

# *The role of Article 12 of the UNCRPD within guardianship practice in Victoria*

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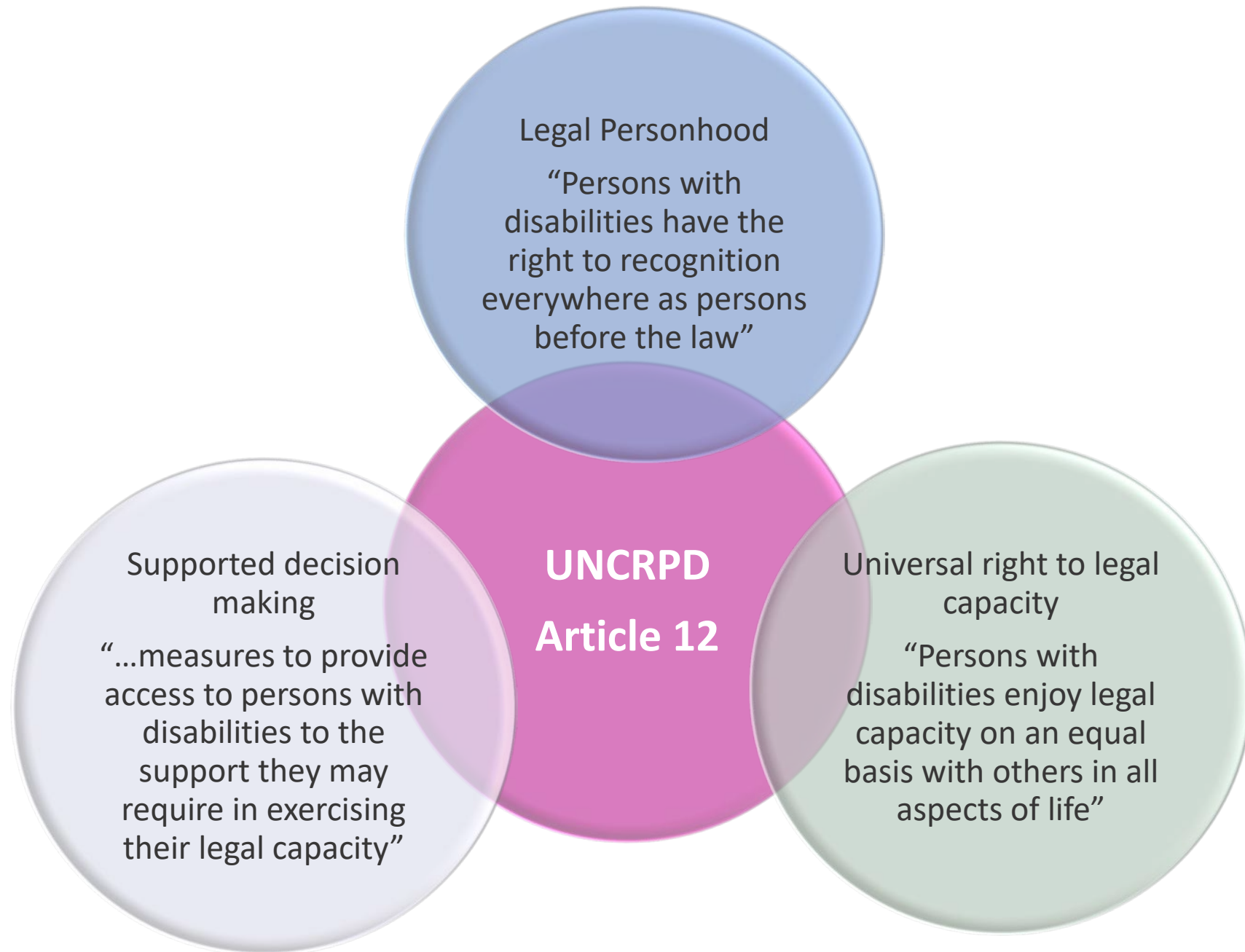
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# Article 12: Equal recognition before the law







