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Consumer Transactions: Equitable Support Models for Individuals with Decision-making Impairments

A Pilot Study

Consumer Transactions: Equitable Support Models for Individuals with Decision-making Impairments

A pilot study supported by the
Melbourne Social Equity Institute
and the Melbourne Law School
Major Collaborative Fund Project

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Introduction

This report is based on a pilot study carried out at the University of Melbourne in 2016 as part of a larger program of research funded by the Melbourne Law School Major Collaborative Project Fund. The report is set out in four parts: (i) context of the research; (ii) literature review; (iii) overview of the pilot study and (iv) summary and conclusions.

The pilot study was facilitated by the Melbourne Social Equity Institute, in collaboration with Mind Australia (a community mental health support service) and Scope Australia (a disability service provider). The pilot study was guided by an expert Advisory Board, including representatives from:

- Australian Communications Consumer Action Network,
- Australian Federation of Disability Organisations,
- Carers Victoria,
- Consumer Action Law Centre,
- Office of the Public Advocate (Victoria),
- Telecommunications Industry Ombudsman, and
- Victoria Legal Aid

The primary objectives of the pilot study were to:

- establish what supports individuals with decision-making impairments need when participating in consumer transactions, and
- identify which support models may assist them to engage more equitably in consumer transactions across four industry sectors — finance, telecommunications, insurance, and utilities.

The aim of the overall program of research is to build expertise and tools for wider industry participation in supporting people with decision-making impairments to be fully included in society as economic actors.

1. Context of the Research

Individuals with disabilities encounter unique challenges in their lives compared to individuals without disabilities. For individuals with intellectual impairments,¹ challenges may arise due to impairment with executive functioning which regulates the ability to learn, interpret, plan, solve problems and make decisions.² Individuals with mental impairments may experience significant disturbance of thought, mood, perception or memory.³

Individuals with mental and intellectual impairments may also experience socioeconomic disadvantages, such as being unemployed or on low income, having a low education level, living in public housing, and relying on social welfare.⁴ Further, they may not be able to fully participate in society because of discrimination and the lack of accommodation by society to their needs. These individuals may therefore be conceptualised as vulnerable or disadvantaged consumers not only because of the challenges they face relating to a specific disability (the “personal dimension”), but also due to the structural obstacles created by society which limit their access to opportunities and resources (in the consumer context this may be referred to as the “market dimension”).

Entering into a contract to enable access to the internet or a mobile phone are examples of consumer transactions that have become

1 Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which opened for signature 30 March 2007, 2515 UNTS 3 and entered into force 3 May 2008 states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”. The research team acknowledges that language in this field is important and contested. For the purposes of this report, the term “persons with mental and intellectual impairments” will be used to reflect the language of the CRPD and “persons with decision-making impairments” will be used when referring to the specific group of people that experiences barriers to decision-making.

2 Lynn Meltzer, ‘Executive Function: Theoretical and Conceptual Frameworks’ in Meltzer Lynn (ed), *Executive Function in Education: From Theory to Practice* (New York, Guilford Press, 2007) 1, 1–3; Australian Institute of Health and Welfare, *Australia’s Health 2008 – The Eleventh Biennial Health Report of the Australian Institute of Health and Welfare* (2008) 37–8.

3 See, eg, the definition of mental illness set out in mental health legislation such as s 4 of the *Mental Health Act 2014* (Vic).

4 Louis Schetzer and Judith Henderson, *Access to Justice and Legal Needs – A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW: Stage 1: Public Consultations* (2003, Law and Justice Foundation of New South Wales) xv–xvi.

an essential part of daily living. However, there is evidence that individuals with mental and intellectual impairments experience marginalisation and financial stress at a dramatically higher rate than other Australians.⁵ Difficulties with memory, problem solving and attention may increase the likelihood of individuals exercising poor judgment when entering into a contract. In some cases, this can lead to them signing contracts they do not understand or cannot fulfil. They may also exhibit a greater vulnerability to “pressure selling” techniques and a lack of understanding and ability to enforce their consumer rights. This project seeks to consider how to support people who may be at risk in consumer transactions.

