Office of the Public Advocate

Designing a deprivation of liberty authorisation and regulation framework

Discussion paper

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Executive summary

To be deprived of, or prevented from exercising, one's liberty is a significant incursion on a person's human rights. However, thousands of people with cognitive disabilities, mental illness and/or age-related disabilities are admitted to and reside in social care settings like group homes, hospitals and nursing homes where they are subject to very high levels of supervision and other restrictions on their freedom, up to and including complete and continuous deprivations of liberty. Where the person lacks the decision-making capabilities to give informed consent to those restrictions, it is common practice for facilities to rely on the informal consent of family members and/or their belief that a duty of care permits or requires them to do so.

The legality, necessity and justification for such practices is increasingly being called into question. For instance, the Victorian Law Reform Commission ('VLRC') reviewed restrictions on liberty in residential care in 2012 and acknowledged:

- 'There is no common law or statutory power permitting [a] family member or friend to provide substituted consent to these practices… [and] no statutory power, or any clear common law power, that permits the staff at the residential facility to undertake these practices';[1] and
- 'It is no longer appropriate to rely on informal consent by family members when dealing with residential decisions that involve total restraint of a person's liberty… [and] it is strongly arguable that actions involving total loss of liberty should be authorised by a process that involves appropriate checks and balances'.[2]

However, many people with disabilities who are deprived of their liberty are vulnerable to coercion and pressure from those around them, have reduced ability to assert their rights and interests and often have very limited contact with independent or external people (such as advocates or lawyers) who may be able to assist them. Numerous inquiries and investigations have confirmed that violence, abuse and other rights violations occur regularly against people with disabilities in residential and related services, even where motivations may be benign or well-intentioned, and that people with disabilities and their supporters often struggle to satisfactorily report and have these issues addressed.[3]

This situation has been described as 'an acute legal and moral problem'.[4] The Public Advocate takes the view that law reform is required to:

- Clarify when a 'social care' practice may constitute a deprivation of liberty;

[1] VLRC, *Guardianship*: *Final Report*, No 24 (2012) 318.
[2] Ibid.
[3] See e.g. Office of the Public Advocate, *Violence Against People with Cognitive Impairments: Report from the Advocacy/Guardianship program at the Office of the Public Advocate, Victoria* (2010); Office of the Public Advocate, *Sexual Assault in Supported Residential Services: Four case studies* (2012); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The experiences of people with disabilities reporting crime* (2014); Victorian Ombudsman, *Reporting and Investigation of Allegations of Abuse in the Disability Sector* (2015); Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015); Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services* (2016); Australian Law Reform Commission, *Elder Abuse – A national legal response*, Report No 131 (2017).
[4] Michael Williams, John Chesterman and Richard Laufer, 'Consent Versus Scrutiny: Restricting liberties in post-Bournewood Victoria' (2014) 21 *Journal of Law and Medicine* 641, 641.

- Establish when a deprivation of liberty is, or is not, justifiable; and
- Provide meaningful processes by which lawful authorisation and monitoring of justifiable deprivations of liberty can occur, as well as the creation of appropriate safeguards.

However, the challenge to design an authorisation process which provides appropriately robust safeguards for liberty and contributes tangible benefits to people's lives without being excessively bureaucratic or practically unworkable has remained unresolved to date. The task is further complicated by the need to traverse the multiple, existing regulatory regimes of both the Commonwealth, in relation to aged care and the National Disability Insurance Scheme ('NDIS'), and the state in relation to mental health, disability and private residential providers.

In addition to making a number of law reform recommendations in this area, the VLRC recommended that 'The Public Advocate should develop guidelines in consultation with appropriate professional groups that identify practices undertaken in supported residential facilities that are a restriction upon liberty and that should be authorised when imposed without consent'.[5] To that end, in February 2017, the Public Advocate convened a roundtable of twenty-seven legal and policy experts in the fields of guardianship, mental health, disability and restrictive interventions to discuss this issue. The six common scenarios included on pages 33-34 were also discussed. It was clear from those discussions that this remains an area of considerable legal complexity and uncertainty.

The purpose of this discussion paper is to go beyond the consideration given to the issue by the VLRC in 2012 and the roundtable in February 2017 to promote further discussion and to direct attention towards practical reform. The paper:

- Outlines preliminary issues;
- Identifies the substantive and procedural elements that a new, human rights-compatible authorising framework for deprivations of liberty should include;
- Identifies and discusses some options;
- Where possible, makes recommendations for reform (highlighted in green boxes throughout); and
- Poses questions for further consideration (highlighted in orange boxes throughout).

The key points, recommendations and questions for further consideration are listed below.

In summary, the Public Advocate's proposed framework would require the following whenever arrangements are being considered that would give rise to a deprivation of liberty:

- Alternative options need to be identified and explored;
- The person who may be subject to the arrangements must be engaged and supported to make their own decision wherever possible, including through the provision of relevant information and other decision-making supports;
- The person can nominate their own advocate or, if they do not, an independent advocate must be arranged for them;

[5] VLRC, above n 1, 341.

- The substantive criteria for a deprivation of liberty must be examined. These should be that:
    - The person is unable to be supported to make their own decision;
    - The threshold harm criterion (to be determined) applies;
    - The proposed arrangements are necessary and proportionate; and
    - There is no less restrictive alternative.
- In the process of examining the criteria, the person's wishes, will and preference must be identified and considered and the relevant people must be consulted;
- The appropriate decision-maker must be engaged. If the proposed arrangements are intended to address a risk of harm to the person themselves, and are consistent with the person's wishes, the service seeking to implement the arrangements may determine whether the criteria are met. In any other case, the service must apply to the Victorian Civil and Administrative Tribunal's ('VCAT') Human Rights List for a determination;
- An authorisation record must be produced, which must specify the precise arrangements that are to be authorised, the decision-making process and reasons, the maximum duration for the authorisation and the timeframe for periodic reviews. It must also include a plan to reduce restrictions over time;
- The authorisation record must be registered with the registration authority, which will review any record produced by a service.

The precise scope of deprivations of liberty to which the framework would apply remains to be determined.

The Public Advocate also proposes that the framework include the following safeguards:

- Empowerment of the registration authority to refer a matter to VCAT or for investigation;
- Required periodic reviews;
- A right to merits review, appeals and judicial oversight;
- Provision for advance directives and second opinions;
- Ongoing rights to independent legal and non-legal advocacy;
- A complaints body; and
- Strengthened civil and criminal sanctions.

The Public Advocate's proposed framework is presented as a flowchart in the Appendix.

This discussion paper and the reform proposals it contains are of course just one small piece of a much larger puzzle. They are intended to sit alongside a range of other law and practice reform efforts which are collectively required to protect the rights and dignity of people with disabilities in social care settings and to significantly reduce the need for deprivations of liberty to occur at all.

Key points, recommendations and questions for further consideration

Introduction and context

- The guardianship regime should not be relied on authorise deprivations of liberty.
- A new legal framework is required to authorise and regulate civil deprivations of liberty in order to bring transparency to current practices and better protect the rights of people who are at risk of being deprived of their liberty.
- The legal framework must be complemented by a range of other advocacy and reform activities to meaningfully improve the protection of people's rights in practice.

Preliminary matters

- The framework should be compatible with human rights and incorporate the Australian Law Reform Commission's proposed national decision-making principles and guidelines.
- *Questions for further consideration:*
    - How frequent, significant and lengthy does a deprivation of liberty need to be to be subject to this framework?
    - Should partial and temporary deprivations of liberty, and restrictions on liberty more broadly, be included in this framework or be subject to a different framework or process?
    - Should specific categories of arrangements that would be covered by the framework be identified (like the proposed UK liberty protection safeguards)? If so, what should they be?
    - Should the framework adopt a flexible range of criteria, processes and/or requirements in order to authorise and regulate a broader spectrum of restrictions or different types of arrangements? For instance, should a proposal to admit a person to a particular place be treated differently from a proposal to restrict a person who is already in care?
- Whatever definition of 'deprivation of liberty' is ultimately adopted, or however broad the scope of the framework will be:
    - Any authorisation granted under the framework should apply and be confined to specific and defined *arrangements* that would give rise to a deprivation of liberty, rather than to a deprivation of liberty at large; and
    - The degree of scrutiny and safeguards required prior to authorisation should be proportionate to the severity of the proposed restrictions on liberty.
- The settings in which this framework applies should not be limited or exhaustively defined.
- *Questions for further consideration:*
    - Should the framework apply to deprivations of liberty occurring in private and domestic settings?
    - Should a non-discriminatory, universal framework be pursued which fuses and replaces existing guardianship laws, mental health laws and disability laws, and provides consistent thresholds and safeguards for authorising civil deprivations of liberty across all settings?
    - Should this framework simply sit in the gaps between the existing detention regimes? If so:
        - How can this be made workable in practice?

        - How can we ensure that it is not used to permit deprivations of liberty of people who should be entitled to their liberty by virtue of not meeting the criteria for detention under an existing regime?
- The framework should apply without discrimination and not be confined to people with disabilities or any other characteristic.
- *Questions for further consideration:*
    - Should the framework permit a deprivation of liberty of a child or young person?
    - Even if a deprivation of liberty is not permitted, should the safeguards that will accompany the framework be available to them?
- No person who has the decision-making capabilities, or who can be supported, to make their own decision may be deprived of their liberty through this framework.
- *Questions for further consideration:*
    - Should advance directives in relation to deprivations of liberty operate to bar a conflicting authorisation under the framework?
    - In what circumstances, if any, could an advance directive be overridden?
- Even where a guardian has been or could be appointed or an enduring power of attorney has been made, authorisation under this framework should still be required.
- The framework should provide complementary and enhanced rights protection rather than undermine the rights protections within existing civil detention regimes.
- Where the proposed justification for arrangements that would result in a deprivation of liberty relates to the justification for detention under an existing regime, that regime must be followed. The framework cannot be used to authorise the detention of people who do not meet the criteria for detention under the existing regime.
- Existing civil detention regimes should include a provision equivalent to s 150A of the *Disability Act 2006* (Vic), clarifying that detention outside of those regimes is prohibited.
- The human rights compatibility of existing civil detention regimes should be reviewed and reformed where necessary.
- *Question for further consideration:*
    - What legal mechanism or device should the framework adopt to render approved deprivations of liberty lawful?

Substantive criteria

- The substantive criteria should include that the person is unable to be supported to make a decision about the proposed arrangements that would result in a deprivation of liberty.
- The framework should address how fluctuating decision-making capabilities will be dealt with.
- The substantive criteria should include a specific threshold harm criterion, set at a high standard, which constitutes the purpose of the intervention. For example, 'the person would pose a significant risk of serious harm to themselves or others if they were not deprived of their liberty'.
- *Questions for further consideration:*
    - How should the threshold harm criterion be formulated (with reference to the severity, likelihood, imminence and type of potential harms)?
    - Should the risk of relevant harms be confined to risks to self, to others, or to both?
    - Is the threshold harm criterion necessary where the proposed arrangements are consistent with the person's wishes, will and preferences?
- The substantive criteria should include that the arrangements that would give rise to a deprivation of liberty must be necessary and proportionate to the threshold harm criterion (for

example, necessary and proportionate to prevent a significant risk of serious harm to the person or another person).

- The substantive criteria should include that a person can only be deprived of their liberty after all less restrictive alternatives have been explored and exhausted.
- The onus is on the person seeking to deprive the person of their liberty to ensure that this exploration has occurred.
- *Questions for further consideration:*
    - How should the person's wishes, will and preferences be incorporated into this framework:
        - Expressly in the criteria or decision-making test? Should the framework only permit arrangements that would be consistent with or give effect to the person's will and preferences, or prohibit arrangements that would be inconsistent except in, for instance, exceptional circumstances? Should substituted judgment be adopted as the decision-making standard?
        - In the principles and application of the general criteria? Should the person's will and preferences simply be recognised in the framework's principles and factored into the proportionality assessment?
        - In the process requirements? Should a more stringent authorisation process and additional safeguards be required where the proposed arrangements are inconsistent with the person's will and preferences?
- The degree of benefit or otherwise to the person of the arrangements depriving them of their liberty should be factored into the proportionality assessment rather than included as a separate, express criterion.
- The phrase 'best interests' should not appear in the framework.

Process and procedural matters

- *Questions for further consideration:*
    - Who should decide whether the criteria are met:
        - Self-appointed decision-makers?
        - The service provider or person seeking to impose the arrangements?
        - An independent administrative decision-maker?
        - A judicial or quasi-judicial body?
    - Should the decision-maker vary according to the circumstances and/or the risk of rights violation, for instance:
        - Where the proposed justification for the arrangements is (primarily) a risk of harm to other people;
        - Where there are indications that the arrangements are inconsistent with the person's wishes;
        - Where the deprivation of liberty is particularly severe and/or has lasted for a particular length of time;
        - Where the facility or service proposing the arrangements is not in a defined category which is well-regulated;
        - Where the proposal involves a deprivation of liberty in a setting where the person does not meet the primary eligibility criteria (for example, a person younger than 65 years in a nursing home);
        - Any other circumstances?

    - Should any of the possible decision-makers identified above be involved in providing second opinions or have oversight of primary decisions made by others?
- The Public Advocate's preliminary view as to who may decide whether the criteria are met is that:
    - Where the proposed deprivation of liberty arrangements are sought to be implemented to address a risk of harm to the person themselves, and those arrangements are consistent with the person's wishes, the service seeking to implement those arrangements may determine whether the criteria are met and thereby avail themselves of a defence, subject to the procedural requirements and safeguards outlined below.
    - In all other situations, the service seeking to implement the arrangements must apply to the VCAT Human Rights List for authorisation of the deprivation of liberty arrangements.
- A specific person or role within each service should be designated as responsible for ensuring that a valid authorisation is in place, or an application made to VCAT, for any proposed deprivation of liberty. That person would be liable for serious consequences if they fail to do so.
- The process and procedural requirements for a deprivation of liberty authorisation should be that:
    - Alternative arrangements have been explored;
    - All reasonable efforts have been made to support the person to be able to make their own decision;
    - An advocate has been engaged;
    - The person's wishes, will and preferences have been identified and considered;
    - The necessary assessments have occurred;
    - The necessary consultation has occurred;
    - The appropriate decision-maker has been engaged;
    - A plan has been made as to how restrictions may be reduced over time;
    - The decision (including specific details of the arrangements), the decision-making process and reasons for the decision have been documented in an authorisation record;
    - A maximum duration for the authorisation and a timeframe for review has been set; and
    - The authorisation record has been registered with and reviewed by the registration authority.
- All possible alternative arrangements must be identified and explored prior to considering whether a deprivation of liberty arrangement may be justified.
- All reasonable efforts must be made to support the person to be able to make their own decision about the proposed deprivation of liberty arrangements before any consideration is given to authorising them.
- Where a service is considering implementing deprivation of liberty arrangements, they must:
    - Advise the person of their right to nominate someone who is willing and able to provide support and advocacy for them; and
    - If the person is unable or fails to nominate their own advocate, facilitate the engagement of an independent advocate.
- The role of the advocate is to:
    - Help gather and receive relevant information;
    - Provide the person with support, including decision-making support, and help represent their wishes;
    - Be one of the persons who must be consulted; and

    - Assist the person to exercise their rights, including to challenge any decision that is made.
- If advocacy is not available or facilitated, the service cannot proceed to make a determination about the criteria or implement deprivation of liberty arrangements and must apply to VCAT for a determination.
- Each criterion needs to be carefully assessed and established on the balance of probabilities to the *Briginshaw* standard. There is no onus on the person to disprove the criteria, but there is a practical expectation that the person seeking to impose the arrangements will put forward evidence in support of their position.
- The assessment of the person's decision-making capabilities should be carried out by a relevant professional, in accordance with appropriate presumptions, principles and processes including:
    - A presumption of decision-making capacity;
    - A recognition that:
        - Decision-making capacity is specific to the decision in question and may fluctuate over time;
        - Incapacity cannot be assumed because of any particular characteristic of the person or because they make a decision which, in the opinion of others, is unwise;
        - A person has decision-making capacity if it is possible for them to make a decision with support;
    - A requirement that the assessment be conducted at a time and in an environment which maximises and most accurately enables the assessment of the person's capabilities.
- The person's wishes and preferences in relation to the proposed arrangements must be carefully identified during the exploration of the criteria, including through consultation with relevant people. The person's wishes cannot be assumed simply from their compliance with or acquiescence to a particular proposal.
- The following people should be consulted to inform the assessment of the criteria and in particular to better understand the person's wishes:
    - Anyone named by the person as someone to be consulted;
    - Anyone engaged in caring for the person or interested in their welfare, subject to the consent of the person or other safeguards;
    - The person's nominated or appointed advocate;
    - The person's guardian or attorney (pursuant to a relevant power of attorney), if they have one; and
    - If the framework applies to children and the person is a child, the person with parental responsibility for them.
- Any service implementing a deprivation of liberty arrangement should be required to develop a plan as to how the restrictions may be reduced over time.
- Progress towards reductions in restrictions and the implementation of measures identified in the plan should be reviewed during each periodic review.
- An authorisation record should be produced which details the decision (including the specific authorised deprivation of liberty arrangements), the decision-making process and the reasons for the decision and incorporates the plan to reduce restrictions over time.
- There should be a central register for deprivation of liberty authorisations.
- Any deprivation of liberty authorisation must be registered with the registration authority.

- The registration authority should review all authorisation records prepared by services to ensure that all procedural requirements have been complied with and that there is adequate information contained within the record to support the determination. If the registration authority has concerns about the authorisation or the adequacy of the record, it may refer the matter at its discretion:
    - Back to the service, the person and their advocate;
    - To the complaints body (if separate to the registration authority); and/or
    - To VCAT.
- The registration authority should be able to conduct systemic, own-motion investigations and audits of authorisation records.
- *Question for further consideration:*
    - Should the Office of the Public Advocate, the Senior Practitioner – Disability or another organisation perform the functions of the registration authority?
- Wherever possible, authorisation must be sought and obtained prior to implementing any deprivation of liberty arrangements.
- If the framework permits services to make deprivation of liberty determinations in certain situations, the service should not proceed to implement the arrangements prior to review by the registration authority and/or a specified period of time has elapsed.
- *Question for further consideration:*
    - When and for how long may a person take action which deprives another person of their liberty (and be protected in respect of that action) in the case of unforeseeable emergencies?
- Any authorisation for a deprivation of liberty must be time limited, either to the minimum time for which it is assessed that the person will continue to meet the criteria or to the maximum permitted duration, whichever is shorter.
- The authorisation should end:
    - When the specified duration elapses;
    - If the person imposing the deprivation of liberty arrangements knows or ought to reasonably suspect that the criteria no longer apply; or
    - If it is determined that it should end following a periodic review, merits review or appeal.
- *Question for further consideration:*
    - What should be the maximum permitted duration of an authorisation? Should this vary according to the circumstances?
- Periodic reviews of all deprivation of liberty arrangements should be conducted to check if they are operating as intended and if they are no longer required.
- The timing and frequency of the periodic reviews should be planned and documented as part of the initial determination, tailored to the individual circumstances of the case, and there should be a maximum period of time that can elapse between reviews.
- The person, their advocate or someone else with an interest in the person should be able to request a review at any time.
- Reviews should be automatically triggered where:
    - There is a significant change in the person's circumstances;
    - It appears that the criteria may no longer met (for instance, that the person now has decision-making capacity); or
    - The arrangements are no longer consistent with the person's wishes (if they were originally authorised through the more streamlined process on that basis).

- The person imposing the deprivation of liberty arrangements should be required to refer a matter for review if they should reasonably be aware of one of the above triggering circumstances.
- VCAT's Human Rights List should be able to conduct merits reviews of deprivation of liberty decisions made under the framework.
- If the initial decision was made by VCAT, a more senior VCAT member should conduct the merits review.
- A person, or their advocate on their behalf, should be able to request merits review.
- *Questions for further consideration:*
    - Should there be any time limit on seeking merits review?
    - Should merits review of any periodic review decision also be available?
- The existing statutory right to appeal a VCAT decision on an error of law to the Supreme Court should be supplemented by an express right under the framework to challenge the lawfulness (as understood in human rights law) of any deprivation of liberty in the Supreme Court.

Other safeguards

- There should be provision for people to make advance instructional and values directives in relation to deprivation of liberty arrangements.
- A person, or their advocate on their behalf, should be able to request an independent second opinion regarding whether the criteria are, or continue to be, met at any stage during an authorisation.
- A formal scheme should be established to provide independent second opinions.
- Specialist legal advocacy should be available, at a minimum, to anyone who is the subject of an application for a deprivation of liberty authorisation at VCAT and to assist in any merits review or judicial challenge against an authorisation.
- Legal and non-legal advocacy agencies must be adequately resourced to carry out their functions under the framework to ensure the effective operation of these safeguards in practice.
- An appropriate body should be authorised to receive and investigate complaints relating to the conduct and exercise of powers by service providers under the framework, to conduct own-motion investigations and to refer matters to VCAT.
- Oversight mechanisms must be empowered and adequately resourced to ensure effective rights protection in practice.
- *Question for further consideration:*
    - What authority should be the complaints body in relation to the framework?
- Unlawful detention should punished and deterred through criminal prosecutions where appropriate.
- A person should be able to bring civil proceedings against anyone responsible for implementing arrangements which give rise to a deprivation of liberty but which have not been authorised under this framework or another law or by an order of a court.

Introduction and context

The right to liberty

Liberty has long been recognised as an important human right. International agreements, such as the *International Covenant on Civil and Political Rights*[6] and the *Convention on the Rights of Persons with Disabilities* ('CRPD'),[7] as well as modern human rights legislation provide express recognition of and protection for this right. For instance, Victoria's *Charter of Human Rights and Responsibilities Act 2006* ('Charter') recognises that 'all people are born free and equal in dignity and rights',[8] have the right to liberty and security and must not be subject to arbitrary detention.[9] The Charter also provides that '[e]very person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live'.[10] Irrespective of any formal legislative recognition, the Victorian Supreme Court has held that the human right to personal liberty is a 'foundational value of the common law and our constitutional arrangements',[11] which is protected by the writ of *habeas corpus* and the tort of false imprisonment.

The right to liberty is important because freedom is regarded as 'a prerequisite for individual and social actuation and for equal and effective participation in democracy'.[12] Similarly, the United Nations' Committee on the Rights of Persons with Disabilities ('CRPD Committee') has recognised that '[b]oth the liberty of movement as well as the right to an adequate standard of living, form indispensable conditions for human dignity and the free development of a person'.[13] The Victorian Supreme Court has described the rights to liberty and freedom of movement as 'being of the first order of importance in terms of human rights protection'.[14]

Restrictions on the right to liberty

Like other rights, the right to liberty is not absolute and all societies provide mechanisms by which people may be deprived of their liberty. However, human rights and other laws and legal principles restrict the circumstances in which it is permissible to do this.

Authorisation under law is critical for any deprivation of liberty. The High Court has stated that it is a fundamental principle of the common law that '[n]either public officials nor private persons can lawfully detain [someone]… except under and in accordance with some positive authority conferred by law'.[15] The Charter reflects this principle in stating that a person 'must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'.[16] Accordingly, the

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[6] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.
[7] Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 14(1).
[8] Charter preamble.
[9] Ibid s 21(1)-(2).
[10] Ibid s 12.
[11] *Antunovic v Dawson* [2010] VSC 377, [6].
[12] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 140.
[13] *Draft General Comment No 5: Article 19 - Living independently and being included in the community*, 17th sess (2017) [9], drawing on Human Rights Committee, *General Comment No 27: Freedom of movement (Art 12)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [1] and Committee on Economic, Social and Cultural Rights, *General Comment No 4: The right to adequate housing (Art 11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) [7].
[14] *Antunovic v Dawson* [2010] VSC 377, [67].
[15] *Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 per Brennan, Deane and Dawson JJ, cited with approval by Bell J in *Antunovic v Dawson* [2010] VSC 377, [134].
[16] Charter s 21(3).

