



# Supported decision-making: the legal landscape in Australia

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# Overview

Global drivers of legal reform to include supported decision-making in law



Types of legally recognised supported decision-making



A decade of legal reform efforts in Australia



How has the Australian legal landscape evolved?

# Human Rights - Global driver for change

- The right to make one's own decisions is embedded in the *United Nations Convention on the Rights of Persons with Disabilities*:
  - Persons with disabilities enjoy **legal capacity on an equal basis** with others in all aspects of life.
  - Signatory nations agree to develop “appropriate measures to provide access by persons with disabilities to the **support** they may require in **exercising their legal capacity.**”

Scholars and governments have often looked to law as the tool to achieve aims.

# Typology of legally recognised supported decision-making

## Recognition in legislative principles

- Decision-making principles require supported decision-making before substitution
- Decision-making principles require focus on W&P not BI

## Legally recognised supporters/co-decision-makers

- Self-appointed
- Tribunal/Court appointed
- Supported decision-making agreements

## Existing Substitute decision-makers

- Substitute decision-makers guided by W&P

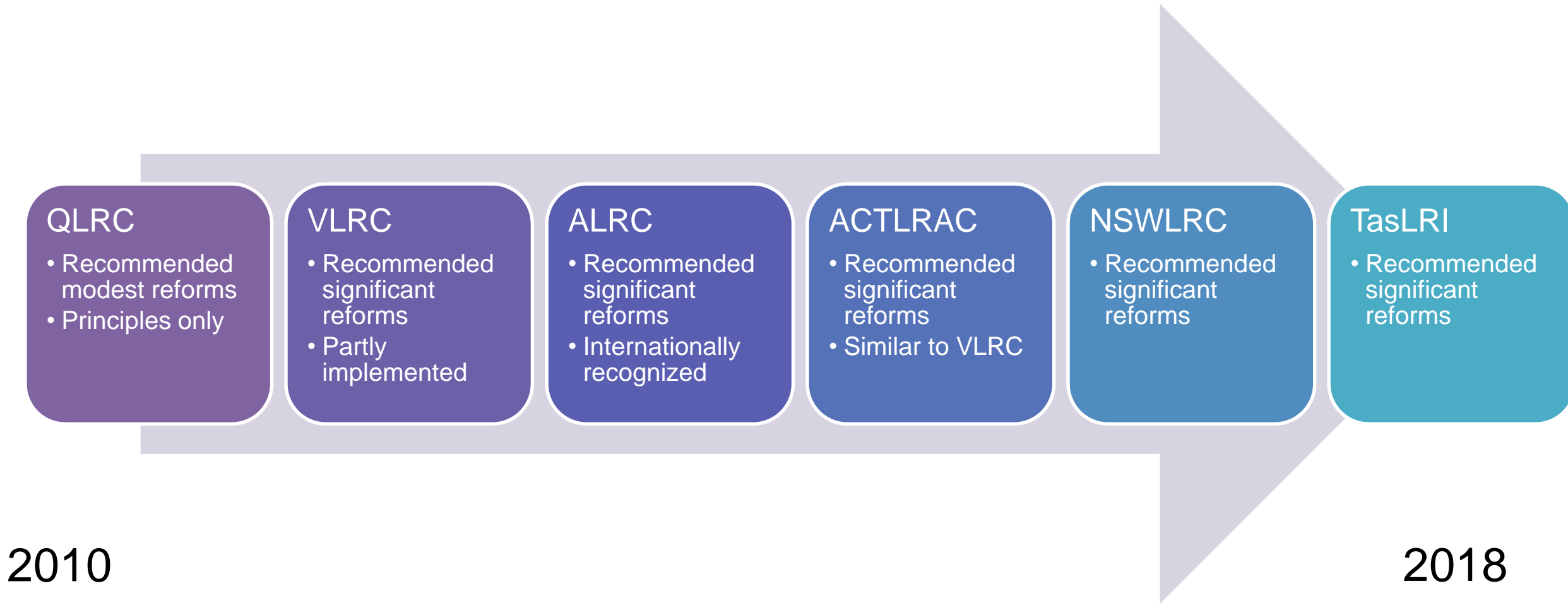
## Advance planning

- Psychiatric Advance directives/statements
- General medical advance directives/statements
- Enduring powers

## Mental Health initiatives

- Independent advocates/patient rights advisors
- Nominated supporters/representatives

# Australian context: proposals from Law Reform Commissions (adult guardianship frameworks)



# Law Reform Agencies

- Focus on guardianship/decision-making legal frameworks.
- Uniformly recognised human rights context and UNCRPD as a driver for legal reform.
- All recommended maintaining substituted decision-making schemes – but sought to improve these to be more aligned to UNCRPD
- Supported decision-making mechanisms seen as an adjunct to existing substitute decision-making frameworks.
- Most recommended formal recognition of supporter roles.
- But take up by government of recommendations – *limited*.

SN Then, T Carney, C Bigby, J Douglas, Supporting decision-making of adults with cognitive disabilities: The role of Law Reform Agencies – Recommendations, rationales and influence, (2018) *International Journal of Law and Psychiatry*

# Government responses and reform

- Response to law reform agency recommendations – limited.
- However, government led reforms have targeted mental health and guardianship and have resulted in some legal change.