In 2008, Australia ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Article 12 (5) of the CRPD requires States Parties to take “all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property”. Such measures may be both interpersonal (for example, through the aid of a support person) and technological (for example, through assistive communication technology) in nature.⁶ Ensuring that individuals have adequate support to engage in decision-making is therefore central to Australia’s obligations under the CRPD. However, challenges remain in relation to implementing such measures.⁷

In 2014, the Australian Law Reform Commission (ALRC) in its inquiry into *Equality, Capacity and Disability in Commonwealth Laws* identified consumer laws as an area that needed further consideration as to how best to ensure that individuals with mental and intellectual impairments are not denied equal access

5 Price Waterhouse Coopers, *Disability Expectations: Investing in a Better Life, a Stronger Australia* (November 2011) 11–12.

6 Michael Bach, *Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities – Questions and Challenges* (3 November 2007, Presentation to the Conference on Legal Capacity and Supported Decision Making Parents’ Committee of Inclusion, Athlone (Ireland)) 3.

7 See, eg, Australian Supported Decision Making Network, *Calling for Development of a National Supported Decision Making Framework* (April 2016, Discussion Paper).

to goods or services.⁸The exercise of consumer choice as a market model is central to the new National Disability Insurance Scheme (NDIS), which will shape disability support services in the coming years in Australia. The NDIS is currently being rolled out across Australia, providing individualised funding packages to persons with disabilities enabling them to identify their support needs and decide on the allocation of individualised funding packages. This makes it ever the more relevant that the experience of consumers with mental and intellectual impairments regarding their decision-making is examined in the Australian context through evidence-based methods of inquiry.

The Australian Competition and Consumer Commission (ACCC) posits that “businesses need to act *responsibly* ... to ensure that no unfair advantage is taken”⁹ of consumers who may not have the ability to make an informed decision without assistance. To improve protection for persons with disabilities entering into contracts, the National Association of Community Legal Centres recommends that companies should be required to ensure that consumers have the ability to fulfil the terms of contracts.¹⁰

The traditional legal response to those who experience challenges in decision-making, and thus barriers to exercising their legal capacity, has focused on substitute decision-making. This form of decision-making permits a third party, such as a guardian or administrator, to manage property and financial related matters for the individual. Under guardianship and administration laws, consideration is given to the wishes of the individual. However, those perceived to be unable to make decisions independently are often not provided with any additional supports they need to engage in the decision-making process and their preferences and wishes may be overlooked.

Substitute decision-making has been challenged in light of the CRPD. For example, the United Nations Committee on the Rights of Persons with Disabilities has called for replacement of guardianship systems with Supported Decision-Making (SDM)

8 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (2014, Report No 124).

9 Australian Competition and Consumer Commission, *Business Snapshot: Don't Take Advantage of Disadvantage — A Compliance Guide for Businesses Dealing with Disadvantaged or Vulnerable Consumers* (2011) 1 (emphasis added).

10 National Association of Community Legal Centres, Submission No 78 to the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) 9.

— whereby individuals are assisted to make decisions with the support of others.¹¹ The United Nations Handbook on the CRPD states that:

Supported decision-making can take many forms. Those assisting a person may communicate the individual's intentions to others or help him/her understand the choices at hand. They may help others to realize that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.¹²

Support may include informal supports which most individuals typically use (such as family and friends), as well as more formal and structured methods. The central tenet underlying SDM is not that individuals are either capable or incapable of making decisions, but rather that they can make their own decisions with the appropriate support.

Support may be provided to enable individuals to find and process information, express what they want, and communicate their decisions. A number of projects are currently exploring SDM models in Australia. For example, research on SDM models and individuals within the mental health system is currently being conducted by researchers at Monash University and the University of Melbourne, as part of an Australian Research Council Linkage project.¹³ There is also a project supported by the Melbourne Social Equity Institute trialling supports for accused persons who may be found unfit to plead.¹⁴ However, a gap exists in knowledge regarding the role of SDM and consumer transactions in Australia.

11 Committee on the Rights of Persons with Disabilities, General Comment on Article 12: Equal Recognition before the Law, 11th sess, UN Doc CRPD/C/11/4 (25 November 2013) [25].