Supreme Court of Victoria has stated, in the context of determining whether a deprivation of liberty is lawful, that a 'critical element of justification is the legality requirement that the decision or conduct be 'under law''.[17]

To that end, Victorian laws expressly authorise deprivations of liberty in a range of situations. For example, a person found guilty of particular crimes may be sentenced to a term of imprisonment under the *Sentencing Act 1991* (Vic) (criminal detention) and people who meet various diagnostic and other criteria may be subject to civil detention under the *Mental Health Act 2014* (Vic), the *Disability Act 2006* (Vic) and the *Severe Substance Dependence Treatment Act 2010* (Vic). The common law also permits deprivations of liberty in certain limited circumstances, for instance through the doctrine of necessity.

However, the mere existence of a potential authorising mechanism is not necessarily sufficient for a deprivation of liberty to be lawful. Section 7(2) of the Charter states that a human right 'may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors',[18] and sets out a range of other protections which constrain the way in which rights may be limited. The references to 'law' in ss 7(2) and 21(3) impose a 'legality requirement' which contains two elements: the limitation must both be authorised by law, and the authorising law must have certain minimum attributes:

> [T]he law concerned must be adequately accessible, not uncertain or vague and sufficiently precise to enable people to predict its application and foresee its consequences to a reasonable degree.[19]

Similarly, the European Court of Human Rights has explained that the equivalent requirement in art 5(1) of the *European Convention on Human Rights*[20] – that a deprivation of liberty be 'in accordance with a procedure prescribed by law' – requires not just the existence of a domestic law but one that has certain minimum attributes:

> The Court reiterates that the lawfulness of detention depends on conformity with the procedural and the substantive aspects of domestic law, the term "lawful" overlapping to a certain extent with the general requirement in Article 5 § 1 to observe a "procedure prescribed by law". Further, given the importance of personal liberty, the relevant national law must meet the standard of "lawfulness" set by the [European] Convention [on Human Rights] which requires that all law be sufficiently precise to allow the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail…
>
> Lastly, the Court reiterates that it must be established that the detention was in conformity with the essential objective of Article 5 § 1 of the Convention, which is to prevent individuals being deprived of their liberty in an arbitrary fashion. This objective, and the broader condition that

[17] *Antunovic v Dawson* [2010] VSC 377, [70].
[18] Charter s 7(2).
[19] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 154.
[20] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

detention be “in accordance with a procedure prescribed by law”, require the existence in domestic law of adequate legal protections and “fair and proper procedures”. [21]

Detention regimes, or certain elements of them, may not be compatible with a contemporary understanding of human rights or meet these minimum attributes and requirements. Therefore, it is possible for a deprivation of liberty to be formally authorised under a law but, if that law does not meet the required attributes, not actually be justifiable in accordance with human rights law.

Compared to the more nebulous common law principles, each of the Victorian Acts referred to above sets out criteria, processes and safeguards which, in combination, help to ensure any deprivation of liberty is justifiable and not arbitrary. However, the human rights compatibility of particular elements of these laws may be open to debate. For example, both the *Mental Health Act 2014* (Vic) and the *Disability Act 2006* (Vic) permit a person who is capable of making their own decision to be detained for compulsory treatment, and both Acts could also be considered discriminatory given their confined application to particular cohorts of people with disabilities.[22] The application of the laws may also not be human rights compliant in practice.

It is noted that many deprivations of liberty, especially against people with disabilities, occur outside of any formal or express authorisation (see ‘Restrictions on liberty in social care settings’ below). In limited circumstances, such deprivations of liberty may be lawful and justified. However, the extent of any authority to detain a person outside a formal statutory framework and in the absence of clear safeguards is very unclear and the question of when a deprivation of liberty is lawful and justified is ultimately one only a court can determine.

Figure 1 below represents how deprivations of liberty may variously be authorised and/or be justifiable/compatible with human rights.

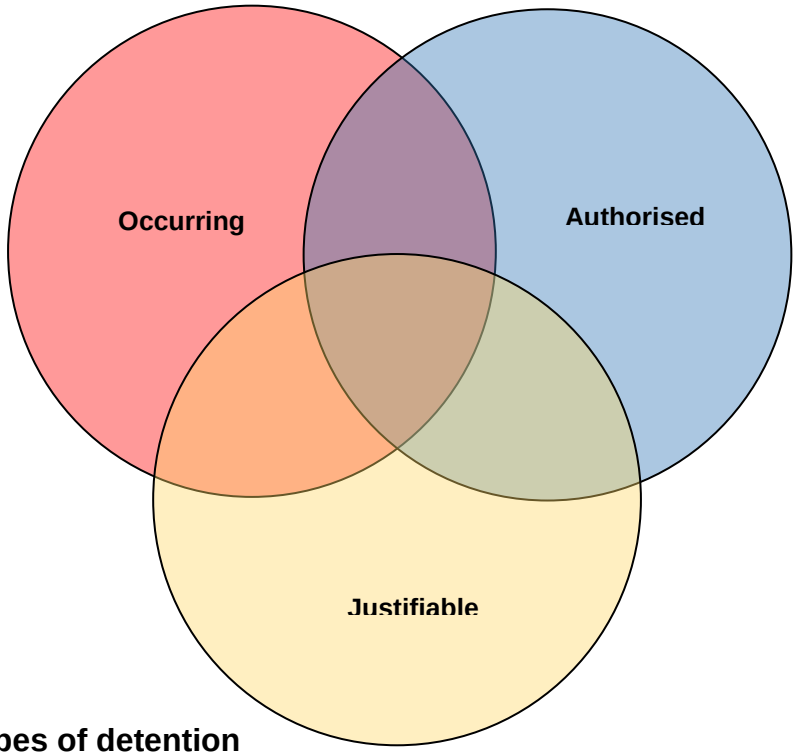

Fig 1. Types of detention

[21] *HL v United Kingdom* [2004] ECHR 471, [114]-[115] (‘*Bournewood*’) (citations omitted).
[22] See CRPD Committee, *General Comment No 1: Article 12 – Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (11 April 2014) [7], [13], [32] (‘*General Comment No 1*’).

Restrictions on liberty in social care settings – issues with current practices

Many people with cognitive disabilities, mental illness and/or age-related disabilities are admitted to and reside in places like group homes, hospitals and nursing homes where they are subject to very high levels of supervision and restrictions on their liberty, up to and including complete and continuous deprivations of liberty (what constitutes a deprivation of liberty is discussed further below). While some people are clearly unhappy with the restrictions imposed on them, others who may appear to be complying with or acquiescing to those restrictions may not be giving full, free and informed consent because:

- They lack the decision-making capabilities to give informed consent to the restrictions; and/or
- They are only complying under pressure or duress.

In the absence of valid consent from the person concerned, it is common practice for facilities to impose the restrictions relying on the informal consent of family members and/or their belief that a duty of care permits or requires them to do so. However, it is increasingly accepted that restricting a person's liberty in these circumstances may not be lawful or compatible with human rights.

In 2004, the European Court of Human Rights delivered judgment in the case of *HL v UK*[23] (known as the '*Bournewood*' case), which significantly changed the legal landscape in this field in Europe. The case concerned a profoundly autistic and non-verbal man, HL, who was being detained and medicated in a hospital ward. Because he was compliant and did not resist, he had not been formally detained under the *Mental Health Act 1983* (UK). In the absence of HL's ability to provide informed consent to the restrictions, the hospital relied on the common law doctrine of necessity to authorise their actions. However, the European Court of Human Rights found that the lack of procedural safeguards regarding the initial admission and the lack of access to a court to review the lawfulness of the detention breached art 5(1) and (4) of the *European Convention on Human Rights*. The court described the problems with relying on the doctrine of necessity as follows:

> [T]he Court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted… In particular and most obviously, the Court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The appointment of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.
>
> The Court observes that, as a result of the lack of procedural regulation and limits, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit: as Lord Steyn remarked, this left "effective and unqualified control" in their hands. While the Court does not question the good faith of those

[23] [2004] ECHR 471.

professionals or that they acted in what they considered to be the applicant's best interests, the very purpose of procedural safeguards is to protect individuals against any "misjudgments and professional lapses".[24]

The court held that an essential objective of art 5(1) is 'to prevent individuals being deprived of their liberty in an arbitrary fashion'.[25] As noted above, this objective, combined with the general requirement that any detention be 'in accordance with a procedure prescribed by law', requires 'the existence in domestic law of adequate legal protections and "fair and proper procedures"' in order for the deprivation of liberty to be lawful.[26]

As a result of this case, the United Kingdom ('UK') inserted a new statutory scheme called the 'deprivation of liberty safeguards' into its *Mental Capacity Act 2005*, to establish when and how deprivations of liberty could be authorised in accordance with law and proper safeguards. However, these onerous deprivation of liberty safeguards became unworkable in practice and in turn have become the subject of criticism. In March 2017, the UK Law Commission released its review of the scheme, along with a draft Bill, which propose replacing the deprivation of liberty safeguards with a new scheme called the 'liberty protection safeguards'.[27]

The *Bournewood* case is relevant to Australia and in particular Victoria because the Charter protects the right to liberty in extremely similar terms to art 5 of the *European Convention on Human Rights*. It is therefore quite possible that proceedings against a Victorian residential service provider in relation to a person who is effectively detained without their informed consent or any other formal authorisation could produce a similar result to the *Bournewood* case. The VLRC acknowledged this in its 2012 review of restrictions on liberty in residential care,[28] and confirmed that '[t]here is no common law or statutory power permitting [a] family member or friend to provide substituted consent to these practices… [and] no statutory power, or any clear common law power, that permits the staff at the residential facility to undertake these practices'.[29]

Despite this, the legality of detaining people with disabilities outside of statutory regimes is still rarely challenged in Victorian courts. Among the few relevant cases that have been determined, the Supreme Court found that using psychological coercion rather than the formal provisions of the *Mental Health Act 1986* (Vic) to restrict a person's liberty was unlawful[30] and also issued a writ of *habeas corpus* in relation to a woman unlawfully detained in a nursing home prior to the reappointment of a guardian[31] (see however 'Inadequacy of guardianship as a solution' below).

Accordingly, current deprivation of liberty practices in these settings remain inconsistent, unpredictable and arbitrary, and therefore likely unlawful, because there are no clear criteria, standards or processes to govern them. However, the lack of formal legal authority is just one part of the problem. In many cases, it is unclear whether such deprivations of liberty are substantively necessary or justifiable. The range of problems in practice include the following:

- Many family members and service providers do not identify commonly used social care practices and accommodation arrangements as restrictions on or deprivations of liberty.

[24] Ibid [120]-[121] (citations omitted).
[25] Ibid [115].
[26] Ibid (citations omitted).
[27] Law Commission (UK), *Mental Capacity and Deprivation of Liberty*, No 372 (2017).
[28] VLRC, above n 1, 329.
[29] Ibid 318.
[30] *Antunovic v Dawson* [2010] VSC 377.
[31] *Skylass v Retirement Care Australia* [2006] VSC 409.

- Most family members and service providers are unaware of the legal uncertainly surrounding restrictions on liberty or their lack of authority to implement such arrangements.
- The person's ability to make their own decision is not always considered or respected; their incapacity may simply be assumed, especially if they wish to make a decision that others disagree with.
- People are not provided with access to relevant information and supports they may require to make their own decision.
- The person's wishes and preferences are not always sought or taken into account in a meaningful way by others exercising control over them.
- There may be limited consultation with other people who are important to the person.
- Decisions regarding people with disabilities and older persons frequently remain motivated by objective 'best interests' considerations, risk avoidance and/or convenience rather than rights-based considerations.
- There may not be any evidence to support the purported need or justification for the restriction, especially in relation to the particular person. For instance, the practice of locking nursing home doors is often defended as necessary to keep residents safe from harm that may befall them if they wandered away. However, a recent study concluded that there is in fact very limited evidence of harm eventuating to people who wander away from nursing homes without permission.[32]
- Risk analyses may not take into account the negative impacts of restrictions, and the positive benefits of maintaining or increasing freedom and autonomy, on the person's health and broader wellbeing.[33]
- Human rights are not well understood and relevant human rights are often not identified or properly considered when decisions are made.
- Less restrictive options may not be identified or adequately pursued.
- Decisions and the reasons for them are rarely documented or transparent, which limits the possibility of review.
- There are no time limits or automatically-triggered reviews to re-examine the ongoing need or justification for detention.
- There are no practically accessible rights of appeal or mechanisms to challenge decisions.

Together, these issues call out for significant law and practice reform.

[32] Marta Woolford, Carolina Weller and Joseph Ibrahim, 'Unexplained Absences and Risk of Death and Injury Among Nursing Home Residents: A systematic review' (2017) 18 *Journal of the American Medical Directors Association* 366.e1, 366.e1.

[33] For example, physical activity associated with wandering has been found to lead to positive outcomes, such as fulfilling exercise needs, sensory stimulation and purposeful behaviour: Marie Boltz, 'Wandering and Elopement: A comprehensive approach' [2006] (September/October) *Assisted Living Consult* 17, 18.

Inadequacy of guardianship as a solution

Expanding the use of guardianship to authorise deprivations of liberty has been suggested as a possible solution to this issue. However, the Public Advocate believes that this is an inadequate solution and that guardianship should not be relied on authorise deprivations of liberty.

Under the *Guardianship and Administration Act 1986* (Vic), VCAT has the power to appoint a guardian for a person with a disability who is unable to make reasonable judgments because of that disability and who needs a substitute decision maker.[34] The Act defines a person with a disability as someone with an intellectual impairment, mental disorder, brain injury, physical disability or dementia.[35] The Act provides that the decisions of a guardian have the same legal effect as if the person with the disability had made them with capacity.[36]

The VLRC considered that a VCAT-appointed guardian with appropriate powers could consent to deprivations of liberty 'in some circumstances'.[37] A plenary guardianship order gives the guardian 'all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child', including to decide where the person is to live temporarily or permanently.[38] It appears that a plenary guardian may consent to accommodation arrangements that involve a deprivation of liberty. For instance, in 2006, the Victorian Supreme Court initially issued a writ of *habeas corpus* in respect of a woman detained in an aged care facility against her wishes because '[a]s a matter of law the nursing home cannot detain a patient against her wishes'.[39] However, the court declined to take any further action after VCAT urgently appointed the Public Advocate as the woman's plenary guardian, 'accept[ing] this as a sufficient response to the writ, given the [woman's] health'.[40]

In practice, plenary guardianship orders are 'rare',[41] although limited orders with accommodation powers are more common. At a 2015 hearing, VCAT provided advice pursuant to s 30 of the *Guardianship and Administration Act 1986* (Vic) that a guardian could exercise the accommodation power to accommodate a person in a locked facility and prevent them from leaving unsupervised.[42] The person subject to that guardianship order disagreed and sought a rehearing of this decision, but the guardianship order was revoked at the rehearing and so the correctness of the advice given at the original hearing was not reviewed. The scope of a guardian's power to detain a person, and the circumstances in which they may exercise it, remains unclear and contested.

Even if a guardian is or could be empowered under the *Guardianship and Administration Act 1986* (Vic) to make deprivation of liberty decisions, the VLRC felt that it is 'unlikely that guardianship will be an effective means of dealing with most instances in which these practices occur because of the numbers of people involved',[43] and so it did not recommend this as a solution. The fact that there are so many people currently being detained without clear legal authority is not a logical or sufficient reason for rejecting a possible mechanism out of hand, especially as any proper solution is likely to

[34] *Guardianship and Administration Act 1986* (Vic) s 22.
[35] Ibid s 3(1).
[36] Ibid ss 24(4), 25(3).
[37] VLRC, above n 1, 320.
[38] *Guardianship and Administration Act 1986* (Vic) s 24(1), (2).
[39] *Skylass v Retirement Care Australia (Preston) Pty Ltd* [2006] VSC 409, [9].
[40] Ibid [10].
[41] VLRC, above n 1, 26.
[42] *NLA (Guardianship)* [2015] VCAT 1104.
[43] VLRC, above n 1, 338.

involve some expenditure to ensure adequate rights protection. However, there are a number of other, valid reasons why expanding the use of guardianship is not an appropriate solution to this problem.

The Public Advocate believes that it would be inappropriate to appoint guardians in all cases where a person may face restrictions on liberty in residential care because it would be a 'mechanistic' use of guardianship that simply seeks 'to authorise what is already happening'.[44] As explained below, the reform goal is not simply to provide a vehicle for consent or to authorise what is already happening but rather to change practices and avoid deprivations of liberty wherever possible.

Furthermore, the *Guardianship and Administration Act 1986* (Vic) as it stands is not sufficiently robust and does not contain adequate safeguards to ensure that any deprivation of liberty is compatible with the person's human rights. For instance:

- The imprecision of when and how the accommodation power may be used to detain a person may not meet the Charter's legality requirement (that any authority to detain is 'adequately accessible, not uncertain or vague and sufficiently precise to enable people to predict its application and foresee its consequences to a reasonable degree'[45]);
- Guardians are required to act and make decisions in the person's 'best interests'.[46] While s 28(2) of the Act provides some guidance as to what acting in a person's 'best interests' entails, and s 4(2) provides some further direction, the Act does not ensure consideration of all relevant matters nor prohibit deprivations of liberty which would not be human rights-compatible;
- Private guardians are not 'public authorities' and are thus not bound by the requirement in s 38(1) of the Charter to give proper consideration to and act compatibly with people's human rights when making decisions;
- Guardians are not necessarily equipped to make independent and effective judgments about considerations relevant to depriving a person of their liberty. As Williams, Chesterman and Laufer noted, 'guardians may genuinely believe the explanation of service providers that restrictions are necessary to prevent harm and will lack any expertise to scrutinise those restrictions';[47]
- Guardians do not have to give reasons for their decisions;
- Decisions made by guardians, and thus any deprivation of liberty they consent to, are not time-limited and they do 'not come under sustained, external scrutiny regarding whether they are necessary in the context of a person's behaviour or need for treatment, or whether they are least restrictive';[48] and

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[44] John Chesterman, 'Restrictions on the Liberty of People with Disabilities: The view from the Office of the Public Advocate' in Bronwyn Naylor, Julie Debeljak, Inez Dussuyer and Stuart Thomas (eds), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable, Monash University Law Chambers, Melbourne, 29 November 2010* (Monash University Law Faculty, 2012) 65, 69.
[45] This requirement was articulated in *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 154.
[46] *Guardianship and Administration Act 1986* (Vic) s 28(1).
[47] Williams, Chesterman and Laufer, above n 4, 656. A similar concern about family members as decision-makers has also been raised by White et al: 'As Australia Reforms its Laws to Protect Those with Mental Illness, is Queensland Going Backwards?', *The Conversation* (online), 14 December 2016 <http://theconversation.com/as-australia-reforms-its-laws-to-protect-those-with-mental-illness-is-queensland-going-backwards-66560>.
[48] Williams, Chesterman and Laufer, above n 4, 655.

- The Act provides no direct mechanism by which a person can seek merits review of a guardian's decision in VCAT or a court, or challenge the lawfulness of the decision.

Finally, guardianship should generally only be invoked to benefit the person concerned, rather than for the wellbeing of others.[49] However, service providers often impose arrangements which deprive people of their liberty to prevent them from harming others.[50] If preventing harm to others is considered to be a proper basis for depriving a person of their liberty in certain circumstances then, as an authorisation mechanism, the appointment of a guardian will be inadequate.

Key points

- The guardianship regime should not be relied on authorise deprivations of liberty.

Reform response required and where this framework fits

The VLRC acknowledged in 2012 that '[i]t is no longer appropriate to rely on informal consent by family members when dealing with residential decisions that involve total restraint of a person's liberty… [and that] it is strongly arguable that actions involving total loss of liberty should be authorised by a process that involves appropriate checks and balances'.[51] The Public Advocate endorses this position and takes the view that law reform is required to:

- Clarify when a 'social care' practice may constitute a deprivation of liberty;
- Establish when a deprivation of liberty is, or is not, justifiable; and
- Provide meaningful processes by which lawful authorisation and monitoring of justifiable deprivations of liberty can occur, as well as the creation of appropriate safeguards.

This is important in order to:

- Ensure that people's rights are protected, including that any detention is lawful, not arbitrarily or discriminatorily applied, and is subject to appropriate oversight and safeguards;
- Significantly reduce the use of practices which deprive people of their liberty in favour of less restrictive, rights-promoting arrangements that enhance people's quality of life;
- Provide clarity and certainty to people as to their rights and the circumstances where it may be justifiable for them to be deprived of their liberty, ensure they are involved in all decisions and maximise respect for their will and preferences;
- Provide clarity for service providers and staff as to their responsibilities when considering arrangements which would deprive someone of their liberty, and provide legal protection for them in circumstances where those arrangements are shown to be justified; and
- Provide better oversight and safeguards for people who are, or are at risk of being, deprived of their liberty.

[49] Office of the Public Advocate, Submission No 8 to Victorian Law Reform Commission in response to the information paper, *Guardianship Review*, May 2010, 41.
[50] Williams, Chesterman and Laufer, above n 4, 656.
[51] VLRC, above n 1, 318.

There is a risk that a new framework authorising deprivations of liberty will permit and perhaps even encourage restrictions on people's rights, in practice on the rights of people with disabilities. There is therefore an argument that it should not be created, or at least should not be the priority for action. However, it must be remembered that, although any deprivation of liberty not covered by an existing authorisation mechanism will likely remain unlawful, such deprivations will, in practice, continue to occur but will remain hidden and unregulated. The fact that many such practices are currently unlawful has not deterred their occurrence to date. Therefore, unless and until there are effective oversight and regulatory mechanisms to detect, deter and punish unlawful deprivations of liberty, it appears that establishing a transparent legal framework with appropriate safeguards to authorise and regulate the comparatively small number of deprivations of liberty that are justified and appropriate will be more effective at protecting people's rights than not having any mechanism at all.

Furthermore, because developing an authorisation framework entails determining and defining when a deprivation of liberty may be justified, it will also necessarily have the normative effect of confirming that all other practices outside the framework are unjustifiable and unlawful (including through proposed offences and penalties – see 'Civil and criminal sanctions' below). Such denunciation is important and will bolster advocacy and reform activities, including education and scrutiny, directed at reducing the current, widespread unlawful practices, thus further contributing to rights protection.

Therefore, while developing an authorisation framework alone is insufficient, it forms part of the suite of advocacy and reform responses that are collectively required to improve detention practices in respect of people with disabilities. The full range of responses are represented in Figure 2 below:

- Where detention is occurring that would be justifiable but is lacking an authorisation mechanism (orange segment), such an authorisation mechanism – accompanied by appropriate safeguards – should be developed. This proposed framework fits here.
- Where detention is occurring that is formally authorised, but the authorisation mechanism (or its application in practice) is not compatible with human rights (purple segment), the laws should be amended to ensure that they and any resultant detention are justified and compatible with human rights.
- Where detention is occurring that is neither authorised, justifiable nor compatible with human rights (red segment), it should be identified, brought to an end, deterred and punished. As well as monitoring and oversight, activities to achieve this would include education and training to promote attitudinal and practice change.

The ultimate goals of these advocacy and reform responses in combination are that deprivations of liberty only occur where they are both authorised and justifiable and that the total number of such instances significantly decreases.

