supported and substituted decisions.[24]

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17 Bruce Alston, 'Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform' (2017) 35(2) *Law in Context: A Socio-Legal Journal* 21; 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; Karrie A Shogren et al, 'Supported Decision Making: A Synthesis of the Literature Across Intellectual Disability, Mental Health, and Aging' (2017) 52(2) *Education and Training in Autism and Developmental Disabilities* 144, 152–4; Gavin Davidson et al, 'Supported Decision Making: A Review of the International Literature' (2015) 38(1) *International Journal of Law and Psychiatry* 61, 63–6; Christine Bigby and Jacinta Douglas, 'Supported Decision Making' in Michael L Wehmeyer and Karrie A Shogren (eds), *Choice, Preference, and Disability: Promoting Self-Determination Across the Lifespan* (Springer, 2020) 45, 45–61.

18 Alston (n 17) 24.

19 Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CPRD/C/GC/1 (19 May 2014) 1 [3] ('*General Comment*').

20 Carney and Beaupert (n 16) 199.

21 *General Comment* (n 19) 6 [28]; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper No 44, 15 November 2013) 31 [68] ('*Equality, Capacity and Disability in Commonwealth Laws Issues Paper*').

22 Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017) 163 [5.14] ('*Elder Abuse: A National Legal Response*').

23 *General Comment* (n 19) 6 [26].

24 Browning, Bigby and Douglas (n 11) 37.

B *Development of Microboards*

The first microboard was established in 1984 in Manitoba, Canada with the aim of supporting a person with an intellectual disability leaving an institution.[25] The idea was progressively developed by the Vela Microboards Association in British Columbia, with a number of pilots launched throughout the early 1990s.[26] These pilots have had long-term success and are all still in existence,[27] thus prompting the creation of additional microboards around the world.[28]

Unsurprisingly, most microboards to date can be found in the disability sector as many people whose lives are characterised by disability-related challenges have long-term needs for physical support, access to government services, social connection, communication assistance, financial management and articulating and achieving their goals.[29] In 2008, Microboards Australia, the peak representative body, was established in Perth[30] to coincide with the creation of Australia's first microboards. A number of microboards have since been established in almost every state and territory in Australia.

There is currently one microboard in South Australia, with at least one other unincorporated group actively pursuing incorporation.[31] These groups regularly meet and include people who are already heavily involved in the life of the principal and can assist the principal with certain aspects of their decision-making process. Although no detailed guidelines exist as to the kinds of decisions a microboard can assist with, it is axiomatic that decisions will centre upon the specific medical, financial and residential needs and desires of the principal.[32] As Microboards Australia correctly

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25 Leighton Jay and Michael T Schaper, 'Microboards: What Are They and How Do They Work?' (2012) 26(4) *Training and Management Development Methods* 4.01, 4.02; Carolyn Lemon and James Lemon, 'Community-Based Cooperative Ventures for Adults with Intellectual Disabilities' (2003) 47(4) *Canadian Geographer* 414, 415.

26 Michelle Jennett Browning, 'Developing an Understanding of Supported Decision-Making Practice in Canada: The Experiences of People with Intellectual Disabilities and Their Supporters' (PhD Thesis, La Trobe University, 2018) 52.

27 Ibid. With the exception of those where the principal has since passed away.

28 Particularly in Canada, although a number exist in the United States and Australia.

29 Jay and Schaper (n 25) 4.02–4.03.

30 'The Jaquie and Sheree Story', *Microboards Australia* (Web Page) <http://microboard.org.au/jaquie-sheree-story/>.

31 Anecdotal evidence based on the numerous discussions which took place with members and the authors to shape this research.

32 David Plater et al, 'New Avenues of Providing Effective Care: The Role of Microboards' (2021) 43(6) *Law Society of South Australia Bulletin* 9, 9. See also Tim Stainton, 'Supported Decision-Making in Canada: Principles, Policy and Practice' (2016) 3(1) *Research and Practice in Intellectual and Developmental Disabilities* 1, 8: 'All planning and decisions made by a microboard will demonstrate regard for the person's safety, comfort, and dignity, with consistent respect for his/her needs, wishes, interests, and strengths.'

notes, a microboard's activities will necessarily be framed around these needs and desires.[33] Theoretically, therefore, there are no firm limits as to what a microboard can assist with, as each principal will be different. However, it is expected that decisions with which principals may require assistance will relate to aspects such as the principal's living arrangements, personal finances, employment options, access to support services, social activities, and healthcare. Despite only one microboard existing in South Australia (and one group pursuing incorporation) at present, a significant amount of community interest in microboards has been noted, suggesting that possible future demand may be substantial.[34]

A microboard traditionally takes the form of an incorporated association (or equivalent) to provide it with a legal personality.[35] In South Australia, the *Associations Incorporation Act 1985* (SA) ('*Incorporation Act*') provides for the incorporation of community associations. Microboards can utilise the *Incorporation Act* to obtain independent legal personality, giving microboards the ability to enter into contracts and hold property on behalf of the principal.[36] The *Incorporation Act* provides certain protections from liability for members whilst containing a number of safeguards in relation to financial transparency and conflicts of interest.[37]

C *Moving from Substitute Decision-Making to Supported Decision-Making*

Australia is a party to the *CRPD* which places significant emphasis on human rights and the equal recognition of persons living with disabilities before the

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33 'Every microboard will be different. They will meet in different ways, have a wide variety of kinds of people involved in them and do different kinds of work because the people at the centre is a unique person': Jaquie Mills, 'The Values and Principles that Drive the Actions of Microboards', *Microboards Australia* (Web Page, 3 March 2017) <http://microboard.org.au/2017/03/03/2285/>. See also 'What is a Microboard?', *Microboards Australia* (Web Page, 2016) <http://microboard.org.au/what-is-a-microboard/>.

34 The issue of microboards and desire to utilise them as an alternative to existing disability support mechanisms was repeatedly raised in a number of community consultation sessions held by the South Australian Law Reform Institute ('SALRI') throughout 2020: Sylvia Villios et al, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Powers of Attorney in South Australia* (Report No 15, South Australian Law Reform Institute, December 2020) 405 [10.1.1]–[10.1.2] ('*Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?*').

35 Jay and Schaper (n 25) 4.05. Each Australian state and territory has a statutory association incorporation scheme. The relevant statutes are: *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act 2009* (NSW); *Associations Act 2003* (NT); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Reform Act 2012* (Vic); *Associations Incorporation Act 2015* (WA).

36 *Associations Incorporation Act 1985* (SA) ss 20(3)(a), 25(a)–(b), (h) ('*Incorporation Act*').

37 Ibid ss 20(3), 31–2.

law.[38] Article 12 of the *CRPD* provides that 'States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law' and that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[39] Article 12 further provides that 'States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[40] This makes it clear that having a disability should not translate to legal incapacity.[41] Additionally, art 12 promotes laws and policies which respect the autonomy of persons living with disabilities, including measures to ensure they can own and inherit property and control their financial affairs.[42] Therefore, there is not only a moral obligation to facilitate supported decision-making processes, but also a legal imperative to ensure that disability support systems respect and reflect the will, preferences and rights of persons living with disabilities.

This human rights-based approach supports individual autonomy and decision-making. Contemporary views in this area lean on the concept of relational autonomy, an understanding that situates individuals within their social and personal contexts. Relational autonomy can be contrasted with traditional independent autonomy and considers that a person's relationships can have an equally valid role in demonstrating autonomy.[43] The Committee in the *General Comment* expressed that States parties must 'take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences'.[44] South Australian mechanisms for making decisions about the lives of people with impaired decision-making capacity are primarily the formal substitute decision-making regimes of guardianship and administration, with a separate but relevant role played by powers of attorney and advance care directives — all of which are, in many respects, inconsistent with

38 *CRPD* (n 10) arts 1, 12.

39 Ibid arts 12.1, 12.2.

40 Ibid art 12.3.

41 Sylvia Villios et al, *A Review of the Role and Operation of Powers of Attorney in South Australia* (Discussion Paper, South Australian Law Reform Institute, June 2020) 15–6 [4.2.2]–[4.2.3].

42 *CRPD* (n 10) art 12.5.

43 Microboards draw from this concept of autonomy. See generally: Laura Davy, 'Between an Ethic of Care and an Ethic of Autonomy: Negotiating Relational Autonomy, Disability and Dependency' (2019) 24(3) *Angelaki Journal of the Theoretical Humanities* 101, 107–8; John Christman, 'Relational Autonomy and the Social Dynamics of Paternalism' (2014) 17(3) *Ethical Theory and Moral Practice* 369, 373–7; Marilyn Friedman, 'Relational Autonomy and Individuality' (2013) 63(2) *University of Toronto Law Journal* 327, 327–8, 331; Jennifer K Walter and Lainie Friedman Ross, 'Relational Autonomy: Moving Beyond the Limits of Isolated Individualism' (2014) 133(1) *Pediatrics* S16, S16, S18–S19; Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000) 4.