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

13 Renata Kokanovic, Bernadette McSherry, Helen Herrman and Lisa Brophy, *Australian Research Council Linkage Grant — Supported Decision Making for People with Severe Mental Health Problems* (2014–2016).

14 Bernadette McSherry, Kerry Arabena, Eileen Baldry, Anna Arstein-Kerslake and Piers Gooding, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (October 2015 – October 2017). This project is jointly funded by Commonwealth, state and territory governments under the National Disability Special Account, administered by the Department of Social Services on behalf of the Commonwealth, state and territory Research and Data Working Group.

2. Literature Review

This literature review is set out in two parts. Part One examines emerging research on Supported Decision-Making, both internationally and in Australia. Part Two outlines current knowledge regarding the challenges consumers with mental and intellectual impairments face, including an overview of relevant contract and consumer protection legislation.

Part One – Supported Decision-Making

From Substitute Decision-Making to Supported Decision-Making

Historically, it has been assumed that persons with mental and intellectual impairments do not have the “mental capacity”¹⁵ to make decisions for themselves. This view is reflected in mental capacity/incapacity laws which have developed in certain countries over the past twenty years, including the *Mental Capacity Act 2005* in England and Wales and the *Adults with Incapacity Act 2000* in Scotland. In Australia, law reforms in some states and territories have also included a lack of capacity to consent to treatment as a criterion for compulsory treatment under mental health legislation.¹⁶ Guardianship laws have also traditionally been based on notions of a lack of mental capacity and appointing substitute decision-makers to act in the “best interests” of those considered unable to make their own decisions.¹⁷

The concept of mental capacity has been viewed as an absolute one, meaning that the person either has capacity or does not. In the context of the latter, a tribunal and/or psychiatrist under mental health laws or a guardian under guardianship laws may make decisions on behalf of the individual. The impact of such determinations can be severe given that the individual no longer holds legal authority to make decisions.

With the growth of the disability rights movement, attention has

¹⁵ Mental capacity differs from legal capacity. On this, see Bernadette McSherry, ‘Legal Capacity under the Convention on the Rights of Persons with Disabilities’ (2012) 20 *Journal of Law and Medicine* 22–27.

¹⁶ See, eg, *Mental Health Act 2016* (Qld) ss 12(1)(b), 18(1), (3); *Mental Health Act 2013* (Tas) s 40(e); *Mental Health Act 2014* (WA) s 25(c).

¹⁷ Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Sydney Federation Press, 1997).

shifted away from the deficits based model of substitute decision-making to a recognition that with adequate and appropriate support, persons with mental and intellectual impairments are able to retain their autonomy and engage in a more equitable decision-making process than was traditionally the case. A predominant driver of this shift has been the CRPD which highlights the importance of upholding the rights of persons with disabilities, including the exercise of their legal capacity. The CRPD is based on the presumption that decision-making is central to the social inclusion and empowerment of persons with disabilities.

Article 12 of the CRPD sets out that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”¹⁸ As such, “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”¹⁹

What Is Supported Decision-Making?

Supported Decision-Making (SDM) is a relatively new framework for supporting people to make significant decisions and to exercise their legal capacity. The approach derives from the “social model of disability”, which emphasises the role that society plays in creating those barriers which jeopardise the equitable participation in decision-making of persons with disabilities. It is based on the notion that “no person should have another person appointed to make a decision on their behalf, if they could make the decision themselves with assistance and support.”²⁰ Hence, autonomy is the central principle that underpins SDM models.

Commonly most people seek out support to make decisions in their day-to-day lives; they draw on their family members, friends, colleagues, and professionals to obtain opinions and advice on the best or wisest option. Hence SDM merely recognises what is a widely-utilised, everyday process.²¹ When compared to substitute

18 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(1).

19 *Ibid* art 12(3).

20 Dianne Chartres and John Brayley, Submission to the Productivity Commission, *Inquiry into Disability Care and Support* (August 2010) [2].

21 Terry Carney, ‘Participation, Rights, Family-Decisionmaking and Service Access: A Role for Law?’ (2012) No 12 *Legal Studies Research Paper* (Sydney University Law School) 4.

decision-making, SDM possesses two distinct differences.