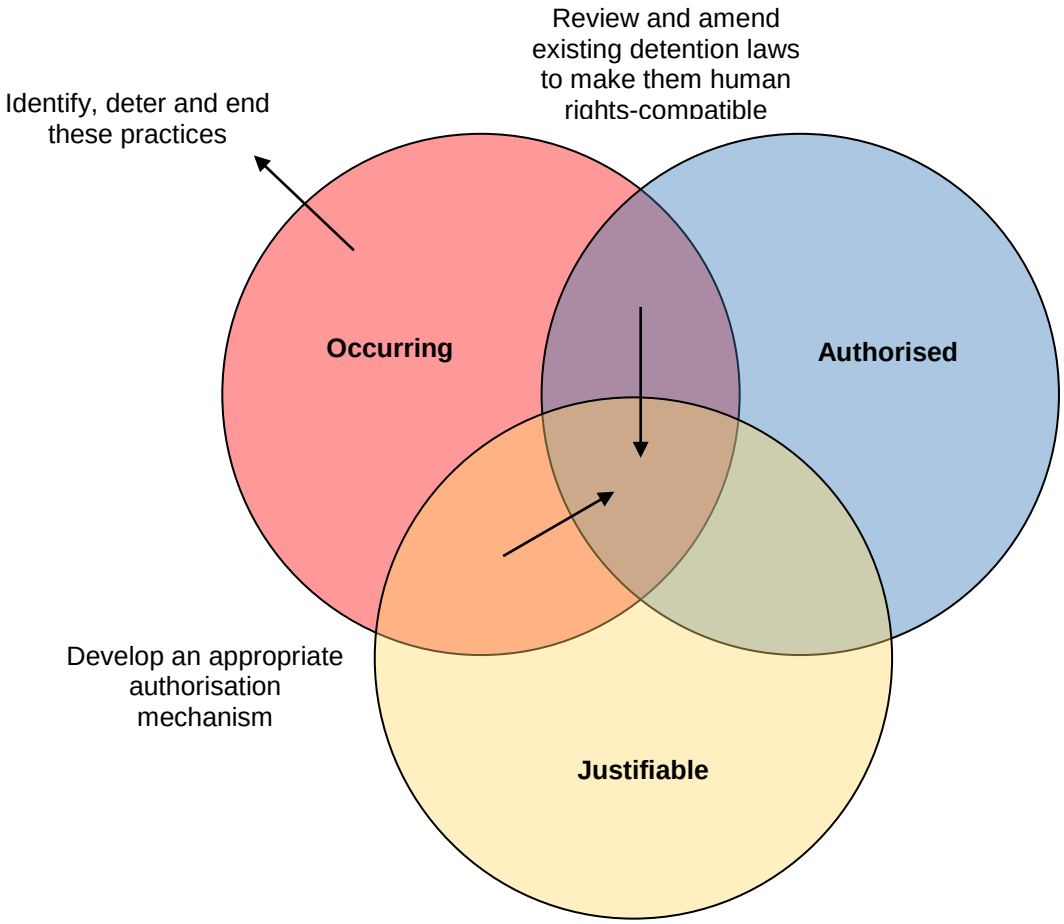

Fig 2. Advocacy and reform responses to detention

Finally, alongside this law reform, there is an overarching imperative to take other steps to significantly reduce the need for deprivations of liberty to occur at all (see 'Next steps: path to reform').

Key points

- A new legal framework is required to authorise and regulate civil deprivations of liberty in order to bring transparency to current practices and better protect the rights of people who are at risk of being deprived of their liberty.
- The legal framework must be complemented by a range of other advocacy and reform activities to meaningfully improve the protection of people's rights in practice and significantly reduce the need for deprivations of liberty to occur.

Preliminary matters

Designing a framework

The following matters need to be determined in designing a framework to authorise and regulate deprivations of liberty:

- Preliminary matters:
    - Underlying principles;
    - The scope of arrangements to which the framework applies;
    - Places where the framework applies;
    - People to whom the framework applies;
    - When the framework cannot be used;
    - The legal mechanism involved;
- Substantive criteria – the circumstances in which a deprivation of liberty is justifiable;
- Process and procedural requirements:
    - Who decides if the criteria are met;
    - The process and procedural steps required;
    - When deprivation of liberty arrangements may commence;
    - Duration and review;
- Other required safeguards.

In designing the framework and process, the UK's experience with the deprivation of liberty safeguards demonstrates that it must be workable and not excessively burdensome in practice. Considerations of efficiency and a degree of pragmatism are therefore required. However, it is equally important that the framework provides robust rights protection proportionate to the degree of interference with the person's rights and does not simply provide regulation for the sake of regulation, or 'rubber stamp' regularisation after a decision has already been made. Therefore, in order to achieve meaningful improvements in the lives of people with disabilities, this framework must actually force changes in current practices, both in decision-making processes and substantive outcomes.

Underlying principles

This proposed framework adopts a human rights approach and endeavours to be compatible with human rights.

The CRPD, which Australia ratified in 2008, endeavours to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Rather than creating new rights, it clarifies and qualifies how particular human rights apply to persons with disabilities, identifies where adaptations have to be

made for persons with disabilities to effectively exercise their rights and identifies where protection of rights must be reinforced. The key relevant CRPD provisions are set out below.

Key CRPD provisions

Article 3: General principles

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons…
- Full and effective participation and inclusion in society…

Article 5: Equality and non-discrimination

- All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.[52]
- States must take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination.[53]

Article 12: Equal recognition before the law

- Persons with disabilities have the right to recognition everywhere as persons before the law and to enjoy legal capacity on an equal basis with others in all aspects of life.[54]
- States must take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.[55]
- States must ensure that 'all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests'.[56]

Article 13: Access to justice

- States must 'ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'.[57]

Article 14: Liberty and security of person

- States must ensure that persons with disabilities, on an equal basis with others:
    - Enjoy the right to liberty and security of person; and

[52] CRPD art 5(1).
[53] Ibid art 5(3).
[54] Ibid art 12(1)-(2).
[55] Ibid art 12(3).
[56] Ibid art 12(4).
[57] Ibid art 13(1).

- Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.[58]

- States shall 'ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation'.[59]

Similarly, the Victorian Charter requires that any deprivation of liberty:

- Not be discriminatory;[60]
- Not be arbitrary;[61]
- Be 'on grounds, and in accordance with procedures, established by law';[62]
- Be capable of speedy challenge in court;[63] and
- Be reasonable, proportionate, least restrictive and 'demonstrably justified'.[64]

This framework will therefore need to comply with these requirements.

The framework is also informed by the Australian Law Reform Commission ('ALRC') report, *Equality, Capacity and Disability in Commonwealth Laws*.[65] The ALRC framed its report around the principles of dignity, equality, autonomy, inclusion and participation, and accountability.[66] Central to the ALRC's recommendations were a set of national decision-making principles (see box below) and guidelines which it said should guide all laws and legal frameworks, including state and territory ones, concerning individual decision-making.[67]

ALRC's national decision-making principles[68]

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

[58] Ibid art 14(1).
[59] Ibid art 14(2).
[60] Charter s 8(2).
[61] Ibid s 21(2).
[62] Ibid s 21(3).
[63] Ibid s 21(7).
[64] Ibid s 7(2).
[65] *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).
[66] Ibid 28-29.
[67] Ibid 11.
[68] Ibid 24.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

Key points

- The framework should be compatible with human rights and incorporate the ALRC's proposed national decision-making principles and guidelines.

What is the scope of the framework?

A major preliminary question is which deprivations of liberty (or restrictions on liberty) should be subject to, or considered for authorisation under, this framework. Before determining this, it is necessary to understand what constitutes a deprivation of liberty.

What is a deprivation of liberty?

There is no single, clear, accepted definition of a deprivation of liberty.

The *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT'),[69] which Australia signed in 2009 and has stated an intention to ratify by December 2017,[70] defines deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.[71] The recognition that a person may be detained in private settings, and by an 'other' authority which is neither judicial nor administrative in nature, makes this a very broad definition.

The understanding of what constitutes a deprivation of liberty in a social care setting has evolved over time. In the *Bournewood* case in 2004, the European Court of Human Rights stated that:

> to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.[72]

[69] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
[70] Commonwealth Attorney-General, 'Improving Oversight and Conditions in Detention' (Media release, 9 February 2017) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx>.
[71] OPCAT art 4(2).
[72] *Bournewood* [2004] ECHR 471, [89].

In 2010, the Supreme Court of Victoria considered the situation of Ms Antunovic, who was subject to a community treatment order with no residential condition under the *Mental Health Act 1986* (Vic).[73] She wanted to live at home with her mother but had been told by her psychiatrist that she had to live at a 'community care unit' operated by the mental health service. Even though she was permitted to leave the unit during the day, and notwithstanding the restraint involved purely psychological coercion, the court held that this amounted to a limitation on her freedom of movement.[74] The court also held that this was a restraint against which *habeas corpus* applied.[75] However, the court left open the question of whether the 'partial' restraint on her liberty also amounted to a deprivation of liberty or detention for the purposes of s 21 of the Charter because it did not need to decide the issue.[76]

Subsequently, in *Stanev v Bulgaria*,[77] the European Court of Human Rights determined that a man placed in a social care home was deprived of liberty for the purposes of art 5 of the *European Convention on Human Rights*, notwithstanding the home was unlocked and he was permitted leave:

> [T[he Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive. While it is true that the applicant was able to go to the nearest village, he needed express permission to do so. Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.[78]

In *P v Cheshire West and Cheshire Council; P and Q v Surrey County Council*[79] (known as '*Cheshire West*'), the leading case in the UK from 2014, the UK Supreme Court emphasised that there must be a universal standard for what constitutes a deprivation of liberty:

> … what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of liberty to a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.[80]

Accordingly, the court in *Cheshire West* held that the 'acid test' for whether a person in a social care situation who lacks the decision-making capacity to consent to their care or treatment arrangements is subject to a deprivation of liberty is whether the person is:

- Under continuous supervision and control; and
- Not free to leave.[81]

This is consistent with the definition of 'detain' in the *Disability Act 2006* (Vic), which includes 'constantly supervising or escorting a person to prevent the person from exercising freedom of movement'.[82]

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[73] *Antunovic v Dawson* [2010] VSC 377.
[74] Ibid [76].
[75] Ibid [176].
[76] Ibid [76].
[77] [2012] ECHR 46.
[78] Ibid [124] (citations omitted).
[79] [2014] UKSC 19.
[80] Ibid [46].
[81] Ibid [49].

In contrast to some earlier approaches, the UK Supreme Court also held that the following factors are **not** relevant to the question of whether a person is deprived of their liberty:

- Whether the facility is locked or lockable;[83]
- The person's lack of awareness of the detention;[84]
- The person's compliance or lack of objection;
- The relative normality of the placement (whatever the comparison made); and
- The reason or purpose behind a particular placement (regardless of how benevolent it is).[85]

Most recently, in 2017, the Centre for Disability Law and Policy at the National University of Ireland, Galway, proposed the following definition of deprivation of liberty for their global study on disability-specific forms of deprivation of liberty:

> An individual is deprived of their liberty when they are cumulatively:
>
> - Confined to a particular restricted space or placed in an institution or setting under continuous supervision and control;
> - Not free to leave; and
> - The person has not provided free and informed consent.[86]

Restrictions on liberty and freedom of movement

It is also important to note that many practices which do not result in a continuous or enduring deprivation of liberty may restrict a person's liberty or freedom of movement to a significant degree such that it borders on a deprivation of liberty. Restrictions on liberty may be achieved through one or more of the following mechanisms.

Mechanisms which restrict liberty and freedom of movement

Environmental restraint - environmental controls such as locked doors, keypad controls on doors, perimeter fencing and other building design features may restrict an individual's freedom to come and go at will. Similarly, being constantly supervised or escorted by staff also severely restricts a person's liberty.[87] Such environmental restraints are very common in social care settings.[88]

Mechanical restraint - mechanical restraint is the use of equipment or devices, such as bed rails and strapping applied to wrists, chests or other parts of the body, to restrict movement. Mechanical restraints almost always cause significant harm or risk to the wellbeing of the individual.

Physical restraint - physical restraint occurs when one person uses their body to restrict another person's freedom to move or act.

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[82] *Disability Act 2006* (Vic) s 3(1).
[83] *Bournewood* [2004] ECHR 471, [92]; also *Cheshire West* [2014] UKSC 19, [43].
[84] *Cheshire West* [2014] UKSC 19, [35].
[85] Ibid [50].
[86] *Global Study on Disability-Specific Forms of Deprivation of Liberty: Concept note* (2017) 13.
[87] As noted above, the *Disability Act 2006* (Vic) defines 'detain' to include 'constantly supervising or escorting a person to prevent the person from exercising freedom of movement': s 3(1).
[88] Williams, Chesterman and Laufer, above n 4, 646.

Seclusion - seclusion refers to confining a person in a room where they are unable to leave or interact with other individuals. This form of restraint is typically used in mental health facilities when a patient receives too much stimulation from other patients or their environment and their behaviour becomes agitated, aggressive or erratic.

Chemical restraint - chemical restraint is the administration of substances to restrict a person's freedom to move or act, rather than to treat a medical condition. The substances used for this purpose include antipsychotic and sedative medications and libido suppressants. They are widely used in aged care accommodation.[89]

Psychological manipulation and coercion - this refers to the use of interpersonal power and threats to coerce behavioural compliance and limit freedom of movement. For example, a voluntary patient in a mental health service may be told that they will be placed on a compulsory treatment order if they try to leave.

Courts have held that the difference between a deprivation of liberty and a restriction on freedom of movement is 'one of degree or intensity, not one of nature or substance',[90] because the rights to liberty and freedom of movement both express the same fundamental value: freedom.[91] Restrictions on freedom of movement and liberty can therefore be seen to fall along a continuum from brief and partial restrictions on freedom of movement all the way up to continuous and enduring deprivations of liberty (see Figure 3 below). There is accordingly no clear dividing line between a restriction on freedom of movement and a deprivation of liberty.

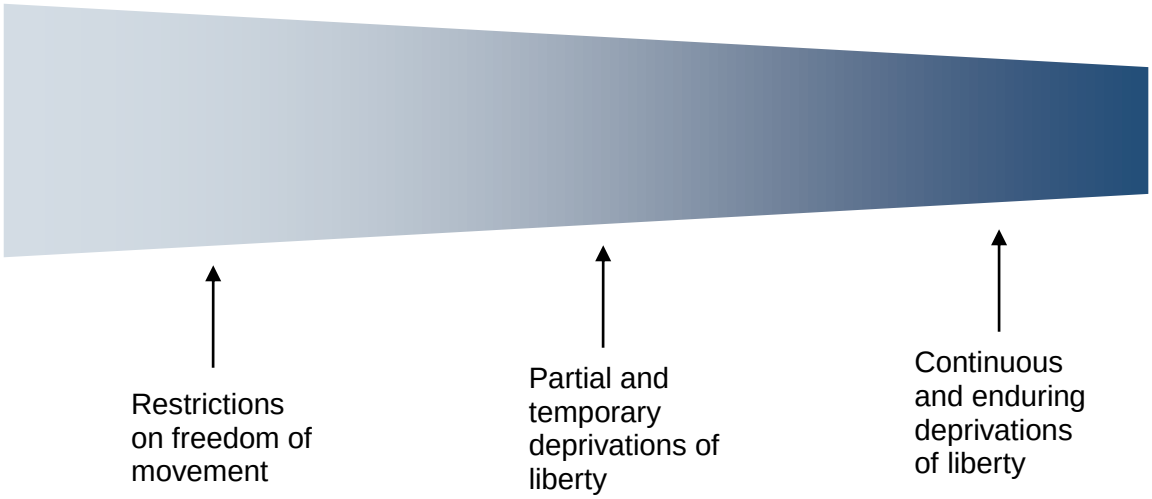

Fig 3. Spectrum of restrictions on freedom and liberty

[89] 'About half of people in residential aged care facilities and up to 80% of those with dementia are receiving psychotropics, although this varies between facilities. There is evidence to suggest that in some cases these medications are being prescribed inappropriately': Carmelle Peisah and Ellen Skladzien, *The Use of Restraints and Psychotropic Medications in People with Dementia: A report for Alzheimer's Australia*, Paper No 38 (2014) 16. The ALRC also found that chemical restraint is 'reportedly widely used on people with dementia' and noted evidence given by the Department of Health and Aging to the Senate Inquiry into dementia that there is 'a high and inappropriate utilisation of antipsychotics in the elderly… which are prescribed at a rate inconsistent with the age-specific prevalence' of the disorders for which those medications are usually prescribed: above n 65, 244-245. See also Williams, Chesterman and Laufer, above n 4, 646-647.

[90] *Bournewood* [2004] ECHR 471, [89]; *Stanev v Bulgaria* [2012] ECHR 46, [115]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 140.

[91] *Antunovic v Dawson* [2010] VSC 377, [73], citing *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 124, 140.

There is also no clear minimum period of time which must elapse before it can be said that a deprivation of liberty has occurred. The UK deprivation of liberty safeguards and proposed liberty protection safeguards apply to any deprivation of liberty that lasts 'more than a negligible period of time'.[92] The UK Law Commission explained:

> There is no fixed definition of how long such a period would be, and it will vary according to the individual circumstances, including the nature and consequences of the restrictions. For example, the [European Court of Human Rights] has considered… that forcing a blood test on a person against their will could give rise to a deprivation of liberty even if the confinement lasted only for a very short period. Conversely, it has also been held that periods of seclusion of a patient already detained under the Mental Health Act lasting up to 18 days might not constitute a further deprivation of their liberty requiring separate justification. In the domestic case of *ZH v Commissioner of Police for the Metropolis,* the Court of Appeal rejected the submission that the [European Court of Human Rights] would usually view a detention of less than 30 minutes as not coming within the scope of Article 5. In this particular case it was held that the "intense" restraint of a 16 year old boy with autism for 40 minutes amounted to a deprivation of liberty.[93]

Guiding questions for identifying deprivations of liberty

- Is the person being continuously supervised?
- Is the person under continuous control?
- Is the period of supervision and control longer than a negligible period?
- Is the person free to leave?
- If the person tried to leave, would someone intervene?

Examples of deprivations of liberty

While a person who has the ability to do so can consent to what would otherwise be a deprivation of liberty, the assumption in each of these scenarios is that valid consent has not been given by the person in question.

Elspeth is 82 years old and has dementia. She lives in a residential aged care facility. The facility has a keypad and a numerical code must be entered on the keypad to enter and exit the facility. Elspeth does not know the code and she occasionally walks to the front door and attempts to open it. Were she to leave the facility without support, Elspeth would be unlikely to be able to find her way back, and her wellbeing would be jeopardised as she has forgotten basic road safety precautions.

Ian lives in the same residential aged care facility as Elspeth and also has dementia. He has become aggressive with other residents, nearly pushing one resident over in a recent altercation. Ian has been prescribed anti-anxiety medication, which makes him lethargic and sleepy. He now rarely leaves his room.

Tran is currently an inpatient at a mental health facility following his decision to admit himself. He is now asking to leave the facility as he feels better, but Tran has been told that he must remain because his psychiatrist is concerned that he is not well enough to leave. If he attempts to leave,

[92] Law Commission (UK), above n 27, 23.
[93] Ibid 23-24, citing *X v Austria* (European Court of Human Rights, Commission, Application No 8278/8, 13 December 1979), [2], *Munjaz v UK* [2012] ECHR 1704, [71] and *ZH v Commissioner of Police for the Metropolis* [2013] 1 WLR 3021.

Tran has been told that he will be placed on a compulsory order and detained.

James lives in supported accommodation. He shares his house with three other residents, but James now lives in a locked section of the house with his own kitchen and toilet. This arrangement followed a series of incidents where James assaulted, and was assaulted by, two of the other residents. James is allowed by staff to enter the main section of the house for short periods of time when he is calm.

Durga has an acquired brain injury following a car accident that occurred a fortnight ago. She is being treated in a locked section of a hospital, which she daily attempts to leave. This section of the hospital provides a low stimulation environment, which experts consider to be critical to the ability of patients like Durga to optimise their recovery from trauma-induced acquired brain injuries.

Jane, who has an intellectual disability, is 23 years old and lives at home with the support of her parents. Despite frequently articulating her desire to go out walking on her own, Jane's parents do not allow this and they constantly supervise her social outings and interactions.

To which deprivations of liberty should the framework apply?

While a wide range of arrangements may give rise to a restriction on or deprviation of liberty, the pertinent question is the scope of restrictions to which this framework should apply. Where on the spectrum (Figure 3 above) should the line be drawn?

The VLRC proposed that its authorisation mechansim would apply to 'restrictions on liberty' that would, 'in the absence of legal authority cause a person to succeed in an action for false imprisonment or would result in an order for release in *habeas corpus* proceedings'.[94] This is a broad formulation because the Victorian Supreme Court has held that *habeas corpus* protects personal freedom quite broadly. After an extensive analysis, Bell J concluded that:

> … habeas corpus should issue against restraints involving 'less than complete incarceration … as long as that which is challenged palpably constitutes a restriction on personal liberty'…[95]
>
> [C]lose custody, imprisonment, detention or something analogous is not a necessary element of the right to habeas corpus, although restraints of that kind are clearly covered. The purpose of the writ is to give a remedy against unlawful restraints on personal liberty, which is not to be narrowly defined. The restraint may be imposed directly or indirectly. It may be partial or total… The liberty protected by common law habeas corpus is broader than the liberty protected by the human right to personal liberty and security in s 21(1) of the Charter. For the purposes of habeas corpus, it is a restraint on personal liberty to imprison or detain somebody and also to impose restrictions on their liberty or freedom of movement which are not shared by the public generally.[96]

The VLRC itself noted that its formulation provides insufficient practical guidance to those who might use it.[97]

The UK deprivation of liberty safeguards may be applied to authorise any deprivation of liberty. However, the proposed UK liberty protection safeguards adopt a slightly different formulation and

[94] VLRC, above n 1, 340.
[95] *Antunovic v Dawson* [2010] VSC 377, [100]-[101], quoting R J Sharpe, *The Law of Habeas Corpus* (Oxford University Press, 2nd ed, 1989) 175.
[96] *Antunovic v Dawson* [2010] VSC 377, [113] (citations omitted).
[97] VLRC, above n 1, 341.

would 'authorise particular *arrangements* for a person's care and treatment insofar as the arrangements give rise to a deprivation of liberty'.[98] The UK Law Commission explained:

> This is an important difference. It focuses attention at the authorisation stage not simply on the "binary" question of whether a person should be deprived of their liberty or not, but on the question of the ways in which a person may justifiably be deprived of their liberty.[99]

The UK Law Commission noted that the meaning of 'arrangements' is 'intentionally broad', but that decision-makers need 'to be clear and precise about the particular arrangements that are being authorised.[100] The specific arrangements that could be authorised under the proposed UK liberty protection safeguards are that:

- The person is to reside in one or more particular place/s;
- The person is to receive care or treatment[101] at one or more particular place/s; and
- The means by and manner in which a person can be transported to a particular place or places.[102]

In contemplating an appropriate solution to this issue, Williams, Chesterman and Laufer noted the importance of 'distinguish[ing] between decisions about admission to care per se from admission decisions that are likely to result in ongoing restrictions upon an individual's liberty once in care'.[103] Requiring the particular arrangements to be specified will enable the substantive criteria, including the necessity and proportionality of those arrangements, to be more meaningful examined.

As noted above, the UK deprivation of liberty safeguards and proposed liberty protection safeguards apply to any deprivation of liberty that lasts 'more than a negligible period of time'.[104] Depending on the procedural requirements created by the framework, this could be impractical. Alternatively, a narrower approach could be adopted which restricts the deprivations of liberty covered by the framework to the more significant ones (i.e. towards the right-hand-side of Figure 3 above).

There are numerous competing considerations in determining the appropriate scope of restrictions on liberty to be covered by this framework, as set out in the boxes below.