44 *General Comment* (n 19) 6 [26].

the *CRPD's* goals.[45] These established forms of disability support will be explored below.

1 *Guardianship in South Australia*

Guardianship and administration orders in South Australia can be granted under the *Guardianship and Administration Act 1993* (SA) ('*Guardianship Act*') to allow a person to make decisions on behalf of another person. Guardianship orders generally cover personal decisions such as accommodation, health care and support services, whilst administration orders mostly pertain to financial decisions.[46] A guardian or administrator is generally appointed through application[47] to the South Australian Civil and Administrative Tribunal ('Tribunal'), if the Tribunal is satisfied both that a principal has mental incapacity and that an order should be made.[48] 'Mental incapacity' is defined in the *Guardianship Act* as

> the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of—
>
> (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or
>
> (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever.[49]

Such an order may be made on a limited basis or in full.[50] The guardian makes substitute decisions concerning the person and/or the person's estate under the *Guardianship Act*.[51] The *Guardianship Act* outlines a number of mandatory criteria which the Tribunal must consider in determining suitability for appointment as either a guardian or an administrator. These include incompatibility, family dynamics, competency, availability, conflicts of interest and any other matters the Tribunal considers relevant.[52] In the absence of a suitable person, the Office of the

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45 South Australia also has a system for substitute decision-making for health care and medical treatment which does not necessarily require that a guardianship order be obtained. This is under the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) pt 2A and the *Mental Health Act 2009* (SA).

46 'Guardianship and Administration', *Legal Services Commission South Australia* (Web Page, 4 February 2021) <https://lawhandbook.sa.gov.au/ch22s01.php>.

47 The Tribunal is also empowered to place a person under a guardianship order of its own motion after revoking an advance care directive under the *ACD Act* (n 1) s 51(1)(f) and *Guardianship and Administration Act 1993* (SA) ss 29(1), 35(1) ('*Guardianship Act*').

48 *Guardianship Act* (n 47) ss 29(1)(a)–(c), 35(1).

49 Ibid s 3 (definition of 'mental incapacity').

50 Ibid ss 29(1)(d)–(e).

51 Ibid s 5.

52 Ibid ss 50(1)(a)–(f).

Public Advocate ('OPA') may be appointed as guardian,[53] and the Public Trustee as administrator.[54]

There is limited empirical data available on the prevalence, use or efficacy of guardianship orders in South Australia, aside from those overseen by the OPA. As of June 2020, there were 1,291 clients under OPA guardianship, constituting a 22.25% increase on the previous year.[55] The predominant impairments recorded were intellectual disability (27%), mental illness (20%) and dementia (19%).[56] There has been a steady increase in the number of people under guardianship orders in South Australia over the past five years.[57] This suggests that there is a growing inclination from families, service providers and disability support networks to seek more formal decision-making arrangements, even when they might be unnecessary due to, for example, the principal's social or economic context.[58] Simultaneously, there is notable anecdotal evidence of community distrust in institutionalised forms of decision-making, particularly within regional areas of South Australia.[59] This is pertinent given that approximately 30% of persons under adult guardianship orders overseen by the OPA live in regional areas.[60]

In 2013, John Brayley, former Public Advocate, noted in local media that there were many people living unnecessarily under guardianship orders.[61] The employment

53 Ibid s 29(4).

54 Ibid s 35(2)(a).

55 Anne Gale, *Annual Report 2019–2020* (Report, Office of the Public Advocate South Australia, 29 September 2020) 10, 13. For 2018–19: see Anne Gale, *Annual Report 2018–2019* (Report, Office of the Public Advocate South Australia, 30 August 2019) 11.

56 Anne Gale, *Annual Report 2019–2020* (Report, Office of the Public Advocate South Australia, 29 September 2020) 11.

57 Ibid 13. See also *ABC News South Australia* (Australian Broadcasting Corporation, 2013) 0:00:00–0:00:15 <https://search.informit.org/doi/10.3316/TVNEWS.TSM201311230178>: 'The number of people under guardianship care in South Australia has doubled in the past four years, but the Public Advocate says many don't need guardianship orders and the legislation governing the issue is out of date and needs reform.'

58 For instance, parents who care for their adult children with cognitive impairments are increasingly asking to be appointed guardian in situations where there is no obvious need for this arrangement and where previously informal arrangements were considered adequate. See John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66(1) *Australian Social Work* 26, 32.

59 This issue was raised at a SALRI consultation session held in rural South Australia. Participants expressed their distrust of the guardianship and administration scheme, particularly with the involvement of the city-based Offices of the Public Advocate and Public Trustee: *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34) 43, 94, 192, 207, 232, 246, 302–4, 400.

60 David Allan Cripps, 'The Social Gradient of Adult Guardianship in South Australia' (2015) 22(3) *Psychiatry, Psychology and Law* 436, 442.

61 See above n 57 and accompanying text.

of a guardianship order has long been recognised as an extreme action, thus eliciting calls for reform, including the exploration of less invasive preliminary options.[62] Additionally, there are critiques that Australia has invested significantly in guardianship services, but failed to provide many alternatives for decision-making support.[63]

The implementation of a guardianship order removes legal decision-making authority from the principal and reduces opportunities to test decision-making capabilities,[64] negating the fact that personal autonomy is seen as key to wellbeing, confidence and increasing capacity.[65] The Australian *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* has been presented with numerous submissions regarding perpetration of abuse under guardianship and administration orders.[66] As an example, one submission detailed a person with a disability being 'verbally abused, isolated, and prevented from attending medical appointments' by her guardian.[67] Such instances of abuse are not limited to independent guardians operating outside of the public service. In 2018, a former officer of the South Australian Public Trustee pleaded guilty to seven counts of financial abuse while operating as administrator.[68]

Research conducted by the Australian Guardianship and Administration Council has shown that less than half of people who are subject to administration or guardianship orders are able to contribute to their own reviews, applications or ongoing case management.[69] The restrictive nature of guardianship orders, operating in conjunction with the inherent vulnerability of the recipient, can lend itself to abuse.[70] Guardianship legislation has been condemned as having 'an air of paternalism that sits uneasily with modern-day conceptions of the rights of people with disabilities'.[71]

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62 John Brayley, *Developing a Model of Practice for Supported Decision Making* (Report, Office of the Public Advocate South Australia, June 2011) 13.

63 Office of the Public Advocate South Australia, Submission No 325 to Productivity Commission, *Inquiry into Disability Care and Support* (20 August 2010) 9 [35].

64 Shih-Ning Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35(1) *Sydney Law Review* 133, 140.

65 Browning, Bigby and Douglas (n 11) 37–8; Matt Jameson et al, 'Guardianship and the Potential of Supported Decision Making with Individuals with Disabilities' (2015) 40(1) *Research and Practice for Persons with Severe Disabilities* 36, 36.

66 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) 420 ('*Royal Commission*').

67 Ibid.

68 Rebecca Opie, 'Former Adelaide Public Trustee Employee Jailed Over Deceased Estate Thefts', *ABC News* (online, 23 Jan 2018) <https://www.abc.net.au/news/2018-01-23/former-public-trustee-worker-jailed-theft-from-deceased-estates/9352136>.

69 *Royal Commission* (n 66) 420.

70 Then (n 64) 160; *Royal Commission* (n 66) 420; Office of the Public Advocate South Australia, Submission No 325 to Productivity Commission, *Inquiry into Disability Care and Support* (20 August 2010) 45.

71 Browning, Bigby and Douglas (n 11) 35.

At the same time, it is well-established that in specific circumstances, guardianship orders can also protect vulnerable people from abuse and enhance their wellbeing.[72]

2 *Powers of Attorney in South Australia*

Enduring powers of attorney under the *Powers of Attorney and Agency Act 1984* (SA) ('*POA Act*') hold significant relevance in disability support. These activate in the event of an individual becoming legally incapacitated,[73] which often occurs as a result of disability or illness related to old age. The attorney is selected by the principal prior to legal incapacitation and often with the assistance of legal advice. Attorneys must act with reasonable diligence to protect the interests of the donor,[74] and often will have power over the management of financial and legal affairs. There is no mention of supported decision-making within the *POA Act*.

There are significant risks in this approach, particularly with vulnerable principals. In a submission to the Victoria Law Reform Commission's review on powers of attorney, the Victorian Coalition of Acquired Brain Industry Service Providers noted

> an example recently of a young man who is in a locked unit in a specialist residential aged care facility whose father has power of attorney and who has retired interstate … Our view is that if given the opportunity to … spend some time out in the community, he would be able to make a decision about an alternative place to live.[75]

The Victorian Law Reform Commission flagged the issue of people being overlooked when they lacked legal capacity to appoint an enduring power of attorney but were ineligible for a guardianship order, with no decision-making support in between.[76] There is a lack of data on abuse as a result of power of attorney relationships, with some evidence suggesting most function effectively[77] whilst other sources describe it as 'not uncommon' for abuses to occur.[78]

Numerous safeguards and remedies exist for abuse. The *POA Act* requires record keeping and actions in the best interests of the principal, with persons who fail to do so guilty of an offence and liable to a penalty.[79] Common law actions might also be available, including for unconscionable conduct, undue influence and

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72 *Royal Commission* (n 66) 31.