- First, when individuals have been supported to make decisions, it means that they have received help to make relevant decisions themselves, rather than decisions being made on their behalf by someone else.
- Secondly, SDM allows individuals to retain legal authority to make decisions, instead of other persons (such as guardians) being granted responsibility under legislation to make decisions for them.

SDM does not have one precise meaning; rather there is a range of approaches that can be taken. Traditionally SDM involves individuals receiving support from others to consider, weigh up alternatives and make specific decisions. During this process the supported person retains his or her right to make decisions and is supported to exercise this right.²² A common SDM model is referred to as a “support circle”.²³ This circle involves family members, friends, or those who are close to the individual providing support for the individual to interpret and make decisions. Members of the circle have an intimate understanding of the supported individuals’ circumstances, including their life history, the nature and impact of their disability, and their preferences and wishes — a relationship of reciprocal trust and respect is therefore intrinsic to this approach.

Types of Support

There are a number of different types of support that can be provided. Michael Bach and Lana Kerzner suggest that there are three main types of support which are required to meet the CRPD requirements.²⁴ These are support to assist individuals to explore the choices available to them and to make decisions; support to engage, where and if required, with other parties to give effect to decisions; and support to act on decisions and fulfil any obligations made. Bach and Kerzner further specify

22 Terry Carney and Fleur Beaupert, ‘Public and Private Bricolage — Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making’ (2013) 36 *University of New South Wales Law Journal* 175–201.

23 Jo Watson, ‘Supported Decision Making: Are Everyone’s Voices Being Heard?’ (2013) Paper presented at the Supported Decision Making: From Theory to Practice Conference, Victoria University).

24 Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (October 2010) Paper prepared for the Law Commission of Ontario) <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>.

that person-centred planning, representation support, advocacy, communication support, support to interpret, and administrative support are useful.

The support provided through SDM models can take many forms, including support to understand options and consequences, providing information in plain language, or providing extra time for the individual to make decisions. The degree of support will of course differ across individuals depending on their decision-making impairments. For people with significant support needs, intensive support may be necessary. Support may focus on interpretation and communication. It may include gathering and obtaining information for individuals, explaining it to them, helping them to understand the consequences of decisions and assisting them to communicate their preferences.

Benefits and Limitations

Research on implementation and impact is limited with few evaluations of SDM. The following is a brief overview of the main literature.

Benefits

From the limited reference material available, a number of potential benefits of SDM models have been identified. In a South Australian trial of SDM, there were specific benefits to most of the participants, including increased confidence in decision-making.²⁵ Many reported that they felt more in control of their lives than before they received support. Participants increased their engagement with the community, expanded their options, and made decisions that changed their circumstances.

Terry Carney argues that SDM may prevent informal substitute decision-making occurring.²⁶ This was the case in the South Australian trial where some participants sought formal decision-making support arrangements to prevent family and friends from taking over their life.²⁷

Because SDM has the potential to enable a person to retain his

25 Margaret Wallace, *Evaluation of the Supported Decision Making Project* (November 2012), Report prepared for the Office of the Public Advocate South Australia.

26 Terry Carney, 'Guardianship, "Social" Citizenship & Theorising Substitute Decision-Making Law' in I Doron and A Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Heidelberg, Springer, 2012) 1–17.

27 Wallace, above n 25.

or her legal capacity, it also means a person's autonomy and capacity for self-determination can be protected.²⁸ SDM may offer protection from vulnerability born from isolation by placing emphasis on mutual, trusting relationships. It may also provide individuals with a sense of empowerment.

A research project commissioned by Scope found that "[p]articipants saw supported decision making as a break from philosophies of the past where people with cognitive disability had not been perceived to have rights or the capacity to make or be involved with decision making".²⁹

Limitations

The limitations of SDM include that it can be highly resource intensive, which may prohibit its uptake. There is a lack of training and large workloads within service providers, limiting their ability to commit to the model.³⁰ Formalising and legislating SDM may mean that pre-existing informal arrangements are shunned in favour of expensive, complex and resource intensive models.