# Personhood

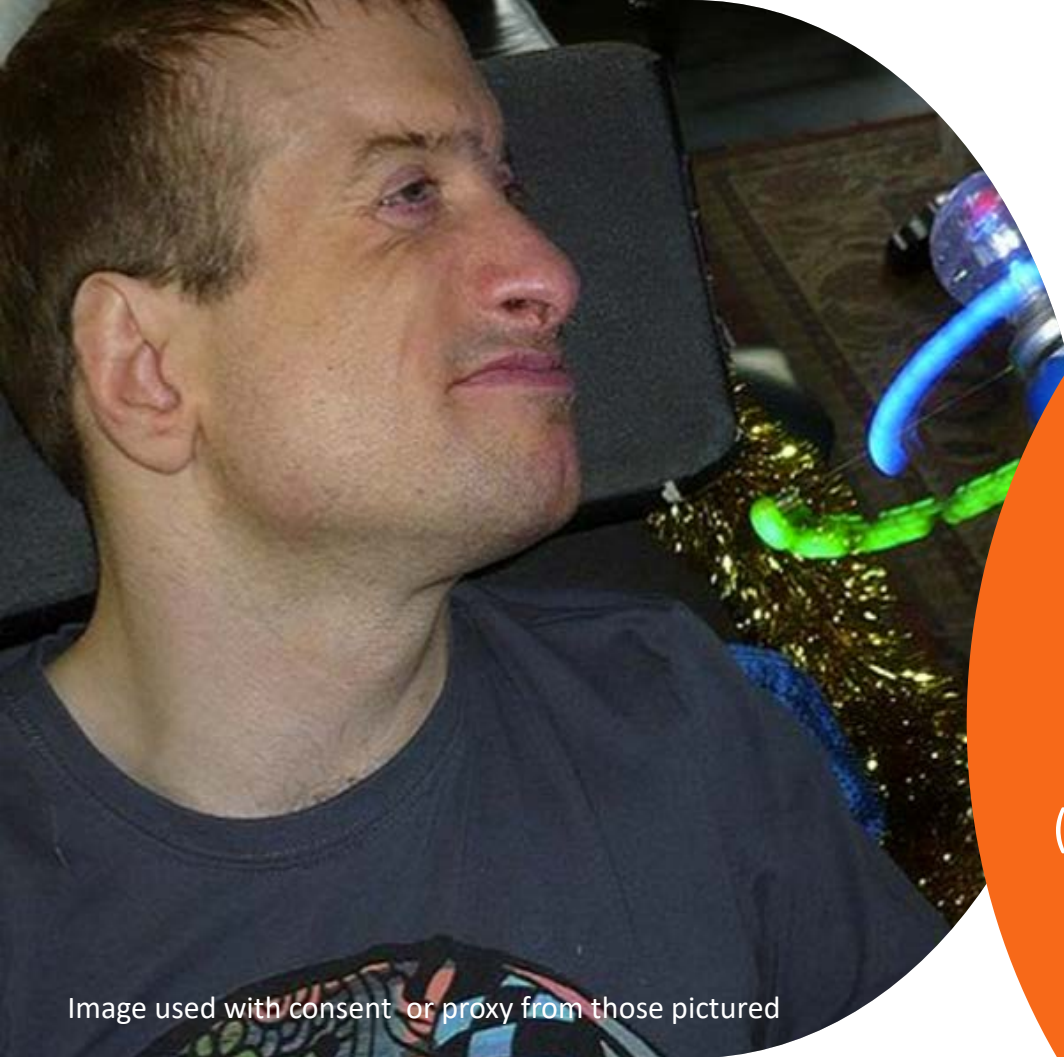


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The more severe someone's cognitive disability the fewer opportunities they have to live autonomous lives

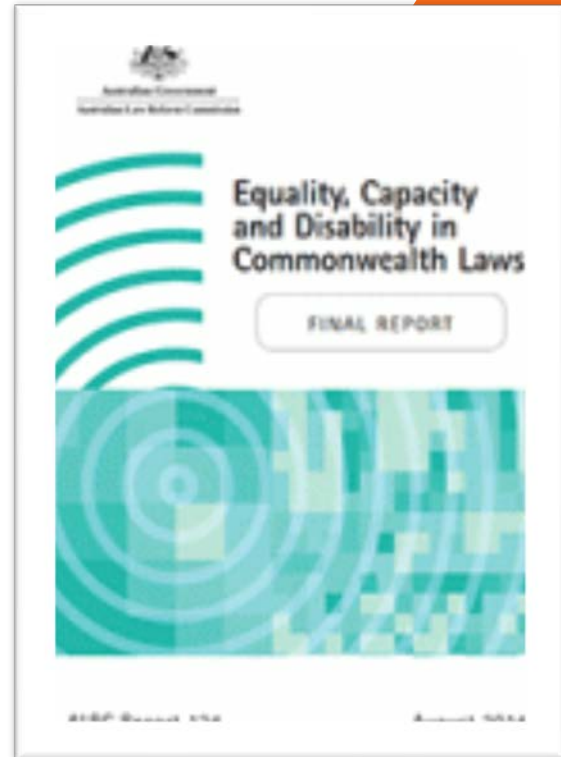
(Agran, Storey, & Krupp, 2010; Burton-Smith, Morgan, & Davidson, 2005)