73 *Powers of Attorney and Agency Act 1984* (SA) ss 6(1)(b)(i)–(ii) ('*POA Act*').

74 Ibid s 7.

75 *Inquiry into Powers of Attorney* (n 11) 116.

76 Ibid 120–3.

77 Ibid 26.

78 Ibid; *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34) 221 [6.1.5].

79 *POA Act* (n 73) s 8.

misappropriation. There may also be criminal offences including for fraud and theft; however, no specific offence for abuse exists.[80] The difficulty faced by individuals with impaired capacity to take action means that abuse is rarely prosecuted and these causes of action are seldom used in the case of abuse.[81] This is compounded by the fact that legal processes are often cumbersome and expensive, which is a substantial barrier to those who may have limited resources as a result of financial abuse.[82]

3 *Advance Care Directives in South Australia*

An advance care directive ('ACD') is a legal document designed as an instrument of autonomy enabling a competent adult to articulate their instructions, wishes and preferences in relation to future medical treatment, living arrangements or other personal matters in the event that they are unable to consent or refuse. An ACD also allows a principal to appoint one or more substitute decision-makers to act on their behalf when they are no longer able to make decisions, in accordance with the *Advance Care Directives Act 2013* (SA) ('*ACD Act*'). The relevant provisions and principles in the *ACD Act* follow a modern emphasis[83] of recognising a person's right to autonomy and self-determination as much as possible.[84]

The *ACD Act* includes a statement of objectives and general principles,[85] arguably based on the human-rights model in which all individuals are equal before the law and a presumption that all individuals have decision-making capacity.[86] One of the general principles of the *ACD Act* is that a competent adult can decide what constitutes 'quality of life' for themselves and can express this in advance in an ACD.[87] Further supporting this human rights model is that the substitute decision-maker must consider directions expressed in the ACD and the wishes of the person who gave the directive.[88]

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80 Natalia Wuth, 'Enduring Powers of Attorney: With Limited Remedies: It's Time to Face the Facts!' (2013) 7(1) *Elder Law Review* 1, 15.

81 Ibid 14.

82 Ibid.

83 Loane Skene, 'When Can Doctors Treat Patients Who Cannot or Will Not Consent?' (1997) 23(1) *Monash University Law Review* 77, 79.

84 The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives* (Report, September 2011) 24.

85 *ACD Act* (n 1) s 9; *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34) 60 [3.3.1].

86 *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34) 150–2.

87 *ACD Act* (n 1) s 10(b).

88 Ibid s 35.

One of the underlying principles in the administration, enforcement and operation of the *ACD Act* is that 'a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs'.[89]

It should also be noted that the definition of 'impaired decision-making capacity' applies *in respect of a particular decision* — in that capacity is decision-specific, not all or nothing. Part of the impetus for a 2008 review of the South Australian ACD scheme was derived from the criticism that the *Guardianship Act* was 'perceived to treat loss of capacity as … a single event whereby all decision-making rights are lost completely and irrevocably'.[90]

The *ACD Act* strengthens the presumption of decision-making capacity by clarifying that a person does not lack decision-making capacity merely because: they do not understand matters of a technical or trivial nature; retain information for a limited time; fluctuate between having impaired decision-making capacity and full decision-making capacity; or make a decision that results, or may result, in an adverse outcome for the person.[91] By acknowledging that a person's decision-making capacity can vary depending on the circumstances,[92] and linking the assessment of capacity to a particular decision, a definition of 'impaired decision-making capacity' which incorporates these provisions allows for a wider and more nuanced scope for assessing capacity. In particular, the definition of 'impaired decision-making capacity' in the *ACD Act* aims to accommodate the needs of people with mental illnesses, neurodegenerative disorders or cognitive impairments (such as dementia) whose capacity to make decisions may fluctuate.[93]

While the *ACD Act* undoubtedly represents a drastic improvement on the *POA Act* and *Guardianship Act*, it too has limitations. An ACD is limited in scope as it does not authorise the substitute decision-maker to deal with the financial and legal affairs of a person. Substitute decision-makers may only decide on an ACD if, at the relevant time, the person who gave the ACD has impaired decision-making capacity in respect of the decision.[94] Therefore, decision-making capacity must be affected for an ACD to come into force. So, whilst an ACD is progressive, it cannot be seen as a substitute for a microboard, which is able to operate in a manner such that

89 Ibid s 10(c).

90 Advance Directives Review Committee, Parliament of South Australia, *Advance Directives Review: Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) Letter of Transmittal.

91 *ACD Act* (n 1) ss 7(2)(a)–(d).

92 New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 60 [6.27].

93 South Australia, *Parliamentary Debates*, House of Assembly, 17 October 2012, 3228 (John Hill, Minister for Health and Ageing).

94 *ACD Act* (n 1) s 34(1).

the principal is continuously supported at all times, irrespective of whether their decision-making capacity at any point in time is considered to be impaired.

III Microboards

A *Role and Function*

A microboard is a formalised circle of support around a principal. The microboard assists the principal in managing health, financial and lifestyle affairs and is driven by a purpose of understanding the principal's long-term goals. A microboard's constitution will require that the principal be placed at the centre of every decision and is designed to maximise the autonomy of the principal, whilst providing a vehicle for increasing the principal's social support network. Incorporation provides a legal framework for the group, which allows for the continuation of the legal personality of the association, while simultaneously protecting members from financial liability and allowing the association to transact in its own name.

Microboards are primarily a community; their legal personality provides assistance and facilitates operation but is merely a formalisation of relationships. At a practical level, a microboard will regularly meet with the principal and assist in managing the principal's affairs. Microboards are often appealing to parents who want to ensure continuing care and support for their children.[95] The end goal is that members of the microboard will assist the principal in living their life without sole dependence on any particular individual.

A key benefit of microboards and the use of legislation such as the *Incorporation Act* is that significant flexibility is afforded when designing structure and governance frameworks. This allows groups of people to create a microboard in conjunction with the principal and in a way which suits their personal and social context. Whilst some members of microboards have anecdotally found this to be of high utility,[96] such a varied nature makes broad-based regulation inherently more difficult.

A microboard is not an ordinary incorporated association — although it benefits from the legal personality afforded to one — in that it can encompass the utilities of both a corporate entity and disability support provider. There are a wide range of applications, including the potential to operate as a registered service provider under the National Disability Insurance Scheme ('NDIS'), hire employees, manage

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95 In a recent consultation a medical practitioner described to SALRI how a microboard could be an ideal arrangement to care for her adult son or daughter with disability in the situation where family could not. The practitioner expressed concern at the possibility of their son or daughter being placed in a residential facility or under a guardianship order with someone they did not know: *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34) 411.

96 This was noted as a key benefit in consultation with Microboards Australia and committee members of the microboard in South Australia.

property, and transact business. The breadth of these functions means that no two microboards are the same, but there are a number of common features which distinguish them from other incorporated associations.

B *Composition, Funding and Existing Disability Support*

1 *Composition*

There is flexibility as to the composition of a microboard, and its precise nature will almost entirely depend on the individual circumstances of the principal, their social connections and their broader circumstantial context. Membership is strictly voluntary, with some microboards opting for shorter terms and requirements that each member replace themselves upon leaving.[97] Unfortunately, there will be instances where there are a lack of people available to support the principal, which is one key reason why microboards will not be an appropriate solution in every circumstance. Microboards necessitate, by definition, a strong existing community of people who are willing to volunteer their time and effort. In many cases, persons who urgently need support do not have the networks to facilitate forming a microboard in the first place. There may also be a lack of capable or experienced people to assist in some of the more nuanced aspects of operating a microboard.[98] The involvement of persons living with disabilities within a faith, sporting, town or community group would thus provide ideal circumstances for the formation of a microboard.

It should be noted, however, that while there are no strict or universal criteria stipulating who can join a microboard, some guidance to help enlist appropriate members exists. For example, Vela Canada, which is based in British Columbia, provides a set of guiding principles[99] and emphasises six key points which have been endorsed by Microboards Australia.[100] To summarise, members must: (1) 'establish and maintain a personal relationship' with the principal; (2) acknowledge, respect and demonstrate their understanding of the fact that the principal is assumed to have the capacity for self-determination; (3) together with other members, make all planning and decisions with regard for the principal's 'safety, comfort, and dignity, with consistent respect for their needs, wishes, interests, and strengths'; (4) 'act as sponsors to the community, ensuring the [principal] participates in community activities with [other] members (e.g. family functions, social events)'; (5) '[e]nsure the [principal] has the opportunity to both receive from and give to their community,

97 In South Australia, this is the case with both the existing microboard and the second proposed microboard yet to be incorporated.