Factors in favour of focussing on a narrower range of restrictions of liberty

- The more complete and enduring the deprivation of liberty, the greater the need and justification for imposing strict standards and oversight. Broadening the coverage to include shorter or less significant restrictions on liberty may dilute the imperative and appetite for, and acceptance of, regulation.
- The broader the spectrum of restrictions on liberty that are covered, the greater the challenge to design a framework that appropriately balances robust rights protection with efficiency of

[98] Law Commission (UK), *Mental Capacity and Deprivation of Liberty: Summary*, No 372 (2017) 5 (emphasis in original).
[99] Law Commission (UK), above n 27, 54.
[100] Ibid 55.
[101] Note that a deprivation of liberty authorisation under the proposed UK liberty protection safeguards does not authorise the actual delivery of care or treatment to the person: ibid 56.
[102] Ibid 49.
[103] Williams, Chesterman and Laufer, above n 4, 655.
[104] Law Commission (UK), above n 27, 23.

use in practice. For instance, it may be unworkable and impractical to seek authorisation for very temporary restrictions.

- If a broad spectrum is covered, including partial, temporary and infrequent deprivations of liberty or restrictions on movement, then a more complex framework will likely be required to provide a sliding scale of processes and safeguards according to how serious the deprivation of liberty is, which may be harder to implement.
- Arrangements or practices resulting in restrictions on liberty further down the spectrum, which are increasingly temporary and limited, are more likely to overlap with and may be harder to distinguish from legitimate care practices. The less clear the arrangements that are to be covered by the framework, the harder it will be to implement in practice.
- There are already a range of mechanisms which guide and regulate (to greater or lesser degrees) restrictive practices falling short of complete deprivations of liberty in some Australian jurisdictions, such as Part 7 of the *Disability Act 2006* (Vic), the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*[105] and the NDIS quality and safeguarding framework. It is a much more ambitious and challenging exercise to attempt to promote a universal framework that would sit across or replace so many existing regimes.
- The broader the range of circumstances covered, the greater the number of matters that will need authorisation and thus the more expensive it will be.

Factors in favour of covering a broader range of restrictions of liberty

- Human rights law protects and demands safeguards for all deprivations of liberty, regardless of how significant they are.
- Confining the operation of the framework to just complete and enduring deprivations of liberty – the pointy end of the spectrum – leaves many other actions which still constitute a deprivation of or significant restriction on liberty without any regulation or, conversely, authorisation. It could be expected that the majority of restrictions on liberty would fall in this area. These restrictions may in fact be of greater practical significance to the person's experience of day-to-day life than the more confined and technical question of a complete deprivation of liberty.[106]
- Given that existing regulation of restrictive practices falling short of complete deprivations of liberty is inconsistent and patchy across Australia,[107] any restriction on liberty not covered by this framework will likely continue to occur but in a hidden and unregulated way. Alternatively, a separate, parallel mechanism or framework to address these less significant deprivations of or restrictions on liberty would be required, which would result in added complexity and confusion in practice.
- It may be that the application of a combination of restrictive interventions has the effect of

[105] Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014).
[106] This was acknowledged by the UK Law Commission: above n 27, 34.
[107] ALRC, above n 65, 248-251.

depriving a person of their liberty, even though no one single restrictive intervention does. Having a framework that demands consideration of the full range of restrictions being imposed on the person would result in a more realistic and contextual assessment of whether the restrictions – individually and in combination – are necessary and justified.

In attempting to determine this question, Northern Ireland's *Mental Capacity Act (Northern Ireland) 2016* provides an interesting model for consideration. It represents a fusion of mental capacity and mental health law (see 'A universal framework for deprivations of liberty?' below) and adopts a sliding hierarchy approach to the regulation and authorisation of restrictive interventions, up to and including deprivations of liberty:

> [T]he Act seeks to legislate for a 'hierarchy' of interventions where the more serious the intervention, the more significant the safeguards which must be in place to protect the rights and interests of the person who lacks capacity. In practice this means the more serious the intervention, the more onerous the obligations on a substitute decision maker should they wish to have available the possible protection from liability enacted in clause 9.[108]

Questions for further consideration

- How frequent, significant and lengthy does a deprivation of liberty need to be to be subject to this framework?
- Should partial and temporary deprivations of liberty, and restrictions on liberty more broadly, be included in this framework or be subject to a different framework or process?
- Should specific categories of arrangements that would be covered by the framework be identified (like the proposed UK liberty protection safeguards)? If so, what should they be?
- Should the framework adopt a flexible range of criteria, processes and/or requirements in order to authorise and regulate a broader spectrum of restrictions or different types of arrangements? For instance, should a proposal to admit a person to a particular place be treated differently from a proposal to restrict a person who is already in care?[109]

Key points

- Whatever definition of 'deprivation of liberty' is ultimately adopted, or however broad the scope of the framework will be:
  - Any authorisation granted under the framework should apply and be confined to specific and defined *arrangements* that would give rise to a deprivation of liberty, rather than to a deprivation of liberty at large; and
  - The degree of scrutiny and safeguards required prior to authorisation should be proportionate to the severity of the proposed restrictions on liberty.

[108] Colin Harper, Gavin Davidson and Roy McLelland, 'No Longer "Anomalous, Confusing and Unjust": The Mental Capacity Act (Northern Ireland)' [2016] *International Journal of Mental Health and Capacity Law* 57, 57.

[109] Williams, Chesterman and Laufer noted that '[w]hile each involves a restriction upon liberty, in reality they are very different with particular criteria and implications for the person concerned. There should be greater distinction made between these types of decisions': above n 4, 653.

Places where the framework applies

A further question to be determined in relation to the scope of the framework is the range of places or settings to which it applies.

The VLRC recommended that its proposed collaborative authorisation mechanism would only apply to 'certain facilities' that 'receive some form of public funding for their accommodation [and] are closely regulated by the Commonwealth and Victorian governments',[110] and would not apply to those operating under limited regulation. As Williams, Chesterman and Laufer noted, this 'means that where deprivations upon liberty against people with impairments are least regulated… the legal lacuna continues unfilled'.[111] The VLRC also omitted to clarify how its proposed mechanism would sit alongside the existing civil detention regimes.

The current practices that concern the Public Advocate, and which have motivated this initiative, are those occurring in social care settings – particularly in aged care but also in hospitals, mental health facilities, disability residential services and supported residential services. There are clearly complexities in creating a framework which sits across this range of settings:

> A comprehensive proposal to address the problems identified must consider the dual regulatory regimes of the Commonwealth in aged care and that of Victoria in relation to disability, mental health and private residential providers… The different levels of regulatory and funding responsibility present significant hurdles to the adoption of a broad regime that does not, for instance, spare certain groups from its protection because they reside in an aged care facility receiving care for dementia, rather than in a private residential facility.[112]

However, there is no logical reason to confine the application of the framework to particular places, given that any deprivation of liberty warrants close scrutiny and safeguards without discrimination. Therefore, notwithstanding the hurdles, it is proposed that the settings in which this framework applies should not be limited. Nevertheless, the application of the regime will need to be closely confined in settings where an existing civil detention regime applies (see 'A universal framework for deprivations of liberty?' and 'Where an existing detention regime covers the field' below).

One further consideration is whether the framework should apply to deprivations of liberty occurring in private homes and domestic settings. The UK deprivation of liberty safeguards and proposed liberty protection safeguards to not apply in private and domestic settings. However, it is known that people with disabilities are sometimes subject to deprivations of liberty within these settings by family members and carers. With the expansion of the NDIS and the increased ability of people with disabilities to broker a range of services to support them living in private accommodation, it may be expected that such practices within private settings may potentially increase if not appropriately regulated, and that the State has a role to play in regulating this sphere.

Key points

- The settings in which this framework applies should not be limited or exhaustively defined.

[110] VLRC, above n 1, 340.
[111] Williams, Chesterman and Laufer, above n 4, 654.
[112] Ibid 657.

Questions for further consideration

- Should the framework apply to deprivations of liberty occurring in private and domestic settings?

A universal framework for deprivations of liberty?

As noted above, various regimes already exist which authorise and regulate deprivations of liberty for different cohorts of people with disabilities for particular purposes, each with differing standards and safeguards. While there were important reasons behind separating the treatment of disability from mental health in the 1986 Victorian reforms, the existence of the current patchwork of parallel detention regimes is rather unsatisfactory, not least because of their discriminatory nature and the potential for inconsistent practices. The Public Advocate has previously expressed concerns regarding 'the uneven and inadequate regulation of restrictive interventions in the disability, mental health and aged care fields'.[113]

Therefore, any contemplation of law reform in this area, especially reform which is intended to sit across a range of settings and increase protection of human rights, provokes consideration of whether a single, universal framework should be developed to replace, rather than simply sit alongside, these existing laws. It is noted that the VLRC considered bringing compulsory mental health treatment within guardianship laws in its 2012 report but ultimately did not favour this approach.[114]

Since then, Northern Ireland has replaced its mental capacity, mental health and disability laws with a single Act, the *Mental Capacity Act (Northern Ireland) 2016*. This aims to provides a comprehensive framework to address the needs of people unable to be supported to make their own decisions across all areas, including mental health, physical health, welfare and financial needs. As noted above, it adopts a sliding hierarchy approach to the regulation and authorisation of restrictive interventions, up to and including deprivations of liberty. The Act also provides a wide range of safeguards and protections which are lacking from our current *Guardianship and Administration Act 1986* (Vic). This provides an interesting model for consideration, although it remains to be seen how well it operates in practice.

Questions for further consideration

- Should a non-discriminatory, universal framework be pursued which fuses and replaces existing guardianship laws, mental health laws and disability laws, and provides consistent thresholds and safeguards for authorising civil deprivations of liberty across all settings?

- Should this framework simply sit in the gaps between the existing detention regimes? If so:
    - How can this be made workable in practice?
    - How can we ensure that it is not used to permit deprivations of liberty of people who should be entitled to their liberty by virtue of not meeting the criteria for detention under an existing regime? (See also 'Where an existing detention regime covers the field' below).

[113] Claire Spivakovsky, Office of the Public Advocate, *Restrictive Interventions in Victoria's Disability Sector: Issues for discussion and reform* (2012) 6.
[114] VLRC, above n 1, 532-537.

People to whom the framework applies

Not confined to people with disabilities

By virtue of her statutory role and functions, the Public Advocate is motivated in this initiative to protect the rights of people with disability. However, in order to respect people's right to equality before the law and freedom from discrimination, this framework should have universal application rather than be confined to people with disabilities. Therefore, the separate existence or examination of a person's disability should not be required.

It is noted that the UK deprivation of liberty safeguards and proposed liberty protection safeguards both confine their application to people with disabilities:

- The 'mental health requirement' of the deprivation of liberty safeguards requires that the person is 'suffering from mental disorder',[115] which in turn is defined as 'any disorder or disability of mind', apart from dependence on drugs or alcohol.[116] Furthermore, the definition of incapacity includes a loose diagnostic test, which requires that the lack of capacity arises 'because of an impairment of, or a disturbance in the functioning of, the mind or brain'.[117]
- It is proposed that there would be a requirement under the liberty protection safeguards that the person be of 'unsound mind' within the meaning of art 5(1)(e) of the *European Convention on Human Rights*.[118]

These diagnostic requirements exist because art 5(1)(e) of the *European Convention on Human Rights* lists the 'lawful detention… of persons of unsound mind' as one of the finite circumstances in which it is permissible to deprive a person of their liberty.[119] However, the human rights instruments applicable in Australia and Victoria do not single out people with disabilities for detention and it would therefore be discriminatory to confine the application of the framework to them alone.

Key points

- The framework should apply without discrimination and not be confined to people with disabilities or any other characteristic.

Application to children?

One question that arises with regards to the scope of framework's application is whether there should be any age limit and, in particular, whether it should apply to children. The UK deprivation of liberty safeguards apply to adults aged 18 and over but the proposed liberty protection safeguards would also apply to young people from the age of 16.[120]

In thinking about this, it may be useful to break this down into two questions: should the framework permit a deprivation of liberty of a child or young person, and should the safeguards that will accompany the framework be available to them.

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[115] *Mental Capacity Act 2005* (UK) sch A1, para [14].
[116] *Mental Health Act 1983* (UK) s 1(2A) and (2B).
[117] *Mental Capacity Act 2005* (UK) s 2(1).
[118] Law Commission (UK), above n 27, 73.
[119] Ibid 71.
[120] Ibid 57-62.

Questions for further consideration

- Should the framework permit a deprivation of liberty of a child or young person?
- Even if a deprivation of liberty is not permitted, should the safeguards that will accompany the framework be available to them?

When can the framework *not* be used?

Where a person is able to make their own decision

Adopting a human rights approach and respecting a person's rights to equality before the law, privacy and autonomy, it is quite clear that, if a person has the decision-making capabilities to make their own decisions, their decisions must be respected. Therefore, this framework cannot be used to impose arrangements that would deprive a person of their liberty if they are capable of making their own decisions about those arrangements. Even if their choice entails a degree of risk, their autonomy must be respected like any other member of the community.

The need to support a person to enhance and exercise their decision-making capabilities, and how decision-making capabilities might be defined and assessed, is discussed further below.

Key points

- No person who has the decision-making capabilities, or who can be supported, to make their own decision may be deprived of their liberty through this framework.

Where the decision conflicts with an advance directive or a decision of an attorney under an enduring power of attorney?

Having regard to human rights principles and the ALRC's national decision-making principles and guidelines, it is intuitively appealing that a person should be able to provide advance consent to, or refusal of, arrangements that would deprive them of their liberty through an advance directive (see 'Advance directives' below). Provided the advance directive was made at a time when the person was capable of making the decision, for the reasons above, it should arguably to be respected and operate to bar any later conflicting authorisation under the framework. It is noted that an authorisation under the proposed UK liberty protection safeguards could not be given if it would conflict with 'a valid advance decision to refuse all or part of the treatment which it is proposed to give them at the hospital or care home'.[121]

However, while this is attractive in principle, whether and how it would work in practice requires further consideration. In particular, in what circumstances, if any, should a person's competent advanced refusal be able to be overridden?

[121] Ibid 92.

Questions for further consideration

- Should advance directives in relation to deprivations of liberty operate to bar a conflicting authorisation under the framework?
- In what circumstances, if any, could an advance directive be overridden?

Relatedly, a person may have made an enduring power of attorney, appointing someone they trust to make decisions on their behalf. Assuming the attorney has the relevant power (which is unclear), should the attorney's decision in relation to arrangements that would give rise to a derivation of liberty be respected and obviate the need for authorisation under the framework?

It is noted that an authorisation under the proposed UK liberty protection safeguards could not be given if it conflicted with a valid decision of a 'donee of lasting power of attorney or a court-appointed deputy'.[122] However, while a decision by a donee or deputy in relation to the acceptance or refusal of treatment can block a conflicting deprivation of liberty authorisation, they are not empowered to consent on behalf of a person to arrangements which would give rise to a deprivation of their liberty.[123] The UK Law Commission recommended that this remain the law because:

- There is 'only very limited support in the [European Court of Human Rights'] case law for any concept of proxy or substituted consent';[124]
- It is 'problematic, as a matter of principle, for a person to be able to remove themselves from the scope of Article 5(1) by giving a power of attorney without themselves having considered the specific circumstances which might engage the Article'[125] (and so it is 'qualitatively different' to personally giving advance consent[126]); and
- '[A]s a matter of practice, it is better to err on the side of caution here given that there is sufficient evidence from the case law that not all donees and deputies act in compliance with the spirit or the letter of the Mental Capacity Act'.[127]

Given that the various laws which currently regulate powers of attorney across Australia do not compel decisions which are consistent with and promote the person's will and preference, and are not accompanied by the range of safeguards which are required under human rights law (see 'Inadequacy of guardianship as a solution' above) or that will be included in this framework, it is proposed that authorisation under the framework would still be required where a person has made an enduring power of attorney.

Similarly, for the reasons discussed above, it is also proposed that authorisation under the framework would still be required where a guardian has been or could be appointed.

As to whether a person should be able to appoint their own decision-maker under this framework, or otherwise nominate people they wish to be consulted, see 'Who decides if the criteria are met?' below.

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[122] Ibid.
[123] Ibid 93-94, 175.
[124] Ibid 94.
[125] Ibid.
[126] Ibid.
[127] Ibid 94.

Key points

- Even where a guardian has been or could be appointed or an enduring power of attorney has been made, authorisation under this framework should still be required.

Where an existing detention regime covers the field

As noted above, some legal regimes already exist to enable civil detention for particular purposes. In Victoria, these include:

- Detention in a designated mental health service for the purpose of compulsory mental health treatment to prevent a serious deterioration in the person's mental or physical health or to prevent serious harm to themselves or others because of their mental illness under the *Mental Health Act 2014* (Vic);
- Detention in a disability residential service for the purpose of compulsory treatment for a person with an intellectual disability who presents a significant risk of serious harm to others under the *Disability Act 2006* (Vic); and
- Detention in a treatment centre for the purpose of compulsory, medically-supervised withdrawal from a severe substance dependence under the *Severe Substance Dependence Treatment Act 2010* (Vic).

Unless a fusion approach is adopted such that the proposed framework would apply universally and replace these existing regimes (see 'A universal framework for deprivations of liberty?' above), they will need to work alongside each other. If so, it is important that the framework provides complementary and enhanced rights protection rather than undermines the rights protections within the existing regimes.

Existing regimes should be seen to 'cover the field' in relation to the purposes for detention to which they apply. This is because, in creating those regimes, parliament has already turned its mind to the appropriate balance between rights and beneficence and/or protection in that particular context. If the criteria reflecting that balance do not apply to a particular person, to enable their detention through an alternative framework would undermine parliament's intention. Accordingly, where the proposed purpose or justification for arrangements that would result in a deprivation of liberty relate to the justification for detention under an existing regime, that regime must be followed.

Example

A person has been voluntarily receiving treatment in a mental health service but now wishes to leave (whether temporarily during the day or permanently). That person's wishes must be respected and their liberty cannot be restricted, even if the service is concerned about their compliance with treatment or potential harms that might befall them, unless the service has assessed that the person meets the criteria for detention under the *Mental Health Act 2014* (Vic) and has made an inpatient treatment order to authorise their detention.

The service cannot coerce the person to stay or threaten, but then fail, to make them subject to an inpatient treatment order if they try to leave because this amounts to an unlawful deprivation of liberty.[128]

If the person does not meet the criteria for detention under the *Mental Health Act 2014* (Vic), neither that Act nor this framework could be used to detain the person.

This position is reinforced by s 150A of the *Disability Act 2006* (Vic), which states that 'A disability service provider must not detain a person with an intellectual disability otherwise than in accordance with [Part 8 of the Act]', and imposes significant penalties for doing so. To reduce confusion in practice, it would be helpful if other regimes included a similar provision.

It is acknowledged that some existing civil detention regimes are not fully compatible with human rights and these should be reviewed and amended.

Key points

- The framework should provide complementary and enhanced rights protection rather than undermine the rights protections within existing civil detention regimes.
- Where the proposed justification for arrangements that would result in a deprivation of liberty relates to the justification for detention under an existing regime, that regime must be followed. The framework cannot be used to authorise the detention of people who do not meet the criteria for detention under the existing regime.
- Existing civil detention regimes should include a provision equivalent to s 150A of the *Disability Act 2006* (Vic), clarifying that detention outside of those regimes is prohibited.
- The human rights compatibility of existing civil detention regimes should be reviewed and reformed where necessary.

What legal mechanism is involved?

It is proposed that this framework would render deprivations of liberty lawful in certain limited and tightly defined circumstances. But how exactly, in legal terms, will it do this? There are various legal mechanisms or devices that might be used, including:

- Empowering certain persons to authorise or provide substituted consent to the arrangements;
- Empowering a court, tribunal or other body to issue an order authorising the arrangements;
- Providing a defence to anyone engaging in actions which give rise to a deprivation of liberty if certain criteria, processes and safeguards are met.

The current UK deprivation of liberty safeguards do two things: (1) they provide express statutory authority to the managing authority of a hospital or care home to deprive a person of their liberty and (2) they provide a statutory defence to individual members of staff who are doing the detention acts.[129] However, in reviewing this law, the UK Law Commission identified some confusion around this and

[128] See *Antunovic v Dawson* [2010] VSC 377, esp [135].
[129] Law Commission (UK), above n 27, 113.

accordingly proposed that the liberty protection safeguards adopt only the latter, by simply 'providing a defence against civil or criminal liability in relation to acts done for the purposes of the authorisation'.[130] The UK Law Commission explained the scope of the defence as follows:

> This defence does not cover the provision of medical treatment or restricting contact with third parties, since "arrangements" cannot extend to these matters. This is so that care and treatment providers cannot be given power to do things that go beyond effecting a justified deprivation of liberty, unless they have the power under the general law.[131]

Northern Ireland's *Mental Capacity Act 2016* also adopts a similar approach:

> Part 2 of the Act lays out the core of the legislation which is the availability of a possible protection from civil and criminal liability for an intervention or substitute decision if certain conditions are met. Unlike the *Mental Health (Northern Ireland) Order 1986* which conferred powers on substitute decision makers, the Act does not in general do so. Acts have the potential to be lawful through the availability of a defence; they are not lawful because they involve the exercise of a legal power. The Act puts the common law doctrine of necessity into the statute. For certain kinds of intervention, or in certain circumstances, one or more of a set of additional safeguards must also be in place for the defence to be available.[132]

Ultimately, the appropriate legal mechanism is interconnected with, and should be determined in relation to, the process adopted by the framework, which is discussed below.

Whatever mechanism is adopted, it is also important to note that, while the framework would render deprivations of liberty lawful in certain circumstances, it would never compel such arrangements to be put in place.

Questions for further consideration

- What legal mechanism or device should the framework adopt to render approved deprivations of liberty lawful?

[130] Ibid 114-115.
[131] Law Commission (UK), above n 98, 18.
[132] Harper, Davidson and McLelland, above n 108, 63.

Substantive criteria

The substantive criteria determine whether the proposed arrangements which would give rise to a deprivation of liberty are justified and should be able to be authorised in the circumstances.

The person is unable to be supported to make their own decision

As noted above, this framework could only be used to authorise a deprivation of liberty where the person is unable to be supported to make their own decision about arrangements that would deprive them of their liberty. Otherwise, even if the person poses a serious risk of harm to themselves or others, their autonomy must be respected like any other member of the community.

It is acknowledged that the CRPD Committee considers that the CRPD does not permit a person's decision-making skills to be used as a basis to deny them legal capacity for two reasons:

- Even a functional incapacity test may constitute indirect discrimination against people with disabilities because it will disproportionately affect them; and
- Such a test 'presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right'.[133]

Nevertheless, while not without critiques, a decision-making capacity test remains a common touchstone of many recently passed laws and law reform proposals (such as Northern Ireland's *Mental Capacity Act 2016*[134] and the proposed UK liberty protection safeguards[135]), and its continued use has been defended by a range of commentators. For instance, the ALRC concluded that:

> … it is not practicable to completely do away with some functional tests of ability that have consequences for participation in legal processes… [and that] with appropriate safeguards, and a rights emphasis, there is no 'discriminatory denial of legal capacity' necessarily inherent in a functional test—provided the emphasis is placed principally on the support necessary for decision-making and that any appointment is for the purpose of protecting the person's human rights.[136]

The task of adequately defining when a person cannot make a decision for themselves is a difficult and complex one; further research is required on this point. Careful processes and safeguards regarding how people are supported to make decisions, and how their decision-making capabilities are assessed, will also be required. These are discussed further below.