There are also concerns about net widening by creating what has been referred to as a "de facto" guardianship system which potentially extends to a broader cohort of the population than would be subjected to guardianship legislation.³¹

Michelle Browning conducted research on SDM in Canada and the United Kingdom as a Churchill Fellow.³² Browning's research discovered that new legislative agreements, such as Representation Agreements in British Columbia, were not often accessed because the individuals who might benefit from such an arrangement did not have suitable persons available to perform this role. In Alberta there was no register of SDM authorisation

28 Office of the Public Advocate South Australia, *Annual Report 2012* (2013) 54.

29 Christine Bigby, Mary Whiteside and Jacinta Douglas, 'Supporting People with Cognitive Disabilities in Decision Making — Processes and Dilemmas' (2015, La Trobe University, Melbourne) 21. Note that this research was commissioned by Scope Australia for the project *Supported Decision Making and Guardianship: Building Capacity within Victoria*.

30 Christine Bigby, Barbara Bowers and Ruth Webber, 'Planning and Decision Making about the Future Care of Older Group Home Residents and Transition to Residential Aged Care' (2011) 55 *Journal of Intellectual Disability Research* 777.

31 Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2013) 117 *Penn State Law Review* 1111, 1112.

32 For the full report see https://www.churchilltrust.com.au/media/fellows/Browning_Michelle_2010.pdf

which made it difficult for Browning to determine the success of the model.

Trials of Supported Decision-Making in Australia

Victoria: The Office of the Public Advocate conducted a SDM trial in 2014.³³ The project recruited 18 volunteers and 18 participants. Participants had the opportunity to use SDM agreements and volunteers provided assistance to them. The Victorian trial produced many positive outcomes and benefits for both participants and volunteers. The outcomes were used in the development of educational material for the new “supportive attorney” legislation enacted in the *Powers of Attorney Act 2014*.

Currently a trial of SDM for accused persons deemed unfit to stand trial is being conducted by researchers supported by the Melbourne Social Equity Institute. In conjunction with community legal centres in the Northern Territory and New South Wales, lawyers have currently been trained as “supporters” to help ensure accused persons understand the case against them, the legal processes, and the significance and consequences of decisions.

Queensland: The Office of the Public Advocate is currently examining the provision of SDM to adults with impaired decision-making capacity that interact with the Queensland guardianship system. The trial aims to uncover the systemic barriers and enablers in relation to protecting and supporting the right of a person to make their own decisions.

South Australia: South Australia was the first Australian state to embark on a SDM trial. The South Australian Office of the Public Advocate conducted the trial from late December 2010. It involved setting up an agreement between a person with disability and a family member or friend who would act as a decision supporter. Twenty-six people participated in the study whose capacity for decision-making was impaired as a result of a brain injury, intellectual disability, autism or a neurological disease. An evaluation of the trial was conducted by Margaret Wallace in 2012 and revealed that the project demonstrated specific benefits to most of the participants involved.³⁴ In 2013,

33 For the full report of the trial see <http://www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making>

34 Wallace, above n 25.

the South Australian Office of the Public Advocate recommended that state guardianship law recognise SDM agreements.

Australian Capital Territory (ACT): The ACT Supported Decision-Making Research Project was conducted by the ACT Disability, Aged and Carer Advocacy Service to examine SDM in the lead up to the launch of the NDIS. It explored the application of the SDM model developed by the South Australian Office of the Public Advocate. Six people with varying degrees of decision-making capacity were recruited between November 2012 and January 2013 to participate in the program until its completion in June 2013. A key finding from the trial was that, for each participant, his or her capacity for self-determination and autonomy was not limited by his or her ability to make a decision, but by the support received to make decisions. The research indicated that people implemented their strategies more successfully in more supportive environments.

New South Wales (NSW): The NSW Office of Ageing, Disability and Home Care, the Public Guardian, and the NSW Trustee and Guardian commenced a supported decision-making pilot in 2013.³⁵ An evaluation does not appear to be publicly available. In July 2015, a four-year project commenced to develop an educational program that trains people to provide decision-making support. The aim of the program is to determine whether the support provided results in better outcomes for the person who requires decision-making assistance. The research is led by La Trobe University and is funded by an Australian Research Council Linkage Grant.