98 Susan A Flanagan and Pamela S Green, 'Fiscal Intermediaries: Reducing the Burden of Consumer-Directed Support' (2000) 24(3) *Generations Journal* 94, 95.

99 'Principles and Guidelines for Microboards', *Vela Canada* (Web Page, 2021) <https://velacanada.org/services/microboards/principles-guidelines/> ('Principles and Guidelines').

100 Mills (n 33).

as well as with other individuals in their network'; and (6) 'conduct their board business in the spirit of mutual respect, cooperation, and collaboration'.[101]

Vela Canada also endorses the British Columbia Law Reform Commission's 'Conflict of Interest Guidelines', which ensure microboard members do not place themselves into a situation of conflict through their position.[102] Future efforts to formalise requirements for microboard membership might draw additional guidance from existing proscriptions contained in legislation governing incorporated associations in each Australian jurisdiction. Across Australia, this legislation prohibits certain persons (such as persons convicted of certain criminal offences, or persons declared bankrupt) from becoming members of the committee of incorporated associations without leave of the court or the relevant regulator.[103]

2 *Funding*

A microboard may be eligible to receive funding from the NDIS to cover certain operational and setup costs.[104] Microboards in Australia have successfully obtained NDIS funding[105] to cover initial and ongoing costs.[106] The *National Disability Insurance Scheme Act 2013* (Cth) ('*NDIS Act*') provides funding for supports which are considered reasonable and necessary.[107] The objects of the *NDIS Act* include (but are not limited to) giving effect to Australia's obligations under the *CRPD*, supporting the independence and social and economic participation of persons living with disabilities, and to enable persons living with disabilities to exercise choice and control in the pursuit of their goals and delivery of their supports.[108]

The *NDIS Act* emphasises choice and control in its general principles. For example, s 4(4) provides that 'persons with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the

101 'Principles and Guidelines' (n 99).

102 Ibid.

103 See, eg: *Associations Incorporation Act 1992* (ACT) ss 63, 63A, 63B; *Associations Act 2003* (NT) s 30; *Associations Incorporation Act 1981* (Qld) s 61A; *Incorporation Act* (n 36) s 30; *Associations Incorporation Reform Act 2012* (Vic) s 78; *Associations Incorporation Act 2015* (WA) ss 39–40; *Associations Incorporation Act 2009* (NSW) s 35.

104 Microboards Australia, 'Using NDIS Funding to Pay for Microboard Development', *NDIS & Microboards* (Web Page) <http://microboard.org.au/ndis/> ('Using NDIS Funding').

105 Ibid.

106 These costs include, for example, initial establishment fees for personal care and participation supports, transport to initial and ongoing service appointments, required therapy sessions etc: 'NDIS Pricing Arrangements and Price Limits', *NDIS* (Web Page, 1 March 2022) <https://www.ndis.gov.au/providers/pricing-arrangements>.

107 *National Disability Insurance Scheme Act 2013* (Cth) s 34 ('*NDIS Act*').

108 Ibid s 3.

planning and delivery of their supports'.[109] Moreover, the *NDIS Act* recognises that persons living with disabilities should be involved in the decision-making process that affects them and make decisions for themselves.[110]

There are strong arguments in support of microboards meeting all of the criteria for reasonable and necessary NDIS support under s 34 of the *NDIS Act*.[111] In that regard, it can be argued that microboards:

- assist the principal to pursue the goals, objects and aspirations included in the principal's statement of goals and aspirations;
- facilitate the principal's social and economic participation;
- represent value for money;
- are likely to be effective and beneficial;
- take into account what it is reasonable to expect families, carers, informal networks and the community to provide; and
- are appropriately funded or provided through the NDIS.

3 *Existing Disability Support*

Microboards are heavily individualised structures, as their purpose is to focus on the 'goals, dreams, needs and desires' of the principal.[112] The role of microboards in decision-making can therefore range from merely facilitating social connections to enabling major financial choices. While supported decision-making is generally embedded in the microboard's constitution, it is worth noting that any microboard will, by necessity, exercise a degree of incidental substitute decision-making in order to practically function. This may vary depending on the fluctuating capacity of the principal. Microboards have the benefit of catering to a 'continuum' of capacity, rather than an 'all or nothing' approach.[113] This recognises that a person's ability to operate within the legal system is not static and can change depending on socio-environmental factors.[114]

There are a significant number of potential benefits of microboards over substitute decision-making mechanisms. Existing approaches, in particular guardianship and

109 Ibid s 4(4).

110 Ibid s 5(a).

111 'Using NDIS Funding' (n 104).

112 'What is a Microboard?', *Microboards Australia* (Web Page) <http://microboard.org.au/what-is-a-microboard/>.

113 Browning, Bigby and Douglas (n 11) 38–40.

114 Ibid 39.

administration orders (even with provisions for joint guardians), have failed to meet best practice. Numerous media reports highlight abuses of these statutory arrangements by guardians and administrators, with the OPA of South Australia among others noting the failures of this substitute decision-making system.[115] Microboards offer a compelling alternative in that they facilitate and cement a community around a principal. The key consideration for membership on a microboard is an existing personal relationship with the principal. The microboard model can provide the principal with access to the skills, social networks and resources of members. This process develops inclusivity between team members and encourages various people to be involved with the wellbeing of people with a disability, rather than primarily relying on trained professionals.[116] In the vast majority of cases, the role of a guardian or power of attorney is held by one person, rather than multiple people. If a primary caregiver is suddenly unable to provide care, this can create significant pressure on family members such as siblings or parents.[117] Microboard networks carry the potential to share responsibility among a wider group of people. Ideally, a wider network of responsibility could help guard against financial abuse, particularly in relation to powers of attorney. It may also facilitate a more even distribution of responsibilities, encouraging greater efficiency in administration.

The application of existing schemes is often limited in operation to a specific area and can quickly become a mechanical and restrictive process.[118] In contrast, a microboard, which often incorporates NDIS goals, can provide a holistic and community-based approach. Individualisation allows a microboard to reduce formality and rigidity as it is tailored to its principal's specific needs. This is essential in providing decision-making frameworks for disability support, as disability is a uniquely personal experience. These benefits are compounded by the ability of a principal to determine who they would like to be a part of their microboard; people that they know and trust, and who will actively contribute. This can be contrasted with guardianship or administration appointments, which are in certain cases made unilaterally by the Tribunal.

The sheer breadth of decision-making categories covered by a microboard, including lifestyle, finance, healthcare and accommodation (depending on the needs of the principal) is another key advantage. This removes the need for separate systems, such as the distinct forms of guardianship, administration or (in a different but still relevant context) powers of attorney, which reduces bureaucracy whilst potentially benefiting the recipient.

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115 See above n 57 and accompanying text; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, August 2014) 278 [10.22] ('*Equality, Capacity and Disability in Commonwealth Laws Report*'); *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34).

116 'Using NDIS Funding' (n 104).

117 There is minimal data available on the prevalence of multi-guardianship orders, and this statement is based on anecdotal discussions.

118 Kohn, Blumenthal and Campbell (n 17) 1155.

There is anecdotal evidence that parents of children with disabilities are fearful that their child will end up under guardianship, particularly beyond the parents' lifetime.[119] There appears to be a general distrust of more institutionalised methods.[120] Microboards can provide parents of a child with a disability with the assurance that they will be cared for and supported by a community. As microboards do not require capacity assessments, they can assist in building capacity and upholding supported decision-making where possible. Thus, the framework aligns with the principles of the *CRPD*, particularly art 12.3, and can be contrasted with the tendency for non-compliance in current mechanisms.

IV Legal, Policy and Practical Issues

A *Interaction with Existing Substitute Decision-Making Schemes*

The interaction of microboards with South Australia's existing substitute decision-making mechanisms warrants a discussion. The Committee interpreted art 12.3 of the *CRPD* such that substitute decision-making statutes should be entirely replaced by supported decision-making regimes.[121] The Committee noted that the 'development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12'.[122] This approach has not been adopted in Australia, where retention of substitute decision-making processes remains, purportedly reserved for imperative circumstances and as a last resort, with relevant accountability mechanisms.[123] In the 10 years since ratification, even this interpretation does not appear to have been incorporated into the practice and operation of disability support in South Australia.

There are numerous considerations when determining the functionality of microboards within existing systems. Policy challenges can arise when reviewing possible changes to law, owing to the possibility of unintended negative effects. As an example, there is concern that legislating supported decision-making arrangements such as microboards may have a 'net widening effect', where appropriate existing

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119 This was ascertained in conversation with parents considering microboards in South Australia and is a reflection of the trend identified in *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System?* (n 34) 407 [10.1.8].