Given the challenge which the issue will pose in practice, the framework should also expressly address how fluctuating decision-making capabilities should be dealt with. By way of example, the proposed UK liberty protection safeguards provide that an authorisation can remain in place where the regaining of capacity is likely to be temporary and an authorisation will be required again within a

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[133] CRPD Committee, *General Comment No 1*, UN Doc CRPD/C/GC/1, [15].
[134] Harper, Davidson and McLelland, above n 108, 62-63.
[135] It is a positive condition of the liberty protection safeguards that the person 'lacks capacity to consent to the arrangements' which would give rise to a deprivation of their liberty: Law Commission (UK), above n 27, 50.
[136] ALRC, above n 65, 73-74. See also Rosalind Croucher, 'Seismic Shifts – Reconfiguring "capacity" in law and the challenges of article 12 of the United Nations Convention on the Rights of Persons with Disabilities' [2016] *International Journal of Mental Health and Capacity Law* 7.

short period of time, provided the person remains 'of unsound mind' and the arrangements remain necessary and proportionate throughout.[137]

Key points

- The substantive criteria should include that the person is unable to be supported to make a decision about the proposed arrangements that would result in a deprivation of liberty.
- The framework should address how fluctuating decision-making capabilities will be dealt with.

Threshold criterion or purpose for intervention

Section 7(2) of the Charter states that rights may only be subject to reasonable limits which are 'demonstrably justified'. This requires consideration of a range of factors including:

- The nature of the rights that would be limited;
- The purpose of the proposed limitation and how important that purpose is;
- The nature and extent of the limitation;
- The relationship between the limitation and its purpose; and
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[138]

Because liberty and autonomy are very important rights, there must be a sufficiently important purpose for proposing to impose or implement arrangements that would deprive someone of their liberty. Therefore, rather than simply adopting the Charter's generalised s 7(2) balancing exercise, it would be helpful for the framework to incorporate a specific threshold harm criterion (or purpose for intervention) that must be satisfied prior to considering whether a deprivation of liberty should be authorised. This would confine the range of people whose liberty may potentially be restricted and should help give substance to, and ensure a proper evidence base for, the subsequent s 7(2) balancing exercise. It would also reduce the potential for arbitrary detention.

Thresholds for intervention under existing civil detention regimes

Disability Act 2006 (Vic): before a person with an intellectual disability can be detained for compulsory treatment, it must be shown that:

- 'the person has previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a significant risk of serious harm; [and]
- 'there is a significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means'.[139]

[137] Law Commission (UK), above n 27, 81.
[138] Charter s 7(2).
[139] *Disability Act 2006* (Vic) s 191(6)(a)-(b).

Mental Health Act 2014 (Vic): before compulsory treatment can be imposed, it must be shown that immediate treatment is needed to prevent serious deterioration in their mental or physical health, or serious harm to themselves or others.[140]

Severe Substance Dependence Treatment Act 2010 (Vic): before a person can be detained for compulsory treatment, it must be shown that 'immediate treatment is necessary as a matter of urgency to save the person's life or prevent serious damage to the person's health'.[141]

Note that the threshold criterion for each of these regimes is linked to the need for treatment rather than detention (as detention is simply the means of ensuring the provision of treatment, rather than an end or purpose in itself, in each of these regimes).

The VLRC recommended that its proposed authorisation mechanism could be used where the deprivation of liberty is necessary 'for [the person's] own health and safety'.[142] However, this does not seem to be a very high or specific standard.

If the threshold harm criterion for this framework is set at a similarly high standard to those in the existing civil detention regimes, it would also reduce the risk that the framework might be used to circumvent the existing regimes.

Risk of harm to whom?

Should the framework be able to authorise deprivations of liberty just where the person poses a risk to themselves, to others or to both? On the one hand, posing a significant risk of serious harm to other people may provide a greater public imperative and justification for restricting a person's rights than where the person poses a risk only to themselves. However, acting purely to minimise risks to others is less likely to be consistent with the person's will and preferences and 'best interests', or to provide them with any meaningful benefit from the intervention (the extent to which each of these factors should guide or determine the decision are discussed further below). Furthermore, if a person's own safety is at serious risk but others are not able to intervene because the person is unable to provide informed consent for them to do so, the person will remain in jeopardy.

The VLRC confined its proposed authorisation mechanism to circumstances where it was necessary for the person's own health and safety alone. However, as their proposed mechanism was not very robust, this was probably appropriate.

The UK Law Commission noted the tension in extending the regime to cover risks to others:

> We recognise that it is not easy to reconcile concepts of public protection with the principles of the Mental Capacity Act, which are directed primarily at the empowerment of individuals and their protection from risks to themselves. It is nevertheless necessary in the public interest for it to be possible to authorise a deprivation of liberty where a person who lacks capacity is a source of risk to others. We consider it preferable for this to be done under our scheme rather than to set up separate legal machinery or to use other existing powers which may (for other reasons) be too blunt a tool.[143]

[140] *Mental Health Act 2014* (Vic) s 5(b).
[141] *Severe Substance Dependence Treatment Act 2010* (Vic) s 8(2)(b).
[142] VLRC, above n 1, 342.
[143] Law Commission (UK), above n 27, 77.

The proposed UK liberty protection safeguards therefore cover both types of risks, by requiring regard to be had to either or both of the following in determining whether the proposed arrangements are 'necessary and proportionate':

- '[T]he likelihood of harm to the person if the arrangements were not in place and the seriousness of that harm; and
- '[T]he likelihood of harm to other individuals if the arrangements were not in place and the seriousness of that harm'.[144]

However, where the deprivation of liberty is being imposed because of a risk to others, the proposed liberty protection safeguards will require a more onerous authorisation process and additional safeguards. The potential for a dual-stream approach to authorisations is discussed further under 'Who decides if the criteria are met?' below.

Key points

- The substantive criteria should include a specific threshold harm criterion, set at a high standard, which constitutes the purpose of the intervention. For example, 'the person would pose a significant risk of serious harm to themselves or others if they were not deprived of their liberty'.

Questions for further consideration

- How should the threshold harm criterion be formulated (with reference to the severity, likelihood, imminence and type of potential harms)?
- Should the risk of relevant harms be confined to risks to self, to others, or to both? Note that different safeguards and procedures could be adopted depending on the type of risk for which the deprivation of liberty is being proposed.
- Is the threshold harm criterion necessary where the proposed arrangements are consistent with the person's wishes, will and preferences?

The balancing exercise: necessary and proportionate

As noted above, s 7(2) of the Charter and human rights principles more broadly require a balancing exercise to determine whether any deprivation of liberty is 'demonstrably justified' having regard to certain matters. Central to this analysis is whether the degree of restriction on rights is necessary and proportionate to a sufficiently pressing and legitimate purpose (i.e. the threshold harm criterion above). It is proposed that the framework adopt this as the touchstone for determining whether a deprivation of liberty is justified.

The proposed UK liberty protection safeguards also adopt the phrase 'necessary and proportionate' for determining whether arrangements resulting in a deprivation of liberty may be authorised.[145]

[144] Ibid 76.
[145] Ibid 73-78.

This proportionality assessment will require consideration of a wide range of matters including:

- The specific arrangements being proposed;
- The imminence, severity and likelihood of the anticipated harm;
- The degree of impact of the specific proposed arrangements on the person's rights;
- The person's wishes and preferences;
- The potential benefits and negative consequences; and
- Any less restrictive alternatives (see 'No less restrictive alternative' and 'Assess the criteria' below).

Key points

- The substantive criteria should include that the arrangements that would give rise to a deprivation of liberty must be necessary and proportionate to the threshold harm criterion (for example, necessary and proportionate to prevent a significant risk of serious harm to the person or another person).

No less restrictive alternative

The 'necessary and proportionate' test already demands consideration of whether there is a less restrictive or less intrusive alternative arrangement that could achieve the intended purpose (i.e. to prevent the anticipated harm).[146] It is therefore not, strictly speaking, necessary to make this a separate criterion. However, given the centrality of this concept to the justifiability of any restriction on rights, it is proposed to include it as a separate, express criterion for the normative value and to influence good practice.

It is noted that the application of this concept is often challenging in practice where less restrictive alternatives exist in theory, or could exist if more funding or services were available, but are otherwise not currently available. It is important that any person seeking to implement a deprivation of liberty arrangement demonstrate that they have comprehensively explored and attempted to put in place all possible less restrictive alternatives before concluding that none are available. In this regard, the UK Law Commission noted in respect of their proposed liberty protection safeguards:

> [The criterion] does not allow an authorisation to be refused on the grounds that additional funding ought to be provided to enable less intrusive arrangements… However, the requirement of proportionality means that a robust approach should be taken to challenging the assumptions upon which funding decisions have been taken.[147]

[146] Ibid 76.
[147] Ibid 76-77.

Key points

- The substantive criteria should include that a person can only be deprived of their liberty after all less restrictive alternatives have been explored and exhausted.
- The onus is on the person seeking to deprive the person of their liberty to ensure that this exploration has occurred.

The wishes, will and preferences of the person

Notwithstanding the person has been assessed as being unable to be supported to make their own decision regarding the arrangements, the wishes, will and preferences of the person remain crucially important. In its general comment on art 12, the CRPD Committee advised that the 'primary purpose of [the] safeguards [required by art 12(4) to support the exercise of legal capacity] must be to ensure the respect of the person's rights, will and preferences'.[148] Similarly, the ALRC adopted as its third decision-making principle, 'The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives'.[149]

What does 'rights, will and preferences' mean?

Despite grounding their comments on the interpretation of art 12 around this phrase, the CRPD Committee did not define what a person's 'rights, will and preferences' means. Understanding this is important as each term means a different thing and they may not always be in alignment.

Szmukler has proposed that a person's 'will' should be understood as their deeply-held, long-term values, beliefs and commitments and their 'preferences' should be understood as their currently expressed wishes.[150] He argues that, where there is a conflict between a person's will and their currently expressed preferences in relation to a particular matter, their will should generally – though not always – prevail and be respected. Adopting this approach, he argues, helps clarify when a person may be ethically (and without discrimination) subject to an intervention despite a currently expressed preference against it, and opens up 'conventional notions of "decision-making capacity" and "best interests"… to radical revision'.[151] Nevertheless, it must be acknowledged that anytime a person's expressed preference is not followed (even where there 'will' is followed), it can result in negative consequences for them, such as feelings of trauma and isolation.

Properly understanding and identifying a person's will and preferences may be fraught and open to abuse in practice. Szmukler maintains that the determination cannot be made by a single person and must involve people who know the person.[152]

According to the CRPD Committee, '[w]here, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.[153] The ALRC suggested that, where a person's will and preferences cannot be determined, 'the default position must be to consider the human rights relevant to the situation as the guide for the decision to be made'.[154]

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[148] CRPD Committee, *General Comment No 1*, UN Doc CRPD/C/GC/1, [20].
[149] ALRC, above n 65, 75.
[150] '"Respect For Rights, Will and Preferences": What Can this Mean?' (Paper presented at XXXVth International Congress on Law and Mental Health, Prague, 14 July 2017).
[151] Ibid.
[152] Ibid.
[153] CRPD Committee, *General Comment No 1*, UN Doc CRPD/C/GC/1, [21].
[154] ALRC, above n 65, 76.

The European Court of Human Rights' judgment in *Stanev v Bulgaria*[155] highlighted the need to appreciate the person's views and wishes and the heavy burden that is placed on anyone seeking to justify arrangements that are contrary to them.[156]

How should the person's wishes, will and preferences be incorporated into this framework:

- **Expressly in the criteria or decision-making test?** Should the framework only permit arrangements that would be consistent with or give effect to the person's will and preferences, or prohibit arrangements that would be inconsistent except in, for instance, exceptional circumstances? Similarly, substituted judgment could be adopted as the decision-making standard, whereby the decision-maker must make the decision they believe the person would have made for themselves if they had the decision-making capabilities to do so.[157]

- **In the principles and application of the general criteria?** Should the person's will and preferences simply be recognised in the framework's principles and factored into the proportionality assessment?

- **In the process requirements?** Should a more stringent authorisation process and additional safeguards be required where the proposed arrangements are inconsistent with the person's will and preferences? The potential for a dual-stream approach to authorisations is discussed further under 'Who decides if the criteria are met?' below.

The VLRC proposed that its authorisation mechanism could not be used or relied on where a person 'consistently resists and opposes restrictions upon their liberty'.[158] However, as their proposed mechanism was not very robust, this was probably appropriate.

The UK Law Commission considered, but ultimately did not recommend, a rebuttable presumption that the person's wishes and feelings must be followed.[159] However, they noted that arrangements which are contrary to the wishes and feelings of the person will be more intrusive than arrangements to which they do not object, and that this must therefore factor into consideration of whether the arrangements are proportionate.[160] Decision-makers would be required to 'give particular weight to any wishes or feelings ascertained' when making decisions.[161] The proposed liberty protection safeguards also require a more onerous assessment process 'where there is an indication that the arrangements are contrary to the person's wishes', including referral to an 'approved mental capacity professional' for independent assessment.[162] How a person's wishes are determined, and thus when this referral duty arises, are explained further under 'Identifying the person's wishes, will and preferences' below.

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[155] [2012] ECHR 46.
[156] Ibid [130]-[132].
[157] As an example in practice, the *Medical Treatment Planning and Decisions Act 2016* (Vic) requires medical treatment decision-makers to 'make the medical treatment decision that [he or she] reasonably believes is the decision that the person would have made if the person had decision-making capacity': s 61(1).
[158] VLRC, above n 1, 345.
[159] Law Commission (UK), above n 27, 159.
[160] Ibid 76.
[161] Ibid 161.
[162] Ibid 99.

Questions for further consideration

- How should the person's wishes, will and preferences be incorporated into this framework:
  - Expressly in the criteria or decision-making test? Should the framework only permit arrangements that would be consistent with or give effect to the person's will and preferences, or prohibit arrangements that would be inconsistent except in, for instance, exceptional circumstances? Should substituted judgment be adopted as the decision-making standard?
  - In the principles and application of the general criteria? Should the person's will and preferences simply be recognised in the framework's principles and factored into the proportionality assessment?
  - In the process requirements? Should a more stringent authorisation process and additional safeguards be required where the proposed arrangements are inconsistent with the person's will and preferences?

'Best interests' or any other requirement of benefit?

Requirement for benefit?

A final consideration for the substantive criteria is whether there should be any express requirement that the person would benefit in some way from the arrangements that would give rise to the deprivation of liberty.

For example, the VLRC's proposed authorisation mechanism could only be used for arrangements that would 'promote [the person's] health and safety'.[163]

It is an express criterion for making a supervised treatment order ('STO'), which authorises detention for compulsory treatment of a person with an intellectual disability under the *Disability Act 2006* (Vic), that 'the services to be provided to the person in accordance with the treatment plan will be of benefit to the person and substantially reduce the significant risk of serious harm to another person'.[164] 'Benefit to the person' is defined as 'maximising a person's quality of life and increasing their opportunity for social participation'.[165] This requirement of benefit was seen as important to justify the restrictions on freedom which the STO regime permits: as the STO regime permits the detention and treatment of people who have the decision-making capabilities to refuse those interventions, and is discriminatory in its confined application to people with intellectual disabilities, such additional safeguards and benefits are required to recalibrate the intervention closer to a human rights-compatible standard.

In designing this framework, it is important not to conflate considerations of deprivations of liberty with care and treatment. Treatment cannot be authorised or compelled under the framework (nor can it be under the UK deprivation of liberty safeguards or proposed liberty protection safeguards[166]). The *Medical Treatment Planning and Decisions Act 2016* (Vic), in conjunction with the *Mental Health Act 2014* (Vic) and the *Disability Act 2006* (Vic), already cover the field in Victoria in relation to treatment decisions where people lack the capabilities to make those decisions.

[163] VLRC, above n 1, 339.
[164] *Disability Act 2006* (Vic) s 191(6)(c).
[165] *Disability Act 2006* (Vic) s 3(1).
[166] Law Commission (UK), above n 27, 56.

Furthermore, if the framework will permit people to be deprived of their liberty because of a risk to others, then any separate 'benefit' criterion becomes problematic. It would likely lead to rather artificial assertions that it is beneficial for the person to lead an offence-free life, as is often asserted in relation to the benefit requirement under the *Disability Act 2006* (Vic), and in all likelihood would not add any meaningful protection for the person's rights.

To the extent that the person may subjectively perceive or experience any benefit from the arrangements, this will already be considered as part of their will and preferences. If the person does not subjectively perceive any benefit from the arrangements, then to consider the arrangements a 'benefit' would turn this into an objective 'best interests' consideration (see below).

It is therefore proposed that the degree of benefit or otherwise to the person of the arrangements depriving them of their liberty should simply be factored into the proportionality assessment.

Key points

- The degree of benefit or otherwise to the person of the arrangements depriving them of their liberty should be factored into the proportionality assessment rather than included as a separate, express criterion.

'Best interests' not a criterion

The phrase 'best interests' should not appear in the framework. Over time, the phrase has taken on a pejorative meaning and it is not consistent with a modern understanding of human rights requirements and safeguards.[167] In proposing to abandon the express 'best interests' requirement from the current UK deprivation of liberty safeguards, the UK Law Commission noted that it adds nothing to the 'necessary and proportionate' test[168] and involves an 'element of artificiality' in circumstances where the purpose of the intervention is in fact to prevent harm to others.[169]

Key points

- The phrase 'best interests' should not appear in the framework.

[167] CRPD Committee, *General Comment No 1*, UN Doc CRPD/C/GC/1, [21]; ALRC, above n 65, 76.
[168] Law Commission (UK), above n 27, 75.
[169] Ibid 76.

Process and procedural matters

Who decides if the criteria are met?

A key consideration in designing the framework is who should be able to determine whether the criteria apply and thus whether the proposed arrangements that would deprive the person of their liberty are justified. Options include:

- A person chosen and appointed by the person who may be subject to the arrangements;
- The person seeking to impose or implement the arrangements;
- An independent administrative decision-maker; or
- A judicial or quasi-judicial body.

Determining who decides is interconnected with the question of what legal mechanism the framework adopts to authorise the deprivation of liberty (discussed above) and the procedure that should be followed (discussed below). The person who decides may or may not be the person who organises and/or conducts assessments in relation to the criteria. The possibility of different decision-makers being used in different situations is also discussed below.

Regardless of who makes the initial decision, further safeguards will be required to protect people's rights. Even if not selected as the primary decision-maker, some of the options canvassed below could be used to provide second opinions, to conduct merits reviews or appeals, or otherwise have oversight of primary decisions made by others.

Self-appointed decision-makers?

Enabling people to appoint their own decision-maker, even if they can only do this at a time when they have decision-making capabilities, may be a means of promoting the person's will and preferences and right to be involved in decisions affecting them. Callaghan and Ryan consider that the CRPD, especially art 12(4), requires that a person have the power to appoint their own proxy decision-maker.[170]

Aside from setting up a scheme or process to enable the appointments, using self-appointed decision-makers is likely to be efficient and inexpensive. It may also be less stressful for the person compared to having to participate in processes involving unknown, external decision-makers.

It could be expected that many people would nominate family members as decision-makers in this situation. However, family members may not be appropriately placed to make these decisions and may not constitute an adequate safeguard of people's rights. For example, family members are not independent and they may well have conflicting interests in the decision.[171] As lay people, they are also likely to lack the specialist skills and expertise to scrutinise the advice and opinions of services, to understand the potentially complex and nuanced statutory criteria, human rights principles and other

[170] 'An Evolving Revolution: Evaluating Australia's compliance with the Convention on the Rights of Persons with Disabilities in mental health law' (2016) 39(2) *University of New South Wales Law Journal* 596, 610.
[171] The VLRC recognised that a person's automatically appointed 'person responsible' or 'health decision maker', who will often be a family member, 'might sometimes experience conflicts of interest' if empowered to participate in an authorisation process for restriction on liberty decisions: above n 1, 342.

requirements, and to ensure that they are correctly applied.[172] The concerns discussed above about the potential use of enduring powers of attorney are also applicable here (see 'Where the decision conflicts with an advance directive or a decision of an attorney under an enduring power of attorney?' above).

Even if they were only empowered to decide on or approve arrangements that would least conflict with the person's rights, such as arrangements that are consistent with the person's will and preferences, there would still be a risk that self-appointed decision-makers with conflicting interests could simply assert that the arrangements are consistent with the person's will and preferences when they may not be.

The service provider or person seeking to impose the arrangements?

Another option is to make the service provider or person seeking to impose the deprivation of liberty arrangements responsible for ensuring the criteria are met.

Part 7 of the *Disability Act 2006* (Vic) provides an example of how this may be done. Part 7 regulates the use of 'restrictive interventions'[173] falling short of detention against people with disabilities, in particular restraint and seclusion. Restraint and seclusion may only be used where particular criteria are met and they have been included in a 'behaviour support plan'.[174] While there are a number of oversights for this process, the responsibility rests with the disability service provider to ensure that the criteria are met and that the required processes have been followed, and thus that they may use those restrictive interventions against the person. However, the quality of these behaviour support plans is generally low[175] (although gradually improving thanks to the efforts of the Senior Practitioner - Disability), thus limiting the efficacy of the protections in practice. This model, which is so reliant on self-assessment and self-regulation, does not represent a sufficiently robust or safeguarding approach for authorising such serious restrictions on rights as a deprivation of liberty.

In considering how restrictions on liberty could be authorised, the VLRC proposed a three-person collaborative authorisation process involving the person in charge of the residential facility, a medical practitioner or other health practitioner approved by regulation and the person's 'health decision-maker'.[176] The VLRC adopted this formulation 'to reflect the significance of allowing anyone other than a court or tribunal to authorise the deprivation of a person's liberty… [and because] two of three nominated people who will usually be involved in the ongoing care of a person with these living arrangements might sometimes experience conflicts of interests'.[177]

Those responsible for authorising arrangements under the proposed UK liberty protection safeguards, the 'responsible bodies', are also connected with but more removed from those directly involved in the day-to-day care and treatment of the person. The responsible bodies are 'the local authorities and hospital managers that are commissioning[178] the person's care or treatment arrangements that will

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[172] Such concerns have been raised by White et al, above n 47.
[173] '"Restrictive intervention" means any intervention that is used to restrict the rights or freedom of movement of a person with a disability including chemical restraint, mechanical restraint [and] seclusion': *Disability Act 2006* (Vic) s 3(1).
[174] Ibid ss 140-141.
[175] Williams, Chesterman and Laufer, above n 4, 659.
[176] VLRC, above n 1, 342. The VLRC proposed that the term 'health decision maker' replace the term 'person responsible' in Part 4A of the *Guardianship and Administration Act 1986* (Vic).
[177] VLRC, above n 1, 342.
[178] 'At its simplest, commissioning is the process of planning, agreeing and monitoring services… Commissioning is not one action but many, ranging from the health-needs assessment for a population, through the clinically based design of patient pathways, to service specification and contract negotiation or

give rise to the deprivation of liberty'.[179] The responsible bodies are responsible for organising the assessments related to the criteria, consulting with relevant people and ensuing the other procedural steps are complied with. If, following this, it is reasonable to conclude that the conditions are met, the responsible body may authorise the arrangements and the defence to the deprivation of liberty may be relied on.[180] The UK Law Commission's rationale for adopting this approach was to 'establish a stronger link between the commissioning of the arrangements and consideration of whether deprivation of liberty is justified':[181]

> [T]he body that is responsible for arranging the relevant care or treatment should (wherever possible) be responsible for considering requests for authorisations, for commissioning the required assessments and for the authorisation of arrangements. This would have the clear advantage that the commissioning body responsible for the proposed arrangements would be directly accountable for all stages of the process.[182]

It is obviously important that people operating facilities ensure that the arrangements are authorised and lawful before implementing them. It may also help improve the culture of such places to require their active involvement in, and place responsibility on them for, considering and upholding people's human rights. However, while they will no doubt possess relevant information which will need to be considered in the assessment of the criteria, their lack of independence and often-conflicted position means that it may well be inappropriate for them to make the final determination of whether the criteria apply, particularly given the gravity of a decision to restrict someone's liberty. To do so would seem to be in direct conflict with the safeguarding requirements in art 12(4) of the CRPD, that all measures 'are free of conflict of interest'.