International Legislation and Approaches to Supported Decision-Making

Canada: Models for SDM were enacted in a number of provinces several years before the CRPD came into force, specifically responding to the needs of individuals with intellectual impairments. Relevant legislation includes: Section 6(1) of the *Vulnerable Persons Living with a Mental Disability Act 1993* of Manitoba (defines SDM); the *Representation Agreement Act 1996* of British Columbia (allows persons to make arrangements for supporters to assist with interacting with service providers, companies etc.); in Saskatchewan *The Adult Guardianship and*

³⁵ For more information on the supported decision-making pilot see https://www.adhc.nsw.gov.au/__data/assets/file/0003/279039/SDMP_fact_sheet_Oct2013.pdf

Co-decision Making Act 2001 (provides for both personal and property co-decision-makers); the *Decision Making, Support and Protection to Adults Act 2003* in Yukon; and the *Alberta Adult Guardianship and Trusteeship Act 2008* (includes both supported and co-decision-making arrangements).

England and Wales: Under the *Mental Capacity Act 2005*, community based advocates can support decision-making by those with disabilities.

Ireland: The *Assisted Decision-Making (Capacity) Act 2015* outlines six mechanisms for supporting decision-making for a person, including: co-decision-making; decision-making representatives; assisted decision-making; decision-making orders by the circuit or high courts; enduring powers of attorney; and informal decision-makers.

Europe: In several European countries, unique alternatives to guardianship exist. For example, in Sweden two forms of support exist: (i) the god man (meaning “mentor”); and (ii) a trustee — a last resort measure similar to a guardian. There is also an option of a personal ombudsman for those with mental impairments.³⁶ The god man model is most similar to the concept of SDM in that there is no loss of legal capacity experienced by the supported person and god men are typically close friends or family. Similarly, in Denmark and Norway, legislation originating in the 1990s provides for a “support person” to assist adults with a disability to make decisions regarding their personal needs.

Part Two — Consumers with Decision-Making Impairments and the Law

Currently, many barriers exist that may prevent consumers with decision-making impairments from having equal access and equal opportunities in the marketplace. One barrier may be difficulties in understanding and engaging in the process of contracting due to personal circumstances (such as, difficulty understanding abstract contracts, difficulty in reading and communicating, lack of concentration). These hurdles are compounded when consumers are faced with unduly harsh or complex contract terms and also when the underlying transaction itself involves

³⁶ See generally <http://www.right-to-decide.eu/2014/08/swedish-personal-ombudsman-service-po-for-people-with-mental-health-problems/>

complex concepts or multiple choices (eg, credit cards, mobile and internet packages).³⁷

There is thus a need to support consumers with decision-making impairments. However, there is a fine line to be drawn between ensuring consumers are protected by law and ensuring that those protections do not infringe their rights and still allow them to experience risk. As Griggs writes, “[j]ust at what point should the law step in, and if we intervene too early, are we marginalising or segmenting a group that may not want to be managed in this way?”³⁸

This part seeks to provide an overview of the relevant law and in particular seeks to highlight that the current law is individualised and reactive, rather than systematic and proactive.

Australia’s Consumer Protection Regime

Protection for consumers is provided primarily through the *Australian Consumer Law (ACL)*,³⁹ and also, for financial services, the *Australian Securities and Investments Commission Act (ASIC Act)*.⁴⁰ Consumers with cognitive impairments benefit from the protections in the ACL, including the prohibitions on misleading conduct⁴¹ and unfair contract terms,⁴² and also the consumer guarantees of quality in the supply of goods and services.⁴³ There are also a range of protections for vulnerable consumers against exploitation and advantage taking under both the general (judge made) law and statutes such as the ACL.⁴⁴ For example:

- *Capacity* is a common law doctrine that may protect vulnerable consumers who enter into contracts they did not choose or understand.
- *Non est factum* is a common law basis for setting aside a transaction entered into by consumers who are unable to read owing to blindness or illiteracy.

37 See Jeannie Marie Paterson, ‘Consumer Contracting in the Age of the Digital Natives’ (2011) 27 *Journal of Contract Law* 152.