120 One mother of a child living with an intellectual disability who spoke with the authors explained:

> There is no price for the peace of mind for families who have a person with a disability and we see microboards as a peace of mind insurance beyond our lifetime. We value our daughter's independence and individuality beyond her disability. We fear that [if a guardianship order was to be put in place] she will be swallowed up into a conformist group home of mind-numbing sameness.

121 *General Comment* (n 19) 2 [7]; Alston (n 17) 23.

122 *General Comment* (n 19) 6 [28]; Alston (n 17) 35.

123 *Australia's Initial Report under the Convention on the Rights of Persons with Disabilities* (Report, 3 December 2010) 16 [55].

informal arrangements would be replaced.[124] Additionally, there is uncertainty as to whether microboards should work alongside, entirely replace, or even be given comparable powers to, substitute decision-making mechanisms. If microboards were to entirely replace substitute decision-making mechanisms, the possibility of unfavourable ramifications must be considered. There is a strong argument that, in the short term, some form of substitute decision-making must remain. The Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws Report* concluded that for certain groups, there is a 'reality that some people will always need decisions made for them'.[125] Any abrupt eradication would likely put undue pressure on the structure of the microboard, which is admittedly still a new approach in Australia. This could contort the intentions of the microboard to become a de facto substitute decision-making arrangement and would rapidly prove insufficient for those without an existing social support network.

A further consideration is that microboards could be given guardianship or administration orders or could be appointed as an enduring power of attorney.[126] This carries some potential practical benefits which could, however, be quickly outweighed by increased complexity and bureaucracy. This is an issue that warrants further exploration. A final consideration would be for microboards to operate as one part of supported decision-making, aiming to safeguard against the enforcement of unnecessary and inappropriate substitute arrangements. This would allow microboards to remain predominantly supported decision-making mechanisms, whilst also providing an alternative to fully substitute schemes.

B *Incorporation under South Australian Legislation*

In 1858, South Australia became the first jurisdiction in Australia to enact associations incorporation legislation.[127] The *Associations Incorporation Act 1858* (SA) provided a relatively simple and cheap method of incorporating a non-profit association formed for specific community purposes and running the association after incorporation.[128] The eligibility for incorporation was restricted to non-profit community organisations such as churches, schools, hospitals, benevolent, charitable institutions, the mechanics' institute and institutes for the purpose of promoting literature.[129] The *Associations Incorporation Act 1858* (SA) was primarily concerned

124 Alston (n 17) 39–40.

125 *Equality, Capacity and Disability in Commonwealth Laws Report* (n 115) 278 [10.21].

126 While rare, this has occurred in Virginia where a microboard was given guardianship over a foster child living with disability. See: Ann McGee Green, 'Microboards and Guardianship', *Special Needs Alliance* (Blog Post, 28 November 2013) <https://www.specialneedsalliance.org/blog/microboards-and-guardianship/>; 'History', *Virginia Microboard Association* (Web Page, 2015) <http://virginiamicroboards.org/history/>.

127 Greg Taylor, 'The Origins of Associations Incorporation Legislation: The Association Incorporations Act 1858 of South Australia' (2003) 22(2) *University of Queensland Law Journal* 224, 224.

128 Ibid.

129 Ibid 225.

with creating a mechanism for holding the property of associations and obviating the need for constant transfers as the trustees changed.[130]

The current *Incorporation Act*, which has not seen much amendment since its inception, continues to serve this purpose. At the time of the enactment of the *Incorporation Act*, it is clear that legislators would not have considered its use as a means to accommodate a microboard established for the benefit of a person with a disability.[131] Unsurprisingly, given that the *Incorporation Act* was never intended to accommodate a microboard structure, it does not make any reference to supported decision-making and does not include sections such as those embedded in the *ACD Act*, which are aimed at promoting the autonomy and protecting persons with disability.[132] Whilst the *Incorporation Act* does not explicitly provide for a microboard, its terms have been interpreted by the Tribunal as to allow incorporation.[133] In *Sands v Commissioner for Corporate Affairs* ('*Microboards Case*'),[134] the South Australian Commissioner for Corporate Affairs ('Commissioner'), acting through the Office of Consumer and Business Services ('OCBS'), declined to incorporate a proposed microboard.[135] The proposed microboard was rejected as it was deemed ineligible for incorporation for having an improper purpose, and because the Commissioner determined another body corporate would be more appropriate.[136] The Applicant sought a merits review of the decision in the Tribunal.

An association is eligible to incorporate under the *Incorporation Act* if its objects fit within one of the enumerated purposes set out under s 18.[137] Microboards attempt to rely on s 18(1)(c), which provides for eligibility where an association is formed: 'for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability'. A key issue in the *Microboards Case* was the interpretation of this section and its use of the word 'persons' — particularly whether this had scope to include an association incorporated for the benefit of a single person living with a disability. The Commissioner considered 'persons' to require the purpose of incorporation to be for the benefit of particular purposes or classes of people, not specified individuals.[138] This interpretation directly precluded incorporation of a microboard, which by definition exists to solely support and serve the needs of a single person.

130 Ibid.

131 South Australia, *Parliamentary Debates*, Legislative Council, 19 February 1985, 2586 (Kenneth Trevor Griffin, Attorney-General).

132 *ACD Act* (n 1) ss 7(2), 9, 10.

133 *Sands v Commissioner for Corporate Affairs* [2021] SACAT 103 ('*Microboards Case*').

134 Ibid.

135 Ibid [2]–[4].

136 Ibid [32]–[34]; *Incorporation Act* (n 36) ss 20(1)(a), 20(2)(a).

137 *Incorporation Act* (n 36) ss 18, 20(1)(a).

138 *Microboards Case* (n 133) [4].

The Tribunal, in setting aside the initial decision of the Commissioner, interpreted the relevant provision in line with the *Acts Interpretation Act 1915* (SA), which provided that in every South Australian Act, a word in the plural number is to be construed so as to include the singular number.[139] This provision applies unless the legislature has expressed a 'contrary intent'[140] either expressly or impliedly. The Tribunal found that the context of the *Incorporation Act* was one which catered to a 'diverse' group of associations and was introduced with broad flexibility in mind.[141] The Tribunal accordingly determined that s 18(1)(c) of the *Incorporation Act* was sufficiently broad as to include a microboard.

The second ground for the initial rejection in the *Microboards Case* was that the Commissioner formed the opinion that another corporate structure would be more appropriate. The Commissioner has the power to decline incorporation of an association if it is of the opinion that it would be more appropriate for its activities to be carried on by a body corporate under another scheme.[142] In the *Microboards Case*, the Commissioner considered incorporation under the *Corporations Act 2001* (Cth) ('*Corporations Act*'), in the form of a company limited by guarantee, to be a more appropriate option. This argument was rejected by the Tribunal, as it considered a company limited by guarantee to be inappropriate for a microboard.[143]

The Tribunal noted a number of reasons why federal incorporation may be difficult for microboards.[144] A microboard is often a small, community group and the *Corporations Act* provides for relatively complex forms of incorporation with accordingly complex rules and procedures.[145] The fees and ongoing costs associated with incorporation under the *Corporations Act* are also considerable and may well be prohibitive for microboards. Directors of corporations are coming under increased regulatory burdens,[146] many of which have no relation to the operation or function of a microboard, yet could mandate the implementation of often onerous compliance mechanisms. Microboards do not seek to turn a profit, operate over state borders or ever approach the size and scale necessary to justify the use of a company limited by guarantee. Issues are also present in that federal incorporation would necessitate registration with the Australian

139 *Acts Interpretation Act 1915* (SA) s 26(c), as repealed by *Legislation Interpretation Act 2021* (SA) sch 1 cl 23. The equivalent provision is now *Legislation Interpretation Act 2021* (SA) s 10(2).

140 *Walsh v Tattersall* (1996) 188 CLR 77, 91 (Gaudron and Gummow JJ); *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651, 656 (Lord Morris).

141 *Microboards Case* (n 133) [51]–[53].

142 *Incorporation Act* (n 36) s 20(2)(a).

143 *Microboards Case* (n 133) [60].

144 Ibid.

145 Ibid; Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1404, 1412, 1417.

146 *Microboards Case* (n 133) [60].

Charities and Not-for-profits Commission ('ACNC') in order to avoid crippling annual fees.[147]

C *Legal Implications of Microboards*

The *Incorporation Act* was drafted to ensure that small community-based organisations, 'such as a local church or tennis club, are not burdened with obligations which it would be beyond their capacity to discharge'.[148] The concept of facilitating individualised disability support was obviously not considered. Whilst this level of individualisation is a relatively novel use of the scheme, the same could be said (for differing reasons) of many forms of associations, such as sporting organisations. The *Incorporation Act* provisions on eligibility for incorporation were designed with an emphasis on flexibility in purpose,[149] but questions are still raised as to whether an alternate form of implementation could be beneficial for a microboard. In exploring this issue, a comprehensive examination of the *Incorporation Act* and its suitability for potential microboards is warranted.