# Australia's response to Article 12

## National Decision-Making Principles:

1. Every adult has the right to make decisions that affect their life and to have those decisions respected;
2. Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives;
3. The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives;
4. Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

(ALRC, 2014)



# Project plan

## Aims

- To examine the nature of decisions made by the Victorian Civil and Administrative Tribunal (VCAT) regarding guardianship for people with severe/profound cognitive disability over the past 15 years.
- To identify and describe any change in the nature of these decisions pre and post Australia's ratification of the UNCRPD, with a particular focus on VCAT's application of Article 12.
- To identify key drivers of Tribunal members' decisions to appoint (or not appoint) a guardian within the context of guardianship hearings.

## Method

Six decisions about guardianship made by VCAT relating to people with severe/profound cognitive disability prior to 2008 were selected from the Australian Legal Information Institute database.

These decisions were compared to 6 decisions relating to the same population post 2008.

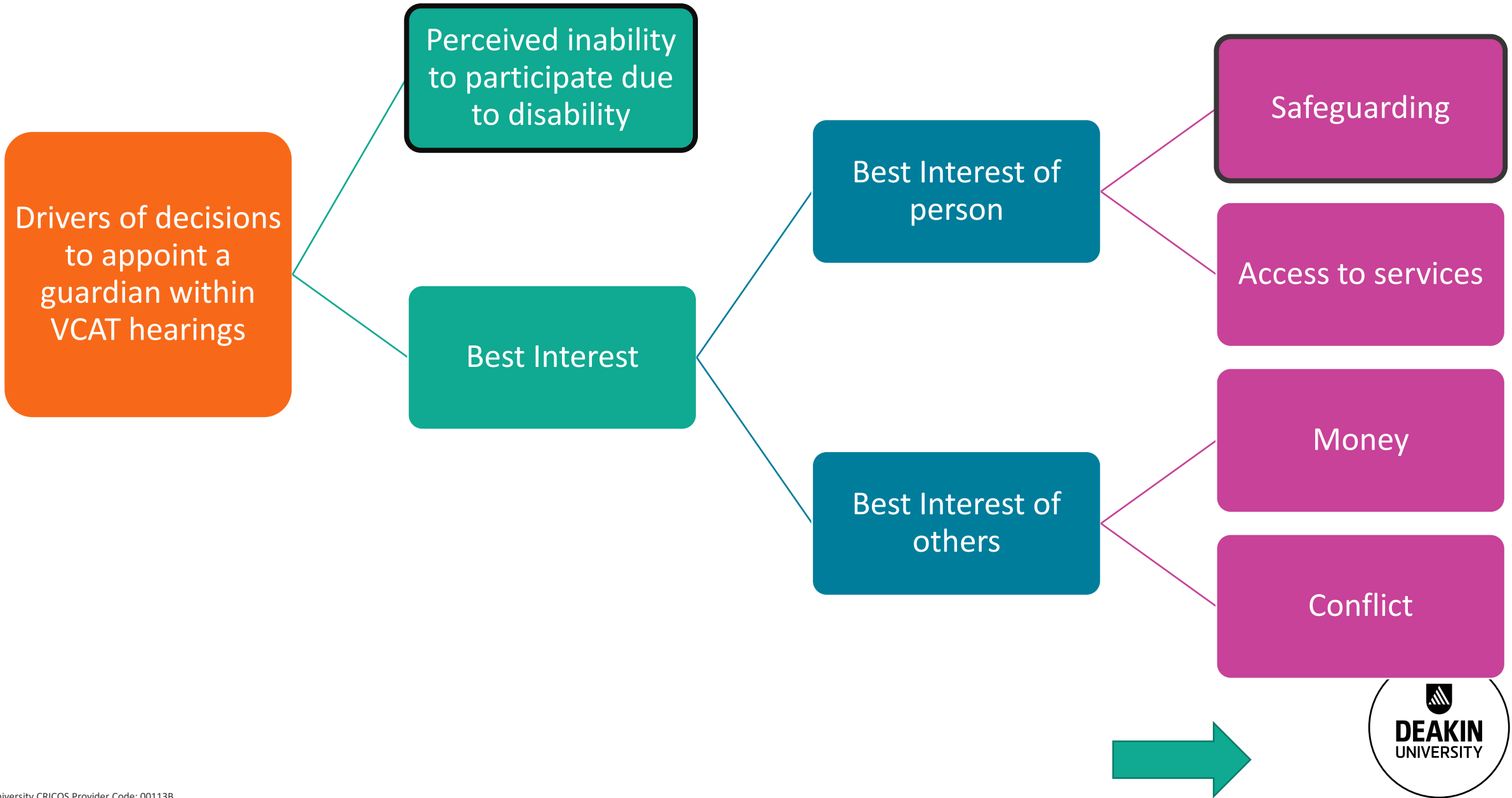
The text relating to these 12 decisions were analysed using document analysis and comparative analysis procedures.