38 Lynden Griggs, ‘The Consumer with an Intellectual Disability — Do We Respond, if so, How?’ (2013) 21 *Competition & Consumer Law Journal* 146, 146.

39 *Competition and Consumer Act 2010* (Cth) sch 2.

40 *2001* (Cth).

41 *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

42 *Ibid* sch 2 pt 3-2.

43 *Ibid* sch 2 pt 2-3.

44 Jeannie Marie Paterson, ‘Unconscionable Bargains in Equity and under Statute’ (2015) 9 *Journal of Equity* 188.

- *Undue influence* is concerned with a relationship of influence that affects a dependent party's mind and judgment in entering into the contract.
- *Unfair practices* such as the use of physical force, undue harassment or coercion by a trader in connection with the supply of goods or services or payment for those goods or services are prohibited under s 50 of the ACL.

While these rules and provisions will protect consumers who have been exploited, it is not clear that they provide strong incentives to better conduct by traders in dealing with consumer with intellectual impairments. They are dependent on knowledge and provide little by way of guidance to the desirable proactive response.⁴⁵ In this sense they are individualised and reactive rather than systemic and proactive. This ensures flexibility in the legal response to vulnerable consumers who have entered into a contract without adequate consent but does not necessarily prompt the development of appropriate industry wide support for the marginalised and vulnerable consumers entering into everyday but nonetheless complex transactions.

There are some relevant initiatives.⁴⁶ For example, the Telecommunications Consumer Protections Code (TCP Code), made pursuant to the *Telecommunications Consumer Protection and Service Standards Act* s 112,⁴⁷ requires consumers to be provided with salient information about the products they are purchasing⁴⁸ and ensures that consumers are given access to the contracts for those products before the time of purchase.⁴⁹ The TCP Code also promotes "transparency" in the terms of the contracts for telecommunications products⁵⁰ by requiring standard form consumer contracts for telecommunications products to be provided in a format that is easy for consumers to

45 See Jeannie Marie Paterson, 'Knowledge and Neglect in Asset Based Lending: When is it Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay' (2009) 20 *Journal of Banking and Finance Law and Practice* 18.

46 See generally Jeannie Marie Paterson and Jonathan Gadir 'Looking at the Fine Print' (2013) 37 *The University of Western Australia Law Review* 45.

47 1997 (Cth). The TCP Code in its current form was registered by the Australian Communications and Media Authority on 1 September 2012.

48 TCP Code r 4.1.2–4.1.3.

49 Ibid r 4.5.1.

50 Ibid rr 4.1.1(b), 4.5.2. Transparency is also a factor to consider in assessing whether a term is unfair under the test for an unfair term set out in the ACL, see *Competition and Consumer Act 2010* (Cth) sch 2 pt 2-3 s 24(3).

navigate,⁵¹ clearly presented,⁵² and expressed in plain language.⁵³ Nonetheless these protections are not specially directed at vulnerable consumers such as those with cognitive impairments. Arguably what is needed is a change in contracting practices.

Access to Redress

Access to justice in vindicating consumer claims may prove a hurdle for many consumers, but particularly consumers who experience multiple disadvantages. There are many important protections in the ACL protecting consumers purchasing goods and services - but it is not clear how consumers with decision-making impairments can assert those rights. This group of consumers are unlikely to go to court over what are ultimately relatively small value claims, as compared to the cost of litigation.

Navigating even the relative informality of the tribunal system available to resolve consumer disputes requires quite considerable literacy, communication and organisational skills, which may present an almost impenetrable hurdle for many vulnerable consumers, and especially consumers with mental and intellectual impairments. Any conversation about access to justice must include consideration of the types of advocacy and support services that may better facilitate access to dispute resolution by consumers "at the margin". It is of vital importance to understand how consumers with mental and intellectual impairments currently interact with a process of mediation and hearings offered by consumer tribunals, and what types of process might be utilised to support this group of consumers in asserting their rights under the ACL.