Service providers may also lack the skills and understanding required to ensure the criteria, human rights principles and other requirements are correctly applied, and there is a risk that they may simply make decisions for convenience. Even if they were only empowered to decide on or approve arrangements that would least conflict with the person's rights, such as arrangements that are consistent with the person's will and preferences, there would still be a strong potential for people involved in setting up or implementing the arrangements to simply assert that they are consistent with the person's will and preferences when they may not be.

Under the current UK deprivation of liberty safeguards, a hospital or care home can grant itself an 'urgent authorisation' for up to seven days pending the supervisory body's assessment of the application for a standard authorisation. The UK Law Commission found a prevailing view among consultees that such self-authorisation by care providers was 'one of the least satisfactory elements' of the regime because of the risk of convenience-based decisions and thus it should no longer be permitted, even for such short lengths of time.[183] Accordingly, hospitals and care homes would not retain this power under the proposed liberty protection safeguards.

The European Court of Human Rights has 'emphasised that where the same clinicians are responsible for depriving [a] person of their liberty and in charge of their treatment during that period, there must be "guarantees of independence" and counterbalancing procedures aimed at preventing

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procurement, with continuous quality assessment.': NHS England, *NHS Commissioning* <https://www.england.nhs.uk/commissioning/>. This footnote does not appear in the original.
[179] Law Commission (UK), above n 98, 5.
[180] Law Commission (UK), above n 27, 51.
[181] Law Commission (UK), above n 98, 11.
[182] Law Commission (UK), above n 27, 65.
[183] Ibid 177.

"indiscriminate involuntary" admissions'.[184] If service providers are to be involved in making decisions about deprivation of liberty arrangements under this framework, very strong additional safeguards would therefore be required.

An independent administrative decision-maker?

One possible approach is to use independent administrative decision-makers (whether individuals, a panel or a body), who are not a court or tribunal, to determine whether the criteria apply. While this would be more costly and involved, it would better 'highlight the gravity of what is at stake: depriving individuals of their liberty should not be simple and should have multiple checks and balances'.[185]

The framework could designate an existing body, role or category of persons as being empowered to make these decisions, in the way that 'mental health practitioners' (defined to include people employed in particular roles) are empowered to take certain actions under the *Mental Health Act 2014* (Vic).[186] Empowering the Public Advocate is one option (although taking on this role would require a significant injection of funding). Alternatively, a body or scheme could be set up specifically for this purpose. While it provides second opinions and recommendations rather than making decisions, the Second Psychiatric Opinion Service[187] (which supports the right of 'entitled patients' to a second psychiatric opinion under the *Mental Health Act 2014* (Vic)[188]) provides a potential, and relatively low-cost, model. As a further example, Northern Ireland's *Mental Capacity Act 2016* requires decisions regarding deprivations of liberty to be made by a three-person panel set up by the Health or Social Care Trust.[189]

In considering who would be most appropriate to make deprivation of liberty decisions, it is important that the person has the skills, experience and inclination to faithfully apply the principles and criteria under the framework. It would therefore be preferable to use decision-makers from outside the medical model who are more likely to apply a holistic, rights-focused lens. If people from clinical backgrounds are to be involved in making the decision, they should sit as part of a panel in order to ensure a balance of perspectives. To be independent, the decision-maker must also not be involved in the day-to-day care of the person, or employed by or connected to the organisation which provides the accommodation and care where the person may be deprived of their liberty.

If the framework requires an independent, external decision-maker, someone – presumably the person seeking to implement the deprivation of liberty arrangements – would have to make an application or bring the matter to decision-maker's attention. Depending on the process adopted by the framework, the decision-maker could then either take on responsibility for gathering the necessary information or rely on those seeking to implement the arrangements to produce the necessary evidence.

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[184] Ibid 96, quoting *IN v Ukraine* (European Court of Human Rights, Chamber, Application No 28472/08, 23 September 2016), [81].
[185] Williams, Chesterman and Laufer, above n 4, 651.
[186] See definition in *Mental Health Act 2014* (Vic) s 3(1) and powers and responsibilities under ss 28, 30, 32, 35, 319 and 351.
[187] See Second Psychiatric Opinion Service, *Learn More About the Second Psychiatric Opinion Service* <https://www.secondopinion.org.au/>.
[188] *Mental Health Act 2014* (Vic) Pt 5 Div 4.
[189] *Mental Capacity Act (Northern Ireland) 2016* s 297, sch 1.

A judicial or quasi-judicial body?

The most expensive but rigorous and rights-safeguarding approach would be to use a judicial body (a court) or a quasi-judicial body (like a tribunal) to make the decision. Again, under this model, someone would have to make an application to the court or tribunal, which could then make an order authorising the arrangements following a hearing.

If a judicial or quasi-judicial determination is to be required under the framework, the Human Rights List of VCAT would seem on balance to be best placed to carry out this function in Victoria. It is already has the jurisdiction to make deprivation of liberty decisions in relation to STOs under the *Disability Act 2006* (Vic) and, while it is experienced in considering matters relating to disability, health, welfare and risk, it adopts a human rights rather than clinical approach. The accessibility, flexibility and informality of VCAT's approach would also be appropriate for the majority of matters likely to come under the framework.

Different decision-makers in different circumstances?

Given the variation in circumstances that could be covered by this framework, which may be more - or less - likely to create the potential for rights violations and abuse, rather than a one-size-fits-all approach, different decision-makers could be used in different situations. In that way, certain arrangements may be authorised (or attract the defence) following a more streamlined process and other arrangements, where people's rights are at greater risk of violation, would have to be authorised through a more intensive process by an external decision-maker.

As noted above, Northern Ireland has adopted a hierarchical approach to safeguards required for the broad spectrum of interventions that may be determined under their *Mental Capacity Act 2016*, including who can make decisions about various matters.

In response to the UK's very thorough but onerous deprivation of liberty safeguards becoming unworkable in practice, the UK Law Commission's proposed liberty protection safeguards adopt a dual-stream approach whereby a more rigorous authorising process – involving a referral to an independent 'approved mental capacity professional' – is required in certain circumstances:[190]

> In our view the most important factor that makes cases particularly acute and in need of additional oversight is where there is an indication that the arrangements are contrary to the person's wishes.[191]

This referral duty would also apply where the arrangements 'are necessary and proportionate wholly or mainly by reference to the likelihood of harm to other individuals',[192] because '[s]uch cases will often give rise to serious interferences with the Article 8 rights[193] of those deprived of their liberty on this basis and an awkward overlap with the powers in the Mental Health Act'.[194]

A dual-stream or hierarchical approach to safeguards and the authorisation process is intuitively appealing because it balances efficiency with appropriate and proportionate rights protection. However, the challenge will be in not overcomplicating the framework. If the requirements are too

[190] Law Commission (UK), above n 27, 97-101.
[191] Ibid 99.
[192] Ibid 104.
[193] The right to respect for one's private and family life, home and correspondence. This footnote does not appear in the original.
[194] Law Commission (UK), above n 27, 101.

complicated or there are too many different pathways and processes, compliance is likely to decrease. One practical problem may also be that it will not always be known at the time authorisation is first sought which category the matter will fall into. These issues would need to be addressed through education and guidance materials to support the implementation of the framework in practice.

Adopting a dual-stream or hierarchical approach, the level of safeguards and the intensity of the authorisation process under this framework should increase in circumstances where:

- The justification for the proposed arrangements is primarily a risk of harm to other people; and/or
- There are indications that the arrangements are contrary to the person's wishes.

Other situations where external or more rigorous authorisation may also be warranted include where:

- The deprivation of liberty is particularly severe and/or has lasted for a particular length of time;
- The facility or service proposing the arrangements is not in a defined category which is well-regulated;[195] and
- The proposal involves a deprivation of liberty in a setting where the person does not meet the primary eligibility criteria (for example, a person younger than 65 years in a nursing home).[196]

Questions for further consideration

- Who should decide whether the criteria are met:
  - Self-appointed decision-makers?
  - The service provider or person seeking to impose the arrangements?
  - An independent administrative decision-maker?
  - A judicial or quasi-judicial body?
- Should the decision-maker vary according to the circumstances and/or the risk of rights violation, for instance:
  - Where the proposed justification for the arrangements is (primarily) a risk of harm to other people;
  - Where there are indications that the arrangements are inconsistent with the person's wishes;
  - Where the deprivation of liberty is particularly severe and/or has lasted for a particular length of time;
  - Where the facility or service proposing the arrangements is not in a defined category which is well-regulated;
  - Where the proposal involves a deprivation of liberty in a setting where the person does not meet the primary eligibility criteria (for example, a person younger than 65 years in a nursing home);
  - Any other circumstances?
- Should any of the possible decision-makers identified above be involved in providing second opinions or have oversight of primary decisions made by others?

[195] The VLRC recommended that its proposed collaborative authorisation process could only be used by facilities that are already effectively regulated, and that facilities operating under limited regulation would have to 'comply with existing laws that govern deprivations of liberty': above n 1, 340.
[196] Victoria Legal Aid made this submission to VLRC guardianship review: VLRC, above n 1, 333.

The Public Advocate's proposed approach

Adopting a pragmatic balance between the competing imperatives of efficiency and robust rights protection, the Public Advocate believes that this framework should provide a dual-stream authorisation process. This would allow services seeking to implement deprivation of liberty arrangements to determine whether the criteria are met – and thereby avail themselves of a defence – in certain situations (subject to the procedural requirements and safeguards outlined below) but would channel situations where a person's rights are at greater risk of violation through a more intensive authorisation process, by requiring an application to be made to VCAT. Table 1 below sets out the Public Advocate's preliminary view as to who may decide whether the criteria apply in different circumstances.

Proposed justification	Proposed arrangements are consistent with the person's wishes	Proposed arrangements are contrary to the person's wishes
Risk of harm to the person alone	The service seeking to implement the arrangements (subject to the procedural requirements and safeguards outlined below)	VCAT Human Rights List
Risk of harm primarily to others	VCAT Human Rights List	VCAT Human Rights List

Table 1. Public Advocate's preliminary view as to who may decide whether the criteria are met in different circumstances

A service should also be able to refer a matter to VCAT for determination if they are unsure or otherwise feel that that is warranted.

In order for this model to be workable in practice, a specific person or role within each service would need to be designated as responsible for ensuring that a valid authorisation is in place, or an application made to VCAT, in respect of any proposed deprivation of liberty. That person should be liable for serious consequences if they fail to do so (see 'Civil and criminal sanctions' below). Where the service has someone appointed as an 'authorised program officer',[197] 'authorised psychiatrist'[198] or similar, it may be appropriate for them to have this responsibility. Alternatively, the general manager or chief executive officer of the service should bear the responsibility.

Key points

- The Public Advocate's preliminary view as to who may decide whether the criteria are met is that:
    - Where the proposed deprivation of liberty arrangements are sought to be implemented to address a risk of harm to the person themselves, and those arrangements are consistent with the person's wishes, the service seeking to implement those arrangements may determine whether the criteria are met and

[197] Under the *Disability Act 2006* (Vic), 'authorised program officers' ('APOs') have particular functions, powers and duties, including to ensure that any restrictive intervention used on a person is administered in accordance with that Act: s 139(1). A disability service provider can appoint a person as an APO, subject to the approval of the Secretary, and they must also notify the Senior Practitioner – Disability of the APO's name and qualifications: ss 3(1), 139(2). The Secretary must also appoint an APO in respect of any residential treatment facility: s 151(8).

[198] Under the *Mental Health Act 2014* (Vic), each designated mental health service must appoint at least one person as an 'authorised psychiatrist', who then have particular functions, powers and duties under that Act: ss 3(1), 150.

thereby avail themselves of a defence, subject to the procedural requirements and safeguards outlined below.
    - In all other situations, the service seeking to implement the arrangements must apply to the VCAT Human Rights List for authorisation of the deprivation of liberty arrangements.

- A specific person or role within each service should be designated as responsible for ensuring that a valid authorisation is in place, or an application made to VCAT, for any proposed deprivation of liberty. That person would be liable for serious consequences if they fail to do so.

What are the process and procedural requirements for an authorisation?

Where arrangements that would deprive a person of their liberty are proposed, the following process and procedural steps should be taken in every case (regardless of who makes the determination) to ensure that the substantive criteria can be properly assessed and that the decision-making process is fair and robust:

- The range of options have been explored;
- All reasonable efforts have been made to support the person to be able to make their own decision;
- An advocate has been engaged;
- The person's wishes, will and preference has been determined;
- The necessary consultation has occurred;
- The necessary assessments have occurred;
- The appropriate decision-maker has been engaged;
- The decision (including specific details of the arrangements), the decision-making process and reasons for the decision have been documented; and
- A maximum duration for the arrangements and a timeframe for review is set.

The Appendix contains a flowchart setting out this proposed process, and each of the steps are explained further below.

Key points

- The process and procedural requirements for a deprivation of liberty authorisation should be that:
    - Alternative arrangements have been explored;
    - All reasonable efforts have been made to support the person to be able to make their own decision;
    - An advocate has been engaged;
    - The person's wishes, will and preferences have been identified and considered;
    - The necessary assessments have occurred;
    - The necessary consultation has occurred;
    - The appropriate decision-maker has been engaged;
    - A plan has been made as to how restrictions may be reduced over time;

- The decision (including specific details of the arrangements), the decision-making process and reasons for the decision have been documented in an authorisation record;
- A maximum duration for the authorisation and a timeframe for review has been set; and
- The authorisation record has been registered with and reviewed by the registration authority.

Explore the alternatives

Self-evidently, it is important that service providers identify and acknowledge at the outset whether and how any arrangements they are considering (or have already implemented) give rise to a deprivation of liberty (see 'What is a deprivation of liberty?' above).

Before consideration can then be given to whether those arrangements are justified, all possible alternative options must be explored. It is important that this is done at a very early stage to minimise deprivations of liberty. This is also important because the person will need to be provided with information about the range of possible options in order to support them to make a decision.

Guiding questions for exploring alternative options

- What are you trying to achieve?
- Are there other accommodation options?
- Are there other ways that the person might be supported to do what they want to do?
- What efforts have been made to put less restrictive arrangements in place?
- Is any additional funding available or there another way to increase services and support for the person?
- What would need to change for a less restrictive option to become viable?

Key points

- All possible alternative arrangements must be identified and explored prior to considering whether a deprivation of liberty arrangement may be justified.

Allow and support the person to make their own decision wherever possible

As noted above, this framework cannot be used to impose arrangements that would deprive a person of their liberty if they have the decision-making capabilities to make their own decisions about those arrangements. A person must not be assessed or treated as unable to make a decision for themselves about the proposed arrangements unless all practicable help and support to enable them to make a decision has been given or offered to them without success. Accordingly, before any consideration is given to authorising any deprivation of liberty arrangements, it is critically important to engage with the person, ensure they have access to all relevant information (including about possible alternative arrangements) and decision-making supports, and are given sufficient time and opportunity to engage in decision-making. This reflects the ALRC's second decision-making principle: 'Persons

who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives'.[199]

The CRPD Committee has also emphasised the importance of support:

> To fully realize the transition from substitute to supported decision-making and implement the rights enshrined in article 12, it is imperative that persons with disabilities have the opportunity to develop and express their will and preferences in order to exercise their legal capacity on an equal basis with others. To achieve this, they have to be a part of the community. Furthermore, support in the exercise of legal capacity should be provided by using a community-based approach which respects the will and preferences of individuals with disabilities.[200]

There are a number of examples of how legislation may require the optimisation of a person's decision-making ability and decision-making support prior to any assessment (see box below).

Example legislative provisions which require optimisation of the person's decision-making ability

Mental Health Act 2014 (Vic) s 69 - Meaning of informed consent (regarding treatment decisions)

(1) For the purposes of treatment or medical treatment that is given in accordance with this Act, a person gives informed consent if the person—
- (a) has the capacity to give informed consent to the treatment or medical treatment proposed; and
- (b) has been given adequate information to enable the person to make an informed decision; and
- (c) has been given a reasonable opportunity to make the decision; and
- (d) has given consent freely without undue pressure or coercion by any other person; and
- (e) has not withdrawn consent or indicated any intention to withdraw consent.

(2) For the purposes of subsection (1)(b), a person has been given adequate information to make an informed decision if the person has been given—
- (a) an explanation of the proposed treatment or medical treatment including—
  - (i) the purpose of the treatment or medical treatment; and
  - (ii) the type, method and likely duration of the treatment or medical treatment; and
- (b) an explanation of the advantages and disadvantages of the treatment or medical treatment, including information about the associated discomfort, risks and common or expected side effects of the treatment or medical treatment; and
- (c) an explanation of any beneficial alternative treatments that are reasonably available, including any information about the advantages and disadvantages of these alternatives; and
- (d) answers to any relevant questions that the person has asked; and
- (e) any other relevant information that is likely to influence the decision of the person; and
- (f) in the case of proposed treatment, a statement of rights relevant to his or her situation.

(3) For the purposes of subsection (1)(c), a person has been given a reasonable opportunity to make a decision if, in the circumstances, the person has been given a reasonable—
- (a) period of time in which to consider the matters involved in the decision; and
- (b) opportunity to discuss those matters with the registered medical practitioner or other health practitioner who is proposing the treatment or medical treatment; and
- (c) amount of support to make the decision; and
- (d) opportunity to obtain any other advice or assistance in relation to the decision.

[199] ALRC, above n 65, 76.
[200] *Draft General Comment No 5: Article 19 - Living independently and being included in the community*, 17th sess (2017) [78].

Mental Capacity Act (Northern Ireland) 2016 s 5 – Supporting person to make decision

(1) A person is not to be regarded… as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.

(2) Those steps are—
(a) the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);
(b) ensuring that the matter in question is raised with the person—
(i) at a time or times likely to help the person to make a decision; and
(ii) in an environment likely to help the person to make a decision;
(c) ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person.

(3) The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—
(a) deciding one way or another; or
(b) failing to make the decision.

(4) For the purposes of providing the information or explanation mentioned in subsection (2)(a) in a way appropriate to the person's circumstances it may, in particular, be appropriate—
(a) to use simple language or visual aids; or
(b) to provide support for the purposes of communicating the information or explanation.

(5) The reference in subsection (2)(c) to persons whose involvement is likely to help the person to make a decision may, in particular, include a person who provides support to help the person communicate his or her decision.

Key points

- All reasonable efforts must be made to support the person to be able to make their own decision about the proposed deprivation of liberty arrangements before any consideration is given to authorising them.

Ensure an advocate is engaged

Where arrangements that would deprive a person of their liberty are proposed, it is vital that the person has access to independent decision-making support and advocacy because family members and staff at the service seeking to implement the arrangements may well have conflicting positions in relation to the decision and so cannot always be relied to support the person.

The UK Law Commission viewed the provision of advocacy as critical to its proposed liberty protection safeguards:

> The provision of advocacy can have a transformative effect and be the first time that the person's views, and those of their family, are forcefully represented to decision-makers… The provision of advocacy is also an important element in ensuring that a person's right to bring proceedings under Article 5(4) are effective… since it is the advocate who may need to initiate

> court proceedings on the person's behalf. We therefore remain strongly committed to ensuring that an advocate is available for every person when arrangements are being proposed or authorised under the Liberty Protection Safeguards… In our view, it is essential to the success of the new scheme that legal rights to advocacy are delivered in practice… We believe that advocacy support must be available to all people who are being deprived of their liberty – irrespective of settings – in order to deliver practical and effective Article 5(4) rights.[201]

The proposed UK liberty protection safeguards require the appointment of an independent advocate or 'appropriate person' to represent and support the person, both during the initial authorisation process and throughout the period of the authorisation, in every case (see box below for further information).

Engagement of advocacy under the proposed UK liberty protection safeguards

'Under the Liberty Protection Safeguards, advocacy support must be provided at the earliest possible stage. The draft Bill provides that an advocate must be appointed if a responsible body "proposes to authorise arrangements". Therefore, the duty to appoint an advocate is triggered when the responsible body has a clear proposal to approve arrangements and is about to arrange for the necessary assessments to be carried out, and not when an authorisation is put in place. Importantly the advocacy duty is an ongoing one, which continues throughout the period of the authorisation. In other words, it is not limited to the assessment period or review process, or any specific tasks during the authorisation…

'[T]he responsible body must appoint an advocate unless the person does not consent, or if the person lacks capacity to consent, unless being represented by an advocate would not be in the person's best interests. This might be the case if, for example, the person's ascertained wishes and feelings clearly show that they do not wish to be supported by an advocate. Our intention is to ensure that advocacy is provided automatically and on an opt-out basis. It is also intended to ensure that the circumstances in which an advocate is not appointed for a person lacking capacity to consent to being represented are rare; the absence of advocacy support in such circumstances would only be lawful if the responsible body is satisfied that appointing an advocate was not in the person's best interests.

'The role of the advocate is to "represent and support" the person or to support the appropriate person…

'The draft Bill provides that the duty to appoint an advocate applies unless there is an appropriate person appointed for the person. If the responsible body proposes to authorise arrangements under the Liberty Protection Safeguards, it must determine whether there is someone who would be an "appropriate person" who is not engaged in providing care or treatment to the person in a professional capacity or for remuneration… The function of the appropriate person is to represent and support the person on matters arising under the Liberty Protection Safeguards…

'When determining whether to appoint an appropriate person, the responsible body would be required to consider a number of matters. First, it must make sure that the appropriate person is able and willing to take on this role... Secondly, the responsible body must consider the views, wishes and feelings of the person who is being assessed or subject to an authorisation. That person must consent, provided that they have capacity to do so, to the appointment of the appropriate person. If the person lacks capacity to consent to the appointment, the responsible body must consider if the appointment would not be in the person's best interests. This is particularly important because advocacy stakeholders brought to our attention that local authorities sometimes exclude relatives from being the appropriate adult under the Care Act when they are too "difficult" or assertive and may challenge too much. We have therefore not imported directly the equivalent Care Act provision (which requires local authorities to consider if being represented by an appropriate person would be in the adult's best interests), but instead included the narrower test

[201] Law Commission (UK), above n 27, 130.

that the appointment of an appropriate person must be made unless the appointment is not in the person's best interests…

'The Liberty Protection Safeguards provide that the responsible body must keep under review whether the appropriate person is, in fact, undertaking their functions. If not it may be that he or she no longer meets the criteria for the appointment of an appropriate person, and could no long be considered as such for purposes of the advocacy provisions. There would thus be a duty to appoint another appropriate person or an advocate might be triggered. But it should be noted in this respect that an appropriate person is entitled to support from an advocate to assist them to fulfil their role (a duty to appoint an advocate for an appropriate person applies unless the appropriate person does not consent).'[202]

Particularly given it is proposed under this framework that the service seeking to implement the deprivation of liberty arrangements would be able to make a determination about the criteria in certain situations, the availability and facilitation of independent advocacy in each case will be critical to ensure that the correct processes are followed and that people's rights are respected in practice. If advocacy is not available or has not been facilitated, then the service should be unable to make a determination or implement those arrangements, and instead must apply to VCAT for a determination.

People should be able to nominate a person of their choice who is willing and able to provide support and advocacy for them, like a 'nominated person' under the *Mental Health Act 2014* (Vic)[203] or a 'support person' under the *Medical Treatment Planning and Decisions Act 2016* (Vic).[204] Alternatively, if the person is unable or fails to nominate their own advocate, the service considering implementing the deprivation of liberty arrangements must facilitate the engagement of an independent advocate. The role of the advocate would be to:

- Help gather and receive relevant information;
- Provide the person with support, including decision-making support, and help represent their wishes;
- Be one of the persons who must be consulted (see 'Consult and involve others' below); and
- Assist the person to exercise their rights, including to challenge any decision that is made.