1 *Oversight*

The *Incorporation Act* imposes many different obligations upon an incorporated association.[150] These include (but are not limited to) auditing and reporting requirements, financial and notification obligations, and a requirement to hold an annual general meeting.[151]

There are a number of financial reporting and administration requirements under the *Incorporation Act*. Associations are required to keep and maintain accounting records for at least seven years,[152] and keep official records of all meetings.[153] Notably, associations do not have to file periodic returns unless they are 'prescribed', which requires total gross receipts to exceed $500,000 per annum.[154] A microboard is unlikely to meet this threshold, and as such would not be under any obligation to engage in periodic financial or administrative reporting. This scheme makes sense in the context of the *Incorporation Act* as it would be unfair to overly burden small

147 Ibid; 'Benefits of Registration', *Australian Charities and Not-for-Profits Commission* (Web Page) <https://www.acnc.gov.au/for-charities/start-charity/you-start-charity/why-register>.

148 South Australia, *Parliamentary Debates*, House of Assembly, 26 February 1985, 2838 (Greg Crafter, Minister of Community Welfare).

149 Ibid.

150 'How to Incorporate', *Consumer and Business Services* (Web Page, 15 March 2021) 8 <https://www.cbs.sa.gov.au/resources/how-incorporate>.

151 Ibid.

152 *Incorporation Act* (n 36) s 39C; *Associations Incorporation Regulations 2008* (SA) reg 7 ('*Incorporation Regulations*').

153 *Incorporation Act* (n 36) ss 51(1)(a), 51(2).

154 *Incorporation Act* (n 36) ss 3 (definition of 'prescribed association'), 34, 36; *Incorporation Regulations* (n 152) regs 4, 7, 8.

organisations, though a total lack of annual reporting requirements for a microboard may be of long-term regulatory concern.

The actions and management of incorporated associations in South Australia are overseen by the Corporate Affairs Commission, a body within OCBS.[155] As a corporate regulator, it is doubtful that OCBS is adequately equipped to manage or oversee disability support vehicles. This therefore raises the question: even if the *Incorporation Act* can be appropriate for a microboard, is the regulator sufficiently equipped to ensure adequate checks and balances are carried out?

2 *Safeguards and Regulation*

A microboard may assist in the management of a vulnerable person's affairs, lifestyle, health and financial decisions and as such should be subject to safeguards and regulation. The prevalence of abuse of vulnerable people in society[156] suggests that despite the built-in safeguard of a microboard consisting of multiple independent members, there must be limitations on what these members can and cannot do.

The *Incorporation Act* provides a number of safeguards to ensure that associations function as intended. These include requirements that:

- members must disclose any conflicts of direct or indirect pecuniary interests;[157]
- committee members with such interests must not take part in any decision with respect to the interest;[158]
- officers must not act with intent to deceive or defraud, or make improper use of their position;[159]
- an officer or employee of an incorporated association must not make improper use of information acquired by his or her position to gain directly or indirectly any pecuniary benefit or material advantage;[160]
- when determining disputes between members the rules of natural justice must be observed;[161]
- an association must not operate in a manner calculated to secure a pecuniary profit for its members;[162]

155 *Incorporation Act* (n 36) s 5.

156 Wuth (n 80) 14–15; *Royal Commission* (n 66) 420.

157 *Incorporation Act* (n 36) s 31(1).

158 Ibid s 32(1).

159 Ibid ss 39A(1), (3).

160 Ibid s 39A(2).

161 Ibid s 40.

162 Ibid s 55(1).

- an association must not misrepresent its status of incorporation,[163] falsify books[164] or engage in conduct which is oppressive or unreasonable;[165]

- a person who is insolvent under administration must not, without permission from OCBS, be a committee member or participate in managing an incorporated association;[166] and

- a person who has been convicted of an indictable offence, within or outside the State, must not, without permission from OCBS, be a member of an incorporated association within five years of their conviction.[167]

A number of further requirements apply only to prescribed associations,[168] including that:

- an officer of a prescribed association must always act with reasonable care and diligence in exercising his or her powers and discharge of their duties; and [169]

- prescribed associations must prepare, audit and submit annual financial records.[170]

It is important to note that a microboard will almost never meet the $500,000 turnover threshold required to be considered prescribed.[171] As the safeguards are relatively mild for even prescribed associations, officers of a non-prescribed microboard would be under a reduced level of express statutory duty.

The statutory safeguards in South Australia can be contrasted with those in other jurisdictions hosting microboards. The *Associations Incorporation Act 2015* (WA) requires that officers of any Western Australian incorporated association exercise their power with the degree of care and diligence that a reasonable person would exercise,[172] and in good faith in the best interests of the association.[173] This largely reflects the core duties for company directors under the *Corporations Act*. Whilst s 39A(4) of the *Incorporation Act* also mirrors these duties, it only applies to prescribed associations — limiting its application to microboards. In British Columbia, home to the first

163 Ibid s 60.

164 Ibid s 58(1).

165 Ibid s 61(1).

166 Ibid s 30(1).

167 Ibid s 30(2)(c).

168 Defined as having gross turnover exceeding $500,000 per annum.

169 *Incorporation Act* (n 36) s 39A(4).

170 Ibid s 35(2).

171 In fact, some microboards will never manage or control finances directly.

172 *Associations Incorporation Act 2015* (WA) s 44.

173 Ibid s 45(a).

microboards,[174] the *Societies Act*[175] requires directors of all incorporated societies to 'act honestly and in good faith with a view to the best interests of the society'[176] and to 'exercise the care, diligence and skill [of] a reasonably prudent individual'.[177] These statutory requirements create stricter duties for directors of microboards than those held by officers of a non-prescribed association (which almost all microboards would be) under the *Incorporation Act*. This raises significant possible legal issues for microboards, as ensuring that officers act in the best interests of the principal (or the association) is critical to prevent abuse. The question as to whether the 'best interests' approach is appropriate is not clear; it has been argued that this approach is paternalistic and representative of a substitute decision-making mindset.[178] It is not presently settled whether officers of incorporated associations are subject to common law directors' duties.[179] However, even if this is the case, there does not appear to be any apparent instances of such duties being enforced.[180]

Even the stronger level of safeguarding in other jurisdictions may be considered at odds with existing standards for disability support mechanisms. As an example, guardianship orders must be reviewed at intervals of a maximum of three years.[181] In each of these reviews the Tribunal must revoke the order unless it is satisfied that there are proper grounds for it to remain in force.[182] While a non-prescribed incorporated association in South Australia is not even under the obligation to regularly report financial details[183] a microboard would, in contrast, be subject to minimal ongoing regulatory accountability.

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174 'Our Work', *Vela Microboards Canada* (Web Page, 2022) <https://velacanada.org/about/about-us/>.

175 *Societies Act*, SBC 2015, c 18.

176 Ibid s 53(1)(a).

177 Ibid s 53(1)(b).

178 *Guardianship* (n 7) 92 [6.93]–[6.96]. The Victorian Law Reform Commission recommended that the overarching goal should be the 'promotion of the personal and social wellbeing of the person': at 393 [17.103].

179 Leigh Warnick, 'Incorporated Associations: Liability of Board/Committee Members' (Issue Paper, Law Society of Western Australia, 1 June 2005) 3; Charles Parkinson, 'Duties of Committee Members under the Associations Incorporation Acts' (2004) 30(1) *Monash University Law Review* 75, 79–81. It has been judicially stated that this principle is not supported by authority: *Lai v Tiao [No 2]* [2009] WASC 22, [84] (Johnson J). Some older authorities implicitly lend support to the notion that the duties owed from directors to corporations are largely equivalent to duties owed from officers to incorporated associations: *Haselhurst v Wright* (1991) 4 ACSR 527, 531 (Owen J); *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 197 (Tadgell J). This view is also widely supported by academics: see Parkinson (n 179) and the references there cited; Andrew Twaits, 'The Duties of Officers and Employees in Non-Profit Organisations' (1998) 10(2) *Bond Law Review* 313.

180 Warnick (n 179). No cases could be located on this point.

181 *Guardianship Act* (n 47) s 57(1)(b).

182 Ibid s 57(3).

183 *Incorporation Act* (n 36).