## Recognition in legislative principles

- In QLD, Vic, ACT, Tas
- Decision-making principles require supported decision-making before substitution

## Legally recognised supporters

- Only in Victoria
- Self-appointed
- Tribunal/Court appointed
- Supported decision-making agreements

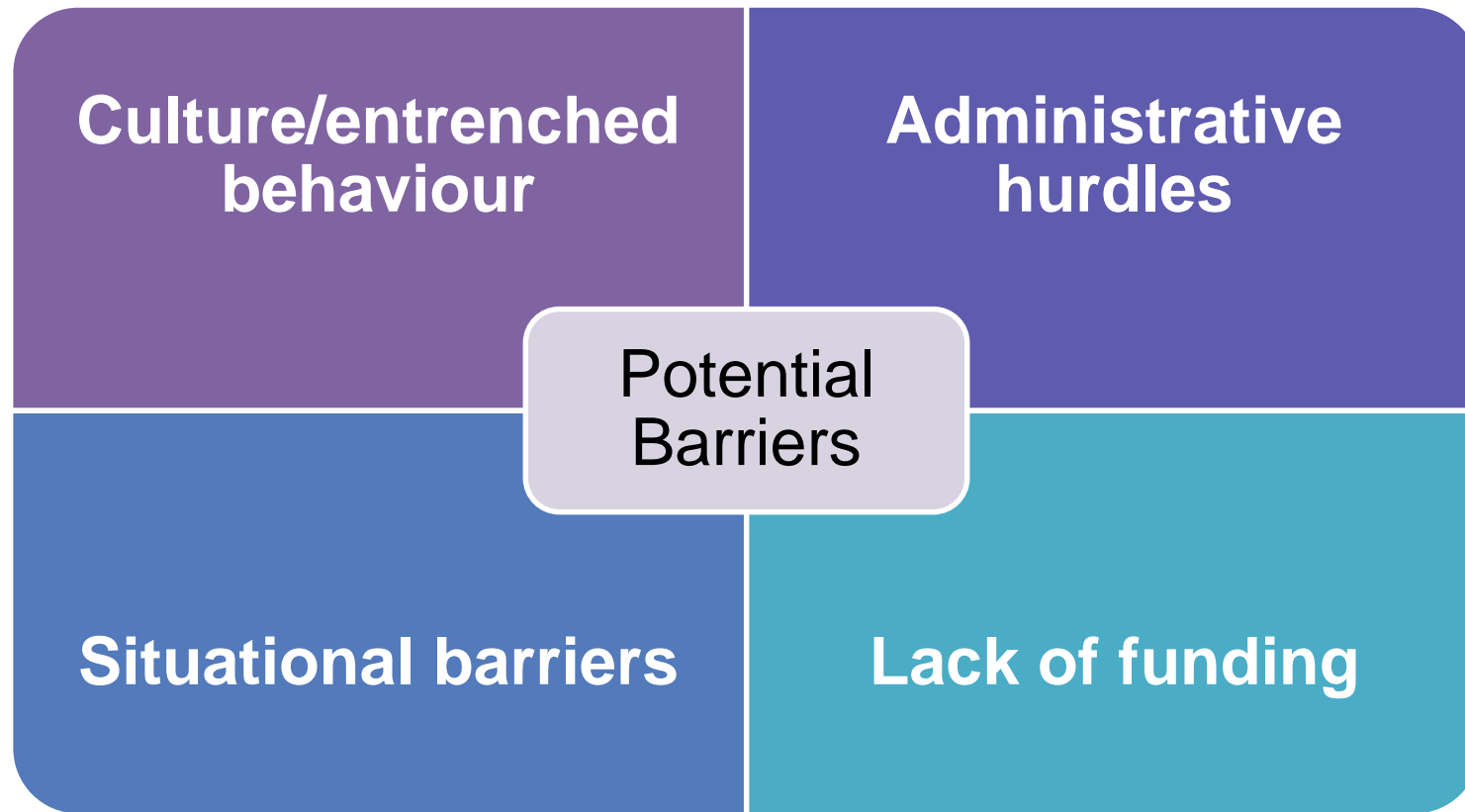
## Existing Substitute decision-makers

- Substitute decision-making frameworks retained
- But substitute decision-makers guided by principles more consistent with UNCRPD (W&P not BI)

## Where are we at?

- Australian substitute decision-making frameworks remain largely intact.
- Only Victoria recognises legally recognised supporters.
- However:
  - Incremental reform in the right direction
  - Parliaments justify reforms based on supported decision-making indicating an adoption of the ‘principled approach’ to understanding what supported decision-making means
  - Reforms are on-going
  - Additional impetus from the Disability Royal Commission Report.

# Impact of legally recognised supported decision-making?



We need more evidence of how these laws are impacting day to day life of those with cognitive disability

## Selected references

- C Bigby, T Carney, SN Then, I Wiesel, C Sinclair, J Douglas, & J Duffy, (2023) *Diversity, dignity, equity and best practice: a framework for supported decision-making*. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability <https://disability.royalcommission.gov.au/policy-and-research/research-program>
- Then SN , Carney T, et al (2022) Moving from Support for Decision-making to Substitute decision-making: Legal Frameworks and Perspectives of Supporters of Adults with Intellectual Disabilities *Law in Context* (online access <https://journals.latrobe.edu.au/index.php/law-in-context/article/view/174>)
- C Bigby & J Douglas, Development of an Evidence-Based Practice Framework to Guide Decision Making Support for People with Cognitive Impairment due to Acquired Brain Injury or Intellectual Disability (2020) *Disability and Rehabilitation* 42(3), 434-441 (online access <https://doi.org/10.1080/09638288.2018.1498546>)
- SN Then, T Carney, C Bigby, J Douglas, Supporting decision-making of adults with cognitive disabilities: The role of Law Reform Agencies – Recommendations, rationales and influence, (2018) *International Journal of Law and Psychiatry*