This is broader than the role of the 'independent person' under the *Disability Act 2006* (Vic), who a disability service provider must ensure is available to explain to a person with disability any proposed inclusion of restraint or seclusion in their behaviour support plan, and their right to seek a review of that decision.[205]

Given the breadth of settings in which this framework may be used, a range of legal and non-legal advocacy services should be funded and available to provide this advocacy (see 'Rights to independent advocacy' below).

[202] Ibid 130-133 (citations omitted).
[203] See *Mental Health Act 2014* (Vic) ss 23-27.
[204] See *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 31-35.
[205] *Disability Act 2006* (Vic) s 143.

Key points

- Where a service is considering implementing deprivation of liberty arrangements, they must:
  - Advise the person of their right to nominate someone who is willing and able to provide support and advocacy for them; and
  - If the person is unable or fails to nominate their own advocate, facilitate the engagement of an independent advocate.

- The role of the advocate is to:
  - Help gather and receive relevant information;
  - Provide the person with support, including decision-making support, and help represent their wishes;
  - Be one of the persons who must be consulted; and
  - Assist the person to exercise their rights, including to challenge any decision that is made.

- If advocacy is not available or facilitated, the service cannot proceed to make a determination about the criteria or implement deprivation of liberty arrangements and must apply to VCAT for a determination.

Assess the criteria

Self-evidently, the substantive criteria for implementing a deprivation of liberty arrangement must be thoroughly assessed before it can be determined whether those criteria are met. As explained above, it is proposed that the criteria are:

- That the person is unable to be supported to make their own decision about the arrangements;
- A threshold harm criterion of some sort, relating to a significant risk of serious harm;
- That the proposed deprivation of liberty arrangements are necessary and proportionate to that harm; and
- That there is no less restrictive alternative to reduce or address that harm.

Each of these criteria will need to be investigated as an absence of evidence will be insufficient to establish that the criteria are met. There is no onus on the person to disprove the criteria. Rather, there is a practical expectation that those seeking to impose the arrangements will gather or put forward evidence in support of their position. The criteria would need to be established on the balance of probabilities. Furthermore, given the seriousness of the matter and the significant consequences at stake for the individual – the deprivation of their liberty and consequent restrictions on other rights – the evidence would need to meet the *Briginshaw*[206] standard: be cogent, compelling and actually persuade the decision-maker of the particular matter.

Assessing the person's decision-making capabilities

As noted above, it is inappropriate to proceed to assess the person's ability to make the decision until they have been provided with all practicable help and support to enable them to make the decision, including through the engagement of an advocate.

[206] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

The particular decision in relation to which the person would need to lack decision-making capabilities relates not just to their placement or accommodation in a particular place but to the specific *arrangements* that would apply to them there, including the elements of supervision, control and lack of freedom to leave, which would give rise to the deprivation of liberty.[207]

A relevant expert should be engaged to undertake the assessment and advise on further decision-making supports. The framework should expressly adopt similar presumptions, principles and processes to those set out in many recent capacity-based laws, such as the *Medical Treatment Planning and Decisions Act 2016* (Vic), to guide the assessment (see box below). The assessor should also consult with the person's advocate and others during this process (see 'Ensure an advocate is engaged' above and 'Consult and involve others' below).

***Medical Treatment Planning and Decisions Act 2016* (Vic) s 4 - decision-making capacity**

(1) A person has *decision-making capacity…* if the person is able to do the following—
- (a) understand the information relevant to the decision and the effect of the decision;
- (b) retain that information to the extent necessary to make the decision;
- (c) use or weigh that information as part of the process of making the decision;
- (d) communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

(2) For the purposes of subsection (1), an adult is presumed to have decision-making capacity unless there is evidence to the contrary.

(3) For the purposes of subsection (1)(a), a person is taken to understand information relevant to a decision if the person understands an explanation of the information given to the person in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means.

(4) In determining whether or not a person has decision-making capacity, regard must be had to the following—
- (a) a person may have decision-making capacity to make some decisions and not others;
- (b) if a person does not have decision-making capacity for a particular decision, it may be temporary and not permanent;
- (c) it should not be assumed that a person does not have decision-making capacity to make a decision—
  - (i) on the basis of the person's appearance; or
  - (ii) because the person makes a decision that is, in the opinion of others, unwise;
- (d) a person has decision-making capacity to make a decision if it is possible for the person to make a decision with practicable and appropriate support.

Examples

Practicable and appropriate support includes the following—
- (a) using information or formats tailored to the particular needs of a person;
- (b) communicating or assisting a person to communicate the person's decision;
- (c) giving a person additional time and discussing the matter with the person;
- (d) using technology that alleviates the effects of a person's disability.

(5) A person who is assessing whether a person has decision-making capacity must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision-making capacity can be most accurately assessed.

[207] This was emphasised by the UK Law Commission: above n 27, 70.

Identifying the person's wishes, will and preferences

Even where the person cannot be supported to make their own decision about the arrangements, it will nevertheless be important as part of the assessment to identify their wishes, will and preferences. Doing this properly will require the involvement of an independent advocate as well as consultation with relevant people (see 'Consult and involve others' below). As noted above, the proposed UK liberty protection safeguards require a more onerous assessment process 'where there is an indication that the arrangements are contrary to the person's wishes',[208] and the UK Law Commission provides useful guidance on how a person's wishes are to be understood in these circumstances:

> In determining whether or not the [referral] duty arises, the independent reviewer must consider "all the circumstances so far as they are reasonably ascertainable, including the person's behaviour, wishes, feelings, views, beliefs and values". Past circumstances can be relevant, as long as it is still appropriate to consider them. The focus should be on the person's current wishes and past circumstances must be relevant to the person's current wishes. Therefore the duty to refer would apply if the person was actively trying to leave a care home – even if in the past (when they had capacity) they had indicated that they would be content to live there. Alternatively, the duty to refer would arise if the person (since losing capacity) was not objecting to the arrangements but had been vociferous in objecting previously… it is important to emphasise that mere acquiescence, in itself, should never be indicative of the person's wishes. In other words, it should never be assumed that because a person is compliant with the care regime, he or she therefore wishes to reside in, or receive care or treatment, at the particular place.[209]

If the proposed dual-stream authorisation approach is adopted and there is any doubt about the compatibility of the proposed arrangements with the person's wishes, the service should err on the side of caution and seek external authorisation from VCAT rather than proceeding to make the determination themselves.

Establishing the relevant risks and determining whether the proposed arrangements are necessary and proportionate

There must clear evidence to demonstrate the need or justification for the proposed arrangements (i.e. of the harms that would likely occur if those arrangements were not implemented). The evidence must be specific to the particular person rather than assumed on the basis of their diagnosis or other cohort characteristics. For instance, a recent study concluded that there is in fact very limited evidence of harm eventuating to people who wander away from nursing homes without permission,[210] raising doubts about this purported justification for locking them in.

It is important that the negative consequences and possible harms associated with implementing the deprivation of liberty arrangements are also explored, as they form a key part of the balancing exercise.

The following questions will help guide the determination of whether the proposed arrangements are necessary and proportionate in the circumstances.

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[208] Ibid 99.
[209] Ibid 99-100 (citations omitted).
[210] Woolford, Weller and Ibrahim, above n 32, 366.e1.

Guiding questions for considering the necessity and proportionality of the proposed arrangements

- What harm or consequence are you trying to prevent? How serious or important is that consequence? Is the person themselves concerned about the consequence?
- How likely is it that the serious harm or consequence would occur? How imminent is it? What evidence is there for this?
- Will the restricting arrangements be effective in preventing or significantly reducing the likelihood of the serious harm or consequence from occurring?
- What negative consequences will arise or may arise for the person as a result of the arrangements?
    - Is the person objecting to or unhappy with the arrangements?
    - Are there particular things that the person wants to do that the arrangements will inhibit?
- What are the person's views and feelings about the arrangements?
- Are the benefits which are likely to eventuate greater than the adverse outcomes that are likely to eventuate?
- Are the restrictions proportionate to the anticipated harms?
- Is there any other, less restrictive way of achieving the purpose or preventing the consequence? What would need to change for a less restrictive option to become viable?
- Why are the available alternative options considered inadequate to address the risk?

Key points

- Each criterion needs to be carefully assessed and established on the balance of probabilities to the *Briginshaw* standard. There is no onus on the person to disprove the criteria, but there is a practical expectation that the person seeking to impose the arrangements will put forward evidence in support of their position.

- The assessment of the person's decision-making capabilities should be carried out by a relevant professional, in accordance with appropriate presumptions, principles and processes including:
    - A presumption of decision-making capacity;
    - A recognition that:
        - Decision-making capacity is specific to the decision in question and may fluctuate over time;
        - Incapacity cannot be assumed because of any particular characteristic of the person or because they make a decision which, in the opinion of others, is unwise;
        - A person has decision-making capacity if it is possible for them to make a decision with support;
    - A requirement that the assessment be conducted at a time and in an environment which maximises and most accurately enables the assessment of the person's capabilities.

- The person's wishes and preferences in relation to the proposed arrangements must be carefully identified during the exploration of the criteria, including through consultation with relevant people. The person's wishes cannot be assumed simply from their compliance with or acquiescence to a particular proposal.

Consult and involve others

Many people at risk of being deprived of their liberty will have family members, unpaid carers and other supporters who care about them and want to ensure their interests are protected. Accordingly, consultation with a range of people is important to help inform the assessment of the criteria and, especially where the person has limited communication, to better understand their wishes.

The UK Law Commission recognised the importance of 'ensuring full consultation takes place before arrangements can be authorised'.[211] To that end, the proposed UK liberty protection safeguards include a duty to consult with the following people prior to authorising any arrangements, 'unless it is not practical or appropriate to do so':[212]

- '[A]nyone named by the person as someone to be consulted;
- '[A]nyone engaged in caring for the person or interested in their welfare;
- '[A]ny donee of a lasting power of attorney or enduring power of attorney, and any court appointed deputy;
- '[A]ny appropriate person or independent mental capacity advocate;
- '[I]n the case of a person aged 16 or 17, anyone with parental responsibility; and
- '[I]n the case of a person aged 16 or 17 who is being looked after by a local authority, the authority concerned'.[213]

The UK Law Commission stated that the 'main purpose of the consultation is to try to ascertain the person's wishes or feelings in relation to the arrangements which are proposed or in place'.[214] As noted above, Szmukler has argued that a proper determination of a person's will and preferences cannot be made by a single person and must involve people who know the person.[215]

Given the sensitive and personal nature of the matters under consideration, issues of confidentiality, information-sharing and consent will need to be carefully managed.

Key points

- The following people should be consulted to inform the assessment of the criteria and in particular to better understand the person's wishes:
  - Anyone named by the person as someone to be consulted;
  - Anyone engaged in caring for the person or interested in their welfare, subject to the consent of the person or other safeguards;
  - The person's nominated or appointed advocate;
  - The person's guardian or attorney (pursuant to a relevant power of attorney), if they have one; and
  - If the framework applies to children and the person is a child, the person with parental responsibility for them.

[211] Law Commission (UK), above n 27, 91.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Szmukler, above n 150.

Plan how to reduce restrictions

Even if it has been determined that it is currently necessary and proportionate to implement arrangements that would deprive a person of their liberty, it does not mean that such arrangements will always be required. In many cases, with appropriate skills training, behavioural interventions and other supports (for both the person and staff involved), there may be a reduced need for such restrictions over time. However, unless plans are made to identify and implement such measures to help the person regain their freedom, they may be overlooked in practice and the restrictive arrangements then simply become the status quo.

Accordingly, any service implementing a deprivation of liberty arrangement should be required to develop a plan as to how the restrictions may be reduced over time, including identifying the training and other supports that are or can be made available to the person and staff. This is similar to the requirement for a written treatment plan in respect of any STO under the *Disability Act 2006* (Vic). Those treatment plans must set out:

- The treatment that will be provided to the person and how it will benefit them;
- Any restrictive interventions that will be imposed;
- The level of supervision which will be required; and, most importantly,
- The process for transition to lower levels of supervision and, if appropriate, to living in the community without an STO being required.[216]

Progress towards reductions in restrictions and the implementation of measures identified in the plan should be reviewed during each periodic review (see 'Periodic reviews' below).

Notwithstanding this recommendation, as noted above, it is important not to conflate considerations of deprivations of liberty with care and treatment, as treatment cannot be authorised or compelled under the framework. Furthermore, given that the framework would not be confined to people with disabilities, it is also possible that it would cover people who, although lacking decision-making capabilities, do not have a disability or other condition amenable to or in need of treatment. Care will have to be taken to ensure that this planning requirement operates in a way that meaningfully enhances the protection of people's rights and their quality of life rather than introducing additional restrictions or obligations on them.

Key points

- Any service implementing a deprivation of liberty arrangement should be required to develop a plan as to how the restrictions may be reduced over time.
- Progress towards reductions in restrictions and the implementation of measures identified in the plan should be reviewed during each periodic review.

Document the decision, the decision-making process and reasons

Finally, detailed records must be made of the decision, the decision-making process and reasons for the decision. This is essential to ensure that the required steps are followed, that the relevant matters

[216] *Disability Act 2006* (Vic) s 191(7).

are properly considered, to increase transparency and to enable scrutiny and review of the decision. Describing the specific authorised arrangements in detail is also important because any legal authority for a deprivation of liberty 'must be sufficiently precise to enable a person to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[217]

The proposed UK liberty protection safeguards include a duty to produce an 'authorisation record' and prescribe the information that must be included, such as detail about the precise nature of the arrangements that have been authorised, the date that the authorisation will start, and why the conditions for an authorisation have been met.[218] Copies of the record must be given 'as soon as reasonably practicable to the person and other individuals who would need to be given a copy of the authorisation record to ensure that they were equipped to carry out their role (most obviously advocates and the appropriate person)'.[219]

In documenting the decision, the record should include:

- The details of the arrangements that will result in a deprivation of liberty – what exactly will be done?
- When and in what circumstances they will be used or apply;
- How long the authorisation will be in place for (see 'Duration of the authorisation' below); and
- When the arrangements will be reviewed (see 'Periodic reviews' below).

In documenting the decision-making process and reasons, the record should include:

- The attempts made to support the person to make their own decision;
- How independent advocacy was facilitated;
- The person's wishes and preferences;
- Who was consulted and what their views are;
- The basis for concluding that the substantive criteria are met, including a copy of the decision-making capacity assessment, the evidence of relevant harm and why the arrangements are considered necessary and proportionate;
- What alternative options were explored and why they were considered inadequate;
- The reasons for not following or giving effect to the person's wishes (if applicable); and
- A copy of the plan to reduce restrictions over time.

If the decision-maker is not a court or tribunal, consideration should be given to whether a template decision-making record should be developed and/or prescribed, as this may well improve the quality and consistency of decision-making and compliance with the law in practice.

The authorisation record would then need to be registered with the registration authority (see below) and copies given to the person and those required to be consulted.

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[217] Law Commission (UK), above n 27, 111, citing *Medvedyev v France* (2010) 51 EHRR 39, [80] and *Creangă v Romania* (2013) 56 EHRR 11, [120].
[218] Law Commission (UK), above n 27, 112.
[219] Ibid.

Key points

- An authorisation record should be produced which details the decision (including the specific authorised deprivation of liberty arrangements), the decision-making process and the reasons for the decision and incorporates the plan to reduce restrictions over time.

Registration and review of authorisations

Requirement to register all authorisations

Any authorisation made under the framework should have to be registered with a central registration authority. This will increase transparency and enable the operation of further safeguards. This requirement is particularly important if the proposed model is adopted whereby services are able to make determinations themselves in certain situations.

The requirement to register the authorisation is similar to the requirement under the *Disability Act 2006* (Vic) that any disability service provider who has prepared a behaviour support plan for a person with a disability which includes the use of restraint or seclusion must provide a copy of that plan to the Senior Practitioner – Disability within two working days.[220]

Having a centralised register and an obligation to register all deprivation of liberty authorisations would also assist Australia to comply with its OPCAT obligations, should it proceed with ratification. OPCAT's objective is to 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'.[221] In order to enable the national inspection bodies, called 'national preventive mechanisms' ('NPMs'), to fulfil their mandate, OPCAT requires States to 'undertake to grant them… [a]ccess to all information concerning the number of persons deprived of their liberty in places of detention… as well as the number of places and their location'.[222] Without a centralised register for deprivations of liberty in social care settings, it would be challenging for Australia to comply with this obligation.

Rather than create a new registration authority, the function could perhaps be taken on by the Office of the Public Advocate or the Senior Practitioner – Disability within the Office of Professional Practice (Department of Health and Human Services). It is noted that the VLRC recommended that the Office of the Public Advocate be notified of deprivation of liberty decisions in certain circumstances under its proposed model[223] (although the Public Advocate did not support that particular model).

Review by registration authority

Upon receiving an authorisation record prepared by a service, the registration authority should conduct a review 'on the papers' to ensure that all procedural requirements have been complied with and that the record contains adequate information to support the determination. The registration authority would not be responsible for making additional enquiries or conducting new assessments, and would not be responsible for certifying whether the criteria are met. However, if they considered the authorisation record to be inadequate, they would advise the service, the person and their

[220] *Disability Act 2006* (Vic) s 145(4).
[221] OPCAT art 1.
[222] OPCAT art 20(a).
[223] VLRC, above n 1, 334.

advocate of this (which may mean the service could not rely on the record as a defence to any proceedings against them until it was rectified) and/or refer the matter to VCAT for a determination on the merits (see 'Merits review' below). The registration authority should also be able to refer any matter at its discretion to the complaints body for investigation (see 'Complaints, investigation and oversight' below) or to VCAT, including:

- Where the deprivation of liberty is particularly severe, has lasted for a particular length of time or was anticipated to no longer be necessary by now;
- Where there are concerns about the conduct of the facility or service that is proposing or implementing the arrangements; and
- Where the proposal involves a deprivation of liberty in a setting where the person does not meet the primary eligibility criteria (for example, a person younger than 65 years in a nursing home).

This proposed review function is similar to the 'independent review' requirement under the proposed UK liberty protection safeguards. The purpose of the UK's proposed independent review, which must occur prior to authorisation in all cases, would be to 'scrutinise the assessments… review the information available to the responsible body and determine whether or not the responsible body's decision to authorise arrangements is a reasonable one to come to on the basis of that information'.[224] The independent reviewer must also refer the matter to an 'independent mental capacity professional' for further consideration in certain circumstances.[225]

The registration authority should also be able to conduct own-motion investigations and audits of authorisation records submitted by particular service providers or in relation to a particular cohort of people where it identifies a systemic issue. For this reason, it would make sense for the registration authority to be the same body as that empowered to receive and investigate individual complaints (see 'Complaints, investigation and oversight' below).

Key points

- There should be a central register for deprivation of liberty authorisations.
- Any deprivation of liberty authorisation must be registered with the registration authority.
- The registration authority should review all authorisation records prepared by services to ensure that all procedural requirements have been complied with and that there is adequate information contained within the record to support the determination. If the registration authority has concerns about the authorisation or the adequacy of the record, it may refer the matter at its discretion:
    - Back to the service, the person and their advocate;
    - To the complaints body (if separate to the registration authority); and/or
    - To VCAT.
- The registration authority should be able to conduct systemic, own-motion investigations and audits of authorisation records.

[224] Law Commission (UK), above n 27, 96-97.
[225] Ibid 99-103.

Questions for further consideration

- Should the Office of the Public Advocate, the Senior Practitioner – Disability or another organisation perform the functions of the registration authority?

Commencing a deprivation of liberty

There are a number of issues relating to the commencement of a deprivation of liberty which the framework would need to address. These include at what point an authorisation must be sought and when an authorisation commences or can be relied on. This is significant because certain actions taken in reliance on an authorisation, such as accepting an accommodation offer or moving a person to different accommodation, may be very hard to change or irreversible, or shut off other options, once made.

Wherever possible, authorisation must be sought and obtained prior to implementing any deprivation of liberty arrangement. Furthermore, if the proposed model is adopted whereby services are able to make determinations themselves in certain situations, the service should not proceed to implement the arrangements prior to the review by the registration authority (see 'Registration and review of authorisations' above), or perhaps during a specified appeal period, to avoid the possible curtailment of options upon review.

Unforeseeable emergencies

It is recognised that it will not always be possible to anticipate and plan in advance for every deprivation of liberty as there will be unforeseeable emergencies, for instance following a rapid and unexpected deterioration in a person's condition. Consideration must be given to when and for how long staff may take action which deprives a person of their liberty (and be protected in respect of that action) in such circumstances.

The UK Law Commission recommended removing the power of hospitals and care homes under the current deprivation of liberty safeguards to grant themselves urgent authorisations for up to seven days in favour of a new, limited, interim authorisation provision in the proposed liberty protection safeguards. The proposed provision provides that 'a person may be deprived of their liberty to enable life sustaining treatment or action believed necessary to prevent a serious deterioration in the person's condition while a responsible body is determining whether to authorise arrangements giving rise to a deprivation of liberty'.[226] The process of obtaining authorisation would have to have started for this provision to apply. The Law Commission deliberately did not put a time limit on the limited authorisation under this provision because they felt that it may encourage responsible bodies to aim for the maximum time allowed rather than determining applications on a timely basis.[227]

In terms of legal protection for actions taken during emergencies, the UK Law Commission recognised that there is already a clear common law power or defence to liability (which applies whether or not the person has decision-making capacity) to 'take such steps as are reasonably necessary and proportionate to protect others from the immediate risk of significant harm'.[228] However, it recommended there be a complementary statutory provision to authorise deprivations of liberty in an

[226] Ibid 178.
[227] Ibid.
[228] Ibid 179, citing *R (Munjaz) v Mersey Care NHS Trust* [2005] 3 WLR 793, [46].

'emergency situation', which it defined as 'one where immediate steps need to be taken to prevent serious harm to the person and it is not reasonably practicable to apply to a court for an order to authorise a deprivation of liberty, for a responsible body to determine whether to authorise arrangements under the Liberty Protection Safeguards, or to make an application for detention under the Mental Health Act'.[229]

Key points

- Wherever possible, authorisation must be sought and obtained prior to implementing any deprivation of liberty arrangements.
- If the framework permits services to make deprivation of liberty determinations in certain situations, the service should not proceed to implement the arrangements prior to review by the registration authority and/or a specified period of time has elapsed.

Questions for further consideration

- When and for how long may a person take action which deprives another person of their liberty (and be protected in respect of that action) in the case of unforeseeable emergencies?

Duration, time limits and periodic reviews

Duration of the authorisation

It is important to determine when and how an authorisation is brought to an end. To be compatible with human rights, any deprivation of liberty arrangements must apply for the shortest time possible. The authorisation for any deprivation of liberty arrangements must therefore be time-limited, set to the minimum time for which it is assessed that the person will continue to meet the criteria or to the maximum permitted duration, whichever is shorter.

If the specified duration elapses, the authorisation should automatically end unless a fresh decision is made to continue the arrangements (whether that constitutes a fresh authorisation or an extension of the initial authorisation).

The authorisation should also end if the person imposing the deprivation of liberty arrangements knows or ought reasonably to suspect that the criteria no longer apply (i.e. that the person has regained decision-making capacity and/or the arrangements are no longer necessary and proportionate). This safeguard is built into the proposed UK liberty protection safeguards.[230]

The appropriate maximum duration permitted by the framework may depend on the circumstances. For instance, where the arrangements are being imposed because of a risk to others, or where they are inconsistent with the person's wishes, there should perhaps be a shorter maximum permitted duration.