3 *Constitutions and Rules*

An incorporated association must have its own set of rules which govern day-to-day management of the association and lodge the same with the regulator.[184] The rules of an incorporated association bind the association and all its members.[185] They must deal with certainty on membership, powers of the association, and how the powers are exercised.[186] At a minimum, the rules must confirm the duties and manner of appointment of committee members and auditors, the procedure of meetings and requirements as to the management and control of funds and property.[187] An alteration to a rule of an incorporated association may be made by special resolution unless otherwise specified by the rules.[188] Any alteration to the rules must be registered with OCBS.[189]

An extended duty, such as to act in the best interests of a principal, may be expressed in a microboard's rules or constitution.[190] Whilst there are penalties for certain breaches of the *Incorporation Act*,[191] OCBS generally will not take action unless conduct is sufficiently serious in nature and where there is sufficient evidence to prove a breach.[192] Further, OCBS does not investigate breaches of an association's rules as this is an internal matter for the organisation.[193] For breaches of rules, the only real option is for an association to commence (often prohibitively expensive) private legal action against non-conforming officers or members. It will then be left to the judicial system to determine whether the alleged breach has been made out. It is not clear what the best or most appropriate form of remedy would be in this situation, but often discretionary injunctive relief is sought.[194]

It has been accepted in some cases that where a voluntary association is incorporated, its rules are binding in law[195] and should be taken to operate as though they

184 'How to Incorporate' (n 150) 4.

185 *Incorporation Act* (n 36) s 23(1).

186 Ibid s 23A(1).

187 Ibid s 23A(1)(c).

188 Ibid s 24(1).

189 Ibid s 24(2).

190 Association rules may allow member liability in some circumstances: *Incorporation Act* (n 36) s 21(2).

191 See, eg, *Incorporation Act* (n 36) s 39A, where penalties for an officer's non-compliance with their prescribed duties range from fines to terms of imprisonment.

192 'Dealing With Suspected Breaches of the Associations Incorporation Act 1985', *Consumer and Business Services* (Web Page) <https://www.cbs.sa.gov.au/resources/dealing-suspected-breaches>.

193 Ibid.

194 See, eg, *Johncock v Port Lincoln Football League Inc* [2013] SASC 143.

195 *Popovic v Tanasijevic* [2001] SASC 289, [46] (Williams J, Doyle CJ agreeing at [1], Martin J agreeing at [63]) ('*Popovic*').

are terms of a contract between members individually and with the association.[196] There are however, notably some authorities which suggest rules must evince contractual intent — where the rules do not do this, or in fact dispel such a notion, mere incorporation is insufficient to provide contractual force.[197] In interpreting rules, courts will likely approach them with a consideration of their context. For voluntary organisations with rules drafted in a 'piecemeal fashion by lay-persons rather than lawyers,' courts will approach construction with a 'degree of flexibility'.[198] This must however be tempered by the general rule that courts will largely abstain from interfering with the internal management of associations in the absence of fraud, oppression[199] or the infringement of a contractual or propriety interest.[200]

While a lawsuit for a breach of a microboard's rules may be successful, this has never been tested.[201] In theory, a member of a microboard who believed the microboard was acting contrary to its rules could take legal action, but this is a drastic solution. The time-consuming and expensive nature of litigation could act as a significant barrier to prompt rectification of the situation if a microboard were to act improperly.[202]

D *Practical and Operational Issues*

In instances where a microboard is implemented there remain a number of potential underlying practical and operational issues. These are more related to the function and operation of microboards as a concept, rather than legal barriers or ineffectiveness. These issues concern guaranteeing that dispute resolution processes are accessible and effective, safeguarding against potential abuse, ensuring that costs involved in management and compliance are not prohibitive, and reducing as far as practicable the bureaucracy behind a microboard, so that the full benefits of adoption are realised.

Microboards, as groups of people, will inevitably face conflict between members. In *Re Gibson Estate*[203] the principal was removed from the care of a microboard

196 *Harrington v Coote* (2013) 119 SASR 152, 156 [4] (Kourakis CJ).

197 See, eg, *Smith v South Australian Hockey Association* (1988) 48 SASR 263, 264 (Cox J).

198 *Echunga Football Club Inc v Hills Football League Inc* (2014) 121 SASR 449, 454 [18] (Stanley J).

199 *Popovic* (n 195) [37] (Williams J).

200 *Cameron v Hogan* (1934) 51 CLR 358, 373 (Rich, Dixon, Evatt and McTiernan JJ).

201 Extensive searches were undertaken in Australia and overseas jurisdictions but no cases could be located on legal action being taken over a breach of a constitution or rules of a microboard.

202 In consultation with Microboards Australia it was strongly expressed that the *Associations Incorporation Act 2015* (WA) has been fit for purpose — representatives made it very clear that there had been no instances of a microboard acting contrary to its rules or not acting in its principal's best interest. This view ought to be tempered by the fact that Australia does not at present have a significant number of microboards.

203 [2008] BCSC 1099 (British Columbia Supreme Court).

after relational arrangements between members deteriorated.[204] Inadequate dispute resolution processes combined with family conflict culminated in a series of events which eventually led to the functional breakdown of the microboard and the principal living full-time in a care facility.[205] This highlights the critical importance of strong dispute resolution procedures in a microboard.

At present, dispute resolution processes are at the discretion of the microboard members and the rules upon incorporation. A largescale adoption of microboards could lead to a vast variety of different dispute resolution procedures, each with different outcomes and issues.

There are no publicly documented cases of a microboard facilitating or allowing abuse or neglect of the principal.[206] This does not mean abuse could not happen, and there needs to be appropriate remedies and safeguards to ensure it does not take place. Microboards are not presently monitored for abuse, and if abuse does take place it is difficult to determine how liability should be apportioned. Whilst the corporate personality of incorporated associations ordinarily protects members, personal liability can be incurred for certain forms of corporate wrongdoing. These exceptions are more limited under the *Incorporation Act* when compared to federal legislation, and it may be of utility to consider whether an exception in the case of abuse is warranted.

Operational, management and compliance costs for an incorporated entity are not insignificant. Whilst the NDIS may cover a substantial portion of these costs,[207] questions remain about ongoing accounting and legal fees, alongside compliance with additional regulatory requirements. This is further complicated if a microboard does not have easy access to a lawyer or other professional (who may sit as a microboard member) as it is a niche area of law and practice.

A microboard is not always appropriate. There are circumstances where a guardianship order (or similar) may be better suited, such as when the principal has no existing support network. This may be compounded by the availability of people to join the microboard — most benefits can be derived from a wide range of skills and experience, but this may not always be possible. Members may not wish to be involved given the time commitment and possibility of future regulatory scrutiny. In these situations the benefits of having multiple people with unique skill sets may begin to be outweighed by the bureaucracy of the microboard.

204 Ibid [41].

205 Ibid [25]–[33].

206 This may in part owe to their limited adoption to date.

207 'Using NDIS Funding' (n 104).

The lack of empirical evidence in support of microboards in Australia, combined with the fact that there is no clear methodology for measuring efficacy means that long-term success is difficult to gauge. An absence of wide-scale education and knowledge about microboards may also hamper success both in the community and in governance through the public sector.

V Law Reform Recommendations

A *Recommendation 1: Supported Decision-Making Framework*

There is a need for increased levels of supported decision-making in South Australia. The following options are methods of doing so, with microboards being recognised as a form of supported decision-making within these broad recommendations.

1 *Option A: General Recognition*

General recognition of supported decision-making as a concept may encourage decision-makers to increase its use. Amendments could be made to the *Guardianship Act*[208] to insert a provision noting that supported decision-making exists and is beneficial to persons living with disabilities. This could be similar in nature to s 6(2) of Manitoba's *Vulnerable Persons Living with a Mental Disability Act*[209] which provides that 'supported decision-making by a vulnerable person with members of his or her support network should be respected and recognized as an important means of enhancing the self-determination, independence and dignity of a vulnerable person'.

Section 9(2)(a) of Queensland's *Guardianship and Administration Act 2000* (Qld) similarly provides some recognition to supported decision-making by recognising that decision-making powers may be exercised by members of the principal's existing support network. There are limited (if any) practical impacts from such provisions, aside from a tokenistic regard to best practice. As such, this approach, while better than nothing, is not sufficient alone.[210]

2 *Option B: Specific Requirement*

A specific requirement is an obligation that a guardian or administrator cannot be appointed until all feasible supported decision-making arrangements have been explored. Microboards would constitute a form of supported decision-making to be considered under such a scheme. It is recommended that the following amendment (underlined) be made to s 29 of the *Guardianship Act*:[211]

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208 A similar amendment could be appropriate in the context of power of attorney schemes.

209 *Vulnerable Persons Living with a Mental Disability Act*, SM 1993, c V-90, s 6(2).

210 Alston (n 17) 39.

211 Including a similar corresponding amendment for administration orders.

29 — Guardianship orders

(1) If the Tribunal is satisfied …

(a) that the person the subject of the application has a mental incapacity; and

(b) that all forms of supported decision-making arrangements have been considered and exhausted; and

(c) that an order under this section should be made in respect of the person,

the tribunal may, by order, place the person under ... [a guardianship order]

Under such a provision microboards (or similar supported decision-making structures) would be a mandatory consideration before a guardianship order is implemented by the Tribunal. This requirement could also be administered as a policy consideration in line with s 29(1)(c) of the *Guardianship Act*.