# Results

Minimal change relating to the principles of Article 12 was seen in the language use and practice of VCAT members in guardianship hearings relating to people who communicate informally pre and post Australian's signing of the Convention





I am satisfied that A has a disability and that she is unable to make reasonable judgments in respect of her estate by reason of that disability. I make this finding on the basis of a medical report from A's treating general practitioner... In her report, the medical practitioner states that A suffers from an intellectual impairment and that she is unable to make reasonable decisions in relation to healthcare, general living circumstances and her financial and legal affairs.

(VCAT member)

Dr Dawes notes that there have been many assessments over the years. Dr Dawes diagnosis is that YWR has advanced severe intellectual disability, is non-verbal, unable to follow simple instructions, and has no insight. The Tribunal accepts this evidence and finds that YWR has a disability.

(VCAT member)

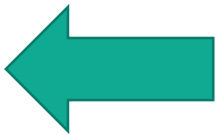
Due to the severity of her cognitive impairment I was satisfied that her wishes could not be ascertained.

...given her level of disability, RL was not capable of making decisions in relation to her medical treatment...

(VCAT member)



Mr O'Brien observed in his report that the represented person wished to remain at home, however this wasn't in his best interest  
(Researcher notes from Member's report)



What doesn't drive decisions to appoint a guardian within VCAT hearings?

Will and preference

Lack of support to have will and preference realised

Disability type

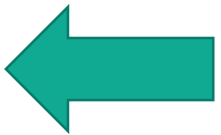
Views of represented person not considered

Person's will and preference only considered for those with acquired disability



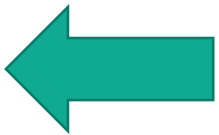
It was not possible  
to ascertain TQ's  
wishes.

(VCAT member)

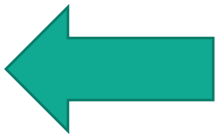


It was impossible to ascertain the applicant's wife's views about it for she had lost the ability to communicate, but in conversations with the applicant and other family members which took place years prior to the onset of her illness she had said that she would not want her life prolonged in circumstances like these. She and the applicant made mutual promises that if ever one of them was in such a condition the other would not allow it to continue.

(VCAT member)



I did not require the represented person to attend the hearing and I did not visit her at the facility where she lives.  
(VCAT member)



# Summary

Australia's signing of the UNCRPD appears to have impacted minimally on guardianship practice in Victoria in relation to Article 12, due to no change in the legislation.

Australia's obligations under Article 12 of the Convention, require a de-emphasis on the outdated concept of 'best interest' and an emphasis on supporting people with cognitive disabilities to have their will and preference reflected in their personal decisions (supported decision making).

Outcomes of this research provides critical information to inform guardianship reform.



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# Victorian Guardianship Reform

Guardianship and Administration Bill 2018

Greater compliance with Article 12

- ✓ Functional as opposed to medical view of decision making capacity
- ✓ Best interest removed
- ✓ Move away from paternalistic model
- ✓ VCAT must hear all initial applications in the person's presence, unless satisfied that the person doesn't want to attend, or there is another justifiable reason for their absence.



# References

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