[229] Law Commission (UK), above n 27, 179.
[230] Ibid 120.

The appropriate maximum permitted duration will also depend on the way in which the periodic review processes and rights are constructed under the framework. For instance, if there is a continuous right to seek a review as well as automatic triggers for reviews in particular circumstances, then a longer maximum duration would be more acceptable. Periodic reviews are discussed further below.

As one example, the proposed UK liberty protection safeguards allow an initial authorisation of up to 12 months, a second authorisation for up to another 12 months and then any further authorisation for up to three years.[231] They also allow the responsible body to 'renew' the authorisation rather than apply afresh if they reasonably believe the criteria continue to be met and that it is 'unlikely that there will be any significant change in the person's condition during the renewal period that would affect [the assessment of the criteria]'.[232] The VLRC similarly recommended that an authorisation under its proposed collaborative mechanism could last up to 12 months initially, and could then be renewed for up to five years.[233]

Key points

- Any authorisation for a deprivation of liberty must be time limited, either to the minimum time for which it is assessed that the person will continue to meet the criteria or to the maximum permitted duration, whichever is shorter.
- The authorisation should end:
  - When the specified duration elapses;
  - If the person imposing the deprivation of liberty arrangements knows or ought to reasonably suspect that the criteria no longer apply; or
  - If it is determined that it should end following a periodic review, merits review or appeal.

Questions for further consideration

- What should be the maximum permitted duration of an authorisation? Should this vary according to the circumstances?

Periodic reviews

Article 12(4) of the CRPD requires that 'measures relating to the exercise of legal capacity… are subject to regular review by a competent, independent and impartial authority or judicial body'. Accordingly, once the decision has been made to implement arrangements that deprive a person of their liberty, it is important that they are regularly reviewed to check if they are operating as intended and if they are no longer required. Without a system of periodic reviews, the arrangements could quickly become out of date and no longer necessary, proportionate or justified.

The primary decision-maker should be responsible for conducting periodic reviews. Progress towards reductions in restrictions and the implementation of measures identified in the plan should also be examined as part of the review (see 'Plan how to reduce restrictions' above).

[231] Ibid 121.
[232] Ibid 118.
[233] VLRC, above n 1, 346-347.

The frequency of or maximum period between reviews, as well as any particular triggers for reviews, needs to be determined. The system should not rely solely on the person proactively requesting a review. The UK Law Commission proposed the following approach, which seems sensible:

> The Liberty Protection Safeguards do not require the responsible body to undertake planned reviews of an authorisation at set minimum intervals, such as at least every three months or yearly. Instead the responsible body is required to set out in the authorisation record its proposals for reviewing the authorisation of requirements. This would enable the responsible body to set out fixed dates or say that it will review it at certain intervals. Our intention is to provide sufficient flexibility to enable the frequency of reviews to match the individual circumstances of the case...
>
> In addition, the responsible body is required to review an authorisation in a number of specific cases…
>
> 1. on a reasonable request by a person with an interest in the arrangements which are authorised [which includes the person subject to the arrangements];
> 2. if the person to whom it relates becomes subject to mental health arrangements… [and]
> 4. if it becomes aware of a significant change in the person's condition or circumstances.[234]

If the review arrangements are required to be planned and documented at the time the arrangements are first imposed, the primary decision-maker should have to consider and approve these as part of the initial decision.

If the primary decision-maker is external to the person or place imposing the arrangements, there would need to be an ongoing obligation on the person imposing those arrangements to refer the matter for review whenever one of the triggers occurs or the criteria no longer appear to be met.

Guiding questions for reviews

- Are the arrangements operating as intended?
- Have they been effective in preventing a serious harm?
- Have there been any unpredicted or negative consequences?
- What are the person's current wishes?
- Have the measures identified in the plan to reduce restrictions been implemented? If not, why not?
- Is the risk of harm lower now than it was previously?
- Are the arrangements still necessary and proportionate?
- Are there any less restrictive arrangements that could be used instead?
- When should the arrangements next be reviewed?

[234] Law Commission (UK), above n 27, 124, 126.

Key points

- Periodic reviews of all deprivation of liberty arrangements should be conducted to check if they are operating as intended and if they are no longer required.
- The timing and frequency of the periodic reviews should be planned and documented as part of the initial determination, tailored to the individual circumstances of the case, and there should be a maximum period of time that can elapse between reviews.
- The person, their advocate or someone else with an interest in the person should be able to request a review at any time.
- Reviews should be automatically triggered where:
    - There is a significant change in the person's circumstances;
    - It appears that the criteria may no longer met (for instance, that the person now has decision-making capacity); or
    - The arrangements are no longer consistent with the person's wishes (if they were originally authorised through the more streamlined process on that basis).
- The person imposing the deprivation of liberty arrangements should be required to refer a matter for review if they should reasonably be aware of one of the above triggering circumstances.

Merits review, appeals and judicial oversight

Entitlements to the following additional processes, which aim to ensure the correctness of decisions, supplement the periodic reviews required to be conducted by the primary decision-maker.

Merits review

Merits review involves a fresh assessment of the criteria following an initial decision. It is important that speedy and effective merits review is available, particularly if the primary decision-maker empowered under the framework is less qualified, rigorous or independent, to ensure that correct decisions are made.

Merits reviews should be conducted by someone with greater experience and authority than the primary decision-maker. In Victoria, VCAT's Human Rights List would on balance be best placed to conduct merits reviews if the primary decision-maker under the framework was the service and/or has less authority than VCAT (see the discussion about VCAT under 'Who decides if the criteria are met?' above). If the primary decision was made by VCAT, then merits review could be conducted by a more senior VCAT member (like a rehearing of a determination under s 60C of the *Guardianship and Administration Act 1986* (Vic) or s 197 of the *Disability Act 2006* (Vic)).

The system should not rely solely on the detained person proactively seeking to challenge the decision themselves. An advocate or other person should be able to request merits review on their behalf.

Key points

- VCAT's Human Rights List should be able to conduct merits reviews of deprivation of liberty decisions made under the framework.

- If the initial decision was made by VCAT, a more senior VCAT member should conduct the merits review.
- The person, or their advocate on their behalf, should be able to request merits review.

Questions for further consideration

- Should there be any time limit on seeking merits review?
- Should merits review of any periodic review decision also be available?

Appeals and judicial oversight

Section 21(7) of the Charter requires that any person deprived of their liberty be able to apply to a court for a prompt order regarding the lawfulness of their detention. Judicial oversight of decisions made under the framework is therefore critically important.

While it is already possible for a person to seek judicial review and/or a writ of *habeas corpus* in relation to contested detention, the European Court of Human Rights has held on a number of occasions that such mechanisms are inadequate to meet the requirement in art 5(4) of the *European Convention on Human Rights*,[235] which is expressed in near-identical terms to s 21(7) of the Charter. This is because a court is only permitted to examine limited aspects of the original decision during such reviews and it cannot explore whether the circumstances which may have justified the original decision no longer exist. Therefore, the safeguard in s 21(7) of the Charter is likely to remain unfulfilled unless an appropriate mechanism to challenge the lawfulness of any deprivation of liberty under the framework is created.

Both the UK deprivation of liberty safeguards and the proposed liberty protection safeguards enable a person to challenge a deprivation of liberty authorisation in a court without having to seek permission or show, as a preliminary matter, that the matter has merit, 'reflect[ing] the importance of the right under [art 5(4)]'.[236]

Because the Victorian Charter has adopted a limited definition of 'court' which does not include any tribunals,[237] review by a tribunal such as VCAT would not protect the right in s 21(7); a court is required to conduct the hearing.

Key points

- The existing statutory right to appeal a VCAT decision on an error of law to the Supreme Court[238] should be supplemented by an express right under the framework to challenge the lawfulness (as understood in human rights law) of any deprivation of liberty in the Supreme Court.

[235] *Bournewood* [2004] ECHR 471, [140]; *X v United Kingdom* (1982) 4 EHRR 188, [58]-[59].
[236] Law Commission (UK), above n 27, 140.
[237] 'Court' 'means the Supreme Court, the County Court, the Magistrates' Court, the Children's Court or the Coroners Court': Charter s 3(1).
[238] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.

Other safeguards

As well as clear substantive criteria and procedural requirements, a range of other practical and effective safeguards are required to ensure that people's rights are adequately protected through this framework.

Advance directives

To maximise people's involvement in key decisions affecting their life and human rights, there should be provision for advance directives to be made under the framework in relation to deprivation of liberty arrangements. The *Medical Treatment Planning and Decisions Act 2016* (Vic), which provides for both instructional and values directives (see box below), provides a good model as it is likely to be difficult for a person to provide a sufficiently precise instructional directive about all possible deprivation of liberty arrangements in advance.

Advance care directives under the *Medical Treatment Planning and Decisions Act 2016* (Vic)[239]

An *instructional directive* –

- 'is an express statement in an advance care directive of a person's medical treatment decision; and
- 'takes effect as if the person who gave it has consented to, or refused the commencement or continuation of, medical treatment, as the case may be.

'Examples

'A statement that a person consents to a heart bypass operation in specified circumstances.

'A statement that a person refuses cardiopulmonary resuscitation'.[240]

A *values directive* is 'a statement in an advance care directive of a person's preferences and values as the basis on which the person would like any medical treatment decisions to be made on behalf of the person, including, but not limited to, a statement of medical treatment outcomes that the person regards as acceptable.

'Examples

"If I am unable to recognise my family and friends, and cannot communicate, I do not want any medical treatment to prolong my life."

"If a time comes when I cannot make decisions about my medical treatment, I would like to receive any life prolonging medical treatments that are beneficial. This includes receiving a medical research procedure to see if the procedure has any benefit for me."'[241]

Under the proposed UK liberty protection safeguards, as well as an advance refusal, a person could give advance consent to specified deprivation of liberty arrangements, thus obviating the need for any external authorisation of those arrangements.[242] Such advance consent would not remain valid if:

[239] See also *Medical Treatment Planning and Decisions Act 2016* (Vic) Part 2.
[240] Ibid s 6(1).
[241] Ibid s 6(2).
[242] Law Commission (UK), above n 27, 172-176.

- '[T]he person withdraws their consent when they have the capacity to do so;
- '[T]here are reasonable grounds to believe that circumstances exist which the person did not anticipate at the time of giving the advance consent and which would have affected their decision had he or she anticipated them; or
- '[T]he person does anything else clearly inconsistent with the advance consent remaining their fixed decision.'[243]

As noted above, whether advance directives should merely guide or operate to bar a conflicting authorisation under this framework, and in what circumstances (if any) they could be overridden, will require further consideration (see 'Where the decision conflicts with an advance directive or a decision of an attorney under an enduring power of attorney?' above).

Key points

- There should be provision for people to make advance instructional and values directives in relation to deprivation of liberty arrangements.

Second opinions

A person, or their advocate on their behalf, should be able to request an independent second opinion regarding whether the criteria are, or continue to be, met at any stage during an authorisation. As the contrasting experience under the *Mental Health Act 1986* (Vic) and the *Mental Health Act 2014* (Vic) shows, formally establishing a scheme for the provision of independent second opinions (such as the Second Psychiatric Opinion Service[244] in relation to compulsory mental health treatment) is important to give practical effect to the right to a second opinion, and to ensure that the second opinion provided is truly independent and has credibility in the mind of the person concerned, which in turn affects the uptake of the option.

Key points

- A person, or their advocate on their behalf, should be able to request an independent second opinion regarding whether the criteria are, or continue to be, met at any stage during an authorisation.
- A formal scheme should be established to provide independent second opinions.

Rights to independent advocacy

As noted above, advocacy is a critical safeguard in ensuring the justifiability of any deprivation of liberty arrangement. While the issue has not yet been tested in Victorian courts, the European Court of Human Rights has repeatedly emphasised that the provision of effective legal representation is part

[243] Ibid 173. In relation to the latter, one example might be 'the level of distress exhibited by the individual at the circumstances in which they now find themselves': 173.
[244] See Second Psychiatric Opinion Service, above n 187.

of the special procedural guarantees required in deprivation of liberty cases involving people of 'unsound mind':

> [T]he Court reiterates that in the context of the guarantees for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in [European] Convention terms, of an individual's deprivation of liberty, the relevant judicial proceedings need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.
>
> This implies, inter alia, that an individual confined in a psychiatric institution because of his or her mental condition should, unless there are special circumstances, actually receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement. The importance of what is at stake for him or her, taken together with the very nature of the affliction, compel this conclusion. Moreover, this does not mean that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court.
>
> Thus the Court, having constantly held that the Convention guarantees rights that are practical and effective and not theoretical and illusory, does not consider that the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, could satisfy the requirements of necessary "legal assistance" for persons confined under the head of "unsound mind", under Article 5 § 1 (e) of the Convention. This is because an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts.[245]

To that end, the UK Law Commission recommended the continued availability of non-means-tested legal aid to, 'at a minimum', be available to challenge deprivations of liberty under the proposed liberty protection safeguards.[246] The existing UK legal aid provisions already reflect this position in relation to the current deprivation of liberty safeguards.

As noted above, people should be able to appoint their own advocate, or have an independent advocate engaged for them where they are unable or have failed to make the appointment themselves, to support and advocate for them during the initial determination process and throughout the period of any authorisation under this framework (see 'Ensure an advocate is engaged' above). Specialist legal advocacy should also be available, at a minimum, to anyone who is the subject of an application for a deprivation of liberty authorisation at VCAT and to assist in any merits review or judicial challenge against an authorisation.

Legal and non-legal advocacy agencies must be adequately resourced to carry out these functions to ensure the effective operation of these safeguards in practice.

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[245] *MS v Croatia (No 2)* [2015] ECHR 196, [152]-[154] (in-text citations removed). See also *Megyeri v Germany* (1993) 15 EHRR 584 and *Winterwerp v Netherlands* (1979) 2 EHRR 387.
[246] Law Commission (UK), above n 27, 141.

Key points

- Specialist legal advocacy should be available, at a minimum, to anyone who is the subject of an application for a deprivation of liberty authorisation at VCAT and to assist in any merits review or judicial challenge against an authorisation.
- Legal and non-legal advocacy agencies must be adequately resourced to carry out their functions under the framework to ensure the effective operation of these safeguards in practice.

Complaints, investigations and oversight

As well as being able to challenge specific decisions through VCAT and the courts, there should also be provision for people, their advocates and supporters, and the registration authority to make complaints about the conduct and exercise of powers by service providers under the framework. The body receiving the complaints must be independent of the service system and have the power, authority and resources to conduct effective investigations. It should also have the power to conduct own-motion investigations and to refer matters to VCAT for determination.

If provided with appropriate resources, the Office of the Public Advocate would be well placed to take on this role, given its existing functions and responsibilities. In doing so, it would draw on the experience and expertise of the Senior Practitioner – Disability and others. Alternatively, another existing authority or a newly created body could take on the role.

If Australia proceeds to ratify OPCAT, the NPM will also play an important rights-safeguarding role through its regular, unannounced visits to places of detention, including places where this framework may be used. Unlike other oversight mechanisms which react to complaints, the NPM would take a preventative approach and seek to address problems through regular dialogue with detention authorities,[247] thus complementing rather than replacing existing oversight mechanisms.

Key points

- An appropriate body should be authorised to receive and investigate complaints relating to the conduct and exercise of powers by service providers under the framework, to conduct own-motion investigations and to refer matters to VCAT.
- Oversight mechanisms must be empowered and adequately resourced to ensure effective rights protection in practice.

Questions for further consideration

- What authority should be the complaints body in relation to the framework?

[247] Australian Human Rights Commission, *OPCAT in Australia: Consultation Paper* (2017) 5.

Civil and criminal sanctions

A number of civil and criminal sanctions already exist to deter and hold to account anyone who unlawfully deprives a person of their liberty, for instance the tort of false imprisonment, the common law offence of false imprisonment and the statutory offence of detaining a person with an intellectual disability outside the provisions of Part 8 of the *Disability Act 2006* (Vic),[248] as well as various offences relating to assault, ill treatment and neglect. To date, these have not been widely used or effective at minimising unauthorised deprivations of liberty of people with disability in social care settings. Consideration should therefore be given to establishing new offences and/or causes of action under this framework, as well as more assertive detection and prosecution efforts, to better ensure the protection of people's rights.

In its recent review, the UK Law Commission considered but refrained from recommending a new criminal offence of unlawful deprivation of liberty. They concluded that the existing crime of false imprisonment is a 'sufficient criminal sanction for the more serious cases of deprivations of liberty',[249] and noted that remedies can also be sought under the *Human Rights Act 1998* (UK) for breaches of the rights to liberty and privacy/autonomy (including arbitrary deprivations of liberty and failures to apply the required safeguards) whenever there is direct State involvement.[250] However, because actions under the *Human Rights Act 1998* (UK) could not be brought against private care providers, the Law Commission recommended that a person should be able to bring civil proceedings against the managers of private care homes or hospitals when arrangements giving rise to a deprivation of liberty have been put in place and have not been authorised under any law or by an order of a court,[251] thus mirroring the action that can be taken against public authorities under the *Human Rights Act 1998* (UK). The Law Commission considered that this was required to close a gap in existing protections because the tort of false imprisonment is insufficiently broad to protect the rights of people who do not express or manifest a desire to leave their accommodation or are not aware that they would be prevented from leaving if they attempted to do.[252]

Given the Victorian Charter does not (yet) provide for any direct cause of action in respect of breaches of the rights it protects,[253] the creation of a similar cause of action to that recommended by the UK Law Commission, but more broadly applicable, would be desirable.

Key points

- Unlawful detention should punished and deterred through criminal prosecutions where appropriate.
- A person should be able to bring civil proceedings against anyone responsible for implementing arrangements which give rise to a deprivation of liberty but which have not been authorised under this framework or another law or by an order of a court.

[248] *Disability Act 2006* (Vic) s 150A.
[249] Law Commission (UK), above n 27, 181.
[250] Ibid.
[251] Ibid 183.
[252] Ibid 181.
[253] The creation of such a cause of action was recommended following a review of the Charter: Michael Brett Young, *From Commitment to Culture - The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) viii.

Next steps: path to reform

Even once the details of the authorisation framework have been settled, the following would need to occur in order for it to be implemented:

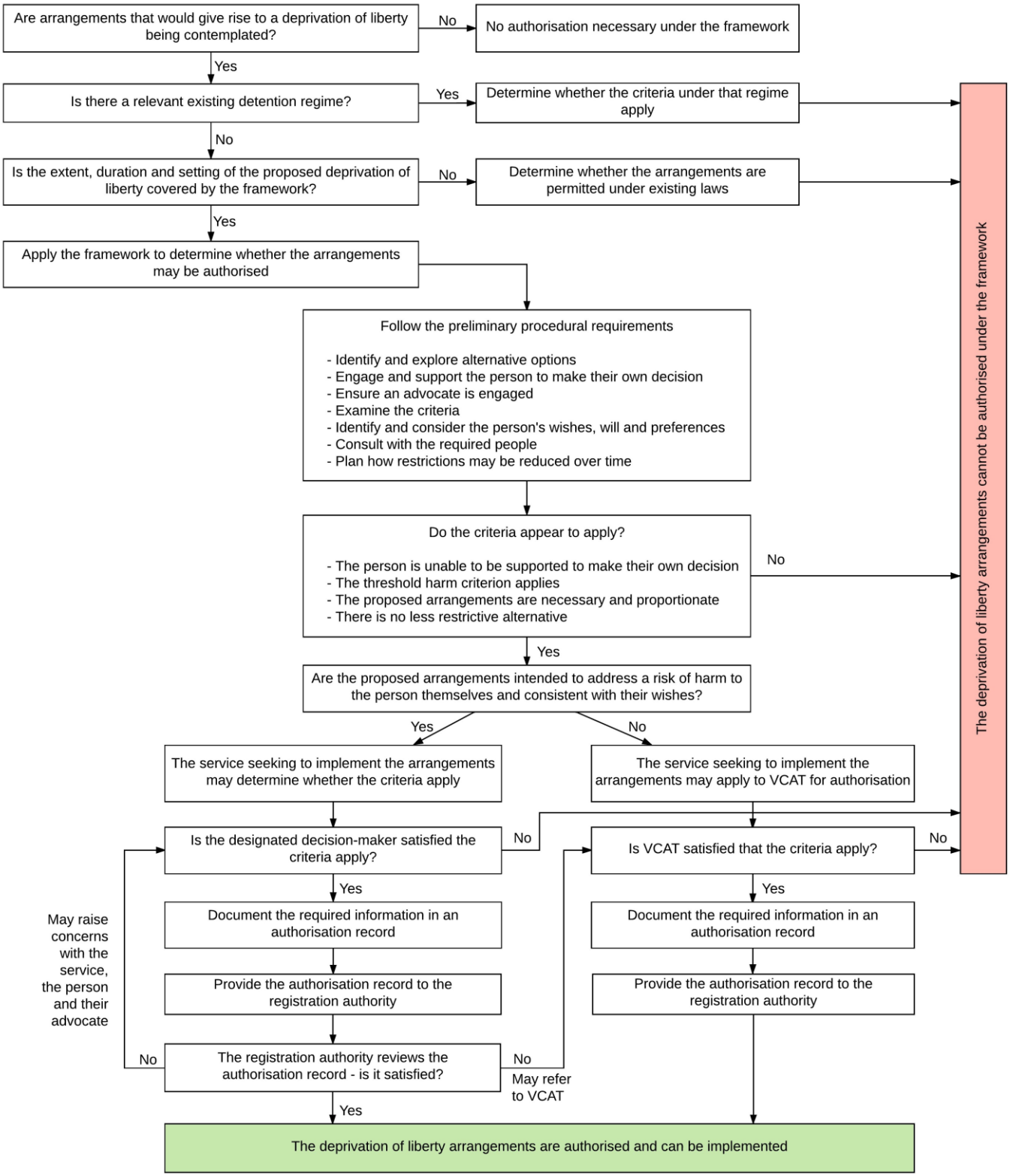
- The drafting and passage of legislation;
- Increased availability of decision-making supports;
- Funding of independent legal and non-legal advocacy organisations;
- Establishment and/or empowerment, and funding, for the registration authority, complaints body and other oversight mechanisms; and
- Education, training and resources (including practice guides) to ensure attitudinal and practice change by services and the community more broadly.

This discussion paper and the reform proposals it contains are of course just one small piece of a much larger puzzle that must be completed in order to properly protect the rights and dignity of people with disabilities detained in social care settings. The other required pieces include:

- Adequate funding for, and the provision of, supports and accommodations necessary to enable people with disabilities to exercise their rights, to live and participate in the community on an equal basis with others and to reduce purported justifications for deprivations of liberty;
- Development and funding of more innovative approaches to care and support that would significantly reduce the need for deprivations of liberty to occur at all;[254]
- Greater uptake of advance directives and other mechanisms which maximise people's control and involvement in decision-making; and
- Stronger mechanisms to prevent, detect and punish unauthorised restrictions, violence, abuse and neglect that occurs towards people with disabilities, especially in closed environments.

[254] Williams, Chesterman and Laufer, above n 4, 642.

Appendix: Flowchart of the proposed deprivation of liberty authorisation framework



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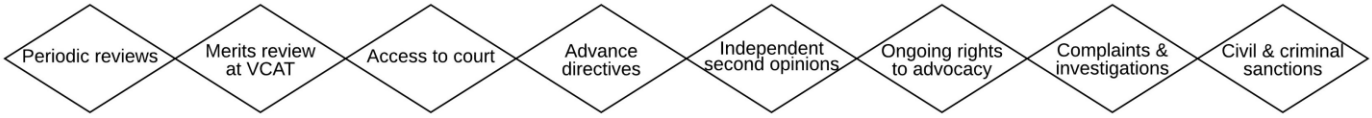

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