3 *Option C: Stepped Approach*

Microboards are not a one-size-fits-all initiative, particularly regarding those with limited existing support networks. As part of a holistic approach, microboards would best fit within a broader supported decision-making framework. The OPA has previously proposed a 'stepped model' whereby traditional substitute decision-making is positioned as a last resort.[212] This would require the implementation of other 'steps' such as co-decision-making or representative arrangements, which could cater more effectively for those without an existing support network. Some provinces in Canada have had significant success in implementing both co-decision and representative agreement legislation, allowing for the principal to choose a supporter to either represent their preferences or make the decision jointly.[213] One pilot trial conducted by the OPA centering on co-decision-making principles has had promising results.[214] This could take the form of a non-legislative and complementary equivalent of the specific requirement, with the addition of other consultative steps.

The above proposals would substantially benefit from supplementary pilot programs and consultation before formal implementation in legislation.[215] Thus, it is evident that data collection and system reviews are required for both existing and potential South Australian decision-making arrangements, as there is minimal empirical evidence that current mechanisms lead to net positive outcomes.[216]

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212 South Australia Office of the Public Advocate, *Annual Report 2010* (Report, 2010) 107–8; Office of the Public Advocate South Australia, Submission No 325 to Productivity Commission, *Inquiry into Disability Care and Support* (20 August 2010) 9.

213 *Representation Agreement Act*, RSBC 1996, c 405; *Adult Guardianship and Co-decision-making Act,* S 2000, c A-5.3.

214 Margaret Wallace, *Evaluation of the Supported Decision Making Project* (Report, Office of the Public Advocate, November 2012).

215 Carney and Beaupert (n 16) 179.

216 Jameson et al (n 65) 38.

B *Recommendation 2: Implementing Microboards in South Australia*

The many difficulties inherent in adapting the *Incorporation Act* to become a broad-based facilitator of disability support suggests that alternative options should be considered. The *Incorporation Act* is generally suitable for its purpose of regulating non-profit, community-based organisations. However, its deficiencies suggest that an ideal recommendation is the introduction of new legislation to provide for microboards in South Australia.

The *Incorporation Act* is generally suitable for the registration, incorporation and administrative tracking of microboards as, in these respects, microboards are no different from other associations. Nevertheless, new legislation could replace certain functions of the *Incorporation Act* and provide for:

- incorporation of a microboard as a new form of body corporate;
- a register of microboards;
- mandatory minimum standards for eligibility; and
- an ongoing practical framework for administrative implementation.

New legislation could address concerns with the *Incorporation Act* by mandating certain restrictions or expanding on duties. A mere duty to act in the best interests of the principal may be overly paternalistic and likely does not align with best practice.[217] British Columbia's *Representation Agreement Act 1996*[218] requires representatives to consult a principal and follow that person's wishes where reasonable, and to only resort to a 'best interests' test if this is not possible.[219] A similar scheme should be adopted in South Australia, with cascading requirements for microboard members to ensure decisions are made in accordance with:

- the principal's actual wishes where reasonable to do so;
- if the wishes are unreasonable or cannot be obtained, any written instructions;
- if there are no written instructions, the principal's known beliefs and values; and
- if the beliefs and values are unknown, their best interests.[220]

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217 See above n 178 and accompanying text.

218 *Representation Agreement Act*, RSBC 1996, c 405.

219 Ibid s 12.

220 The 'best interests' test itself has been criticised as overly paternalistic, with several academics insisting that the concept of 'will, preferences and rights' be adopted instead. See: Browning, Bigby and Douglas (n 11) 37; Alston (n 17) 37. Under the

Further, there must be provisions in either the legislation or the microboard's governing rules which prescribe how the microboard will function where certain events occur or when certain decisions are to be made. For example, the medical management of the principal is one such area. A microboard's function may include managing the principal's medical affairs and there must be protocols established to deal with various medical decisions that need to be made, including making urgent or out of business hours consents to medical treatment.

A breach of duty by any member of the microboard should be grounds for member disqualification, personal liability or in serious cases, winding up of the microboard. This would have the benefit of providing stricter safeguards than any current incorporation legislation, whilst also reducing the need for members to take time-consuming and expensive legal action when issues arise. It would also standardise what at present must be implemented through an association's rules.

Microboards are an individualised structure, designed for the circumstances of the principal. Microboards may be eligible to receive NDIS funding, which is continually examined through recurring NDIS planning reviews.[221] This suggests that the NDIS, presumably through the NDIS Quality and Safeguards Commission, could play a role in regulating and overseeing a microboard, instead of OCBS. Microboards could, for example, be registered in accordance with new legislation and regulated in accordance with NDIS provisions. This would be similar to the incorporation of charitable institutions under the *Incorporation Act*, which allows an association to be exempt from certain state requirements if it is regulated by the ACNC.[222] New legislation specifically for microboards could provide the framework for incorporation and key duties, which would be managed and overseen in accordance with individual NDIS plans.

As with any rearrangement of government functions, there would be significant practical and bureaucratic work necessary for such an arrangement to properly function. The full scale of such changes would be significant and is beyond the scope of this paper.

C *Recommendation 3: Implementing within Existing Scheme*

Whilst a new legislative framework would be the most effective manner to regulate microboards, there are difficulties in passing legislation. An alternative and more practical recommendation would be to work within the existing *Incorporation Act* through a targeted and custom-design approach.

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current *Guardianship Act* (n 47), this likely means appointment of all members as joint guardians, unless amendments are made permitting appointments of incorporated associations or microboards specifically.

221 'Reviewing Your Plans and Goals', *National Disability Insurance Scheme* (Web Page, 25 November 2021) <https://www.ndis.gov.au/participants/reviewing-your-plan-and-goals>.

222 *Incorporation Act* (n 36) s 34(1).

Microboards lack a standardised operational model and, as such, the field could benefit from the introduction of one. There is not presently a clearly established definition of a microboard and as such operational implementations can vary greatly within and across jurisdictions. Whilst many characteristics of a microboard would be tailored to the needs and desires of the principal, there are a number of commonalities intended to be shared between all microboards, such as the voluntary nature of membership and the centrality of the principal.

It would therefore be of significant utility to develop a set of 'minimum standards' required for an association to be considered a microboard. This is particularly pertinent if microboards were to someday be subject to different regulations in comparison with other incorporated associations — the regulator would need a clear outline or checklist to determine whether a proposed body was a valid microboard. Any future legislation would also require a clearly articulated definition of the characteristics necessary for a body to qualify as a microboard.

OCBS could continue to register and control the creation of microboards. In order to ensure that a microboard meets certain requirements, regulation[223] could prescribe a set of minimum standards which must be complied with before being eligible for incorporation. It could be a ground for deregistration if a microboard altered its rules to remove or weaken these.[224] This would be a practical approach and could be done simply by providing a template constitution with key elements which each microboard must include.

Minimum standards could mandate that association rules include the duties described in *Recommendation 2*, alongside other practical considerations. This does not negate the difficulty in legally enforcing the rules through litigation but would, at minimum, ensure that the safeguards were present.

A similar approach could be adopted as described in *Recommendation 2*, whereby microboards could be registered locally and overseen by the NDIS. The precise nature of this supervision would require further consideration, but could be set out in regulations. These regulations could allow the NDIS, for example, to petition for deregistration or other remedies in the event of wrongdoing.

These changes would not alone facilitate the effective and long-term use of microboards in South Australia and would need to be part of a holistic approach to reform.

223 In reality this could be a mere policy consideration, but regulation provides a stronger authority.

224 This would be simple to monitor as associations are already required to self-report any changes to their rules: *Incorporation Act* (n 36) s 24(2).

D *Recommendation 4: Education and Awareness*

Increased awareness about microboards and supported decision-making within the legal profession and society is required. Understanding of these concepts has been reserved predominately for academics and has largely not been communicated to key actors in the disability support sector. If persons living with disabilities and their social network are not aware of available options, law reform runs the risk of redundancy. In particular, third-parties such as financial institutions and businesses would require guidance surrounding implementation of decisions made by a microboard. To be successful, there must also be reform to service systems, so that they are based on true personalisation and 'provide a right to safety rather than a welfare response, and a commitment to overcome inequity and discrimination'.[225]

VI Conclusion

Microboards are a novel and innovative way to support and improve the lives of persons living with disabilities. Whilst the concept currently lacks a sustainable vessel for legislative implementation and is subject to certain overriding structural concerns, the potential benefits are significant. A microboard has the potential not only to increase a person's quality of life, but also creates a vehicle which has the potential to provide them with meaningful long-term relationships. It is imperative that the law be changed in conjunction with societal values, in order to work as a holistic tool to support and empower the most vulnerable. Reform must provide an avenue for the development of new ideas, including microboards, which seek to better society for all.

225 De Mestre (n 14) 3; John Brayley, 'The Future of Supported and Substitute Decision Making' (Speech, World Congress of Adult Guardianship, 17 October 2012) 2.