Supporting Consumers with Decision-Making Impairments

There is now increasing emphasis being placed on the need to support consumers with decision-making impairments in relation to financial and other dealings. For example, the Victorian Law Reform Commission has referred to the need for some consumers to be assisted in "their dealings with organisations such as banks, utility and other service providers, and government agencies".⁵⁴

51 TCP Code r 4.5.1.

52 Ibid rr 4.1.1(b), 4.5.2(b).

53 Ibid r 4.5.2(a).

54 Victorian Law Reform Commission, *Guardianship: Final Report 24* (2012) 142 [8.109]

The Australian Law Reform Commission recommended that in relation to financial transactions:

The Australian Bankers' Association should encourage banks to recognise supported decision-making. To this end, the ABA should issue guidelines... recognising that:

- a. customers should be presumed to have the ability to make decisions about access to banking services;
- b. customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;
- c. customers are entitled to support in making and communicating decisions; and
- d. banks should recognise supporters and respond to their requests, consistent with other legal duties.⁵⁵

It would seem that there will be an increasing emphasis on law reform in relation to consumer transactions as CRPD obligations are implemented.

⁵⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (2014), Report No 124, 152.

3. The Pilot Study

Purpose and Aims

The purpose of the pilot study was to explore the challenges that individuals with decision-making impairments encounter when they engage in consumer transactions. The research team set out to gauge the viability of SDM in relation to transactions occurring in the finance, telecommunications, insurance, and utilities industries.

The pilot study aimed to:

1. Identify the support needs of individuals with decision-making impairments regarding consumer transactions; and
2. Identify support models to address those needs.

The key research questions underpinning the study were:

1. What supports are needed to ensure more equitable engagement in consumer transactions than is currently the case for individuals with decision-making impairments?
2. How can these supports be implemented in practice?

The findings from this project, centred in Victoria, will be used to develop an application for major external funding for an Australia-wide project. Both this pilot project and the larger programme of research will help address Australia's obligations under International Human Rights Law, particularly under the CRPD.

Impact

The potential benefits of the pilot study include:

- A better understanding of the needs of individuals with decision-making impairments in relation to consumer transactions.
- Providing individuals with decision-making impairments the opportunity to influence service reform.
- Helping to establish support models which will enable

individuals with decision-making impairments to be fully included as economic actors.

- Aiding consumers with decision-making impairments to understand contractual obligations and associated risks.
- Encouraging service providers to ensure their contracting practices are socially responsible and cost-effective. This will help businesses with the costly issue of consumers with decision-making impairments entering into unsuitable contracts which they cannot fulfil.
- Building expertise and tools for wider industry participation in supporting people with decision-making impairments. This may include providing a training package or framework to service providers.
- Informing the implementation of models of equitable support which could potentially transform the consumer experience of individuals with disabilities on a larger scale.

Method

The qualitative research design focused on giving voice to individuals with decision-making impairments, in line with recovery principles that include giving recognition to people being experts through lived experience.⁵⁶ This was achieved through the involvement of individuals with mental and intellectual impairments as participants in the project, as well as on the advisory board. A consumer liaison representative within Mind Australia also provided advice on the research process and materials, as well as assisting with recruitment. These modes of involvement facilitated discussion, feedback and advice regarding project planning, development of the interview schedule, review of the plain language statements (PLS), and the recruitment flyer. The research included participatory research methods and tools to enable the active role of people likely to be affected by the research and its findings.

⁵⁶ Davidson L, Shaw J, Welborne S et al, "I Don't Know How to Find My Way in the World": Contributions of User-Led Research to Transforming Mental Health Practice' (2010) 73 *Psychiatry* 101.

Participants

Two groups of participants were involved in this study:

1. Individuals with mental and intellectual impairments
2. Service providers such as:
 - a. Disability support agencies
 - b. Community legal centres
 - c. Companies (Telcos, banks, insurance agencies etc.).

Group One – Individuals with Mental and Intellectual Impairments

The inclusion criteria for participation in Group One were that the individual be over 18 years of age, residing in Victoria, and have experience engaging in consumer transactions.

In order to recruit individuals with mental and intellectual impairments to the study, a recruitment flyer was developed in collaboration with the project partners, Mind Australia and Scope Australia. The flyer was then provided to the service providers to distribute to their clients. Recruitment proved to be challenging, particularly via Scope where unexpected difficulties arose in identifying people who met the selection criteria.

Initially it was intended for focus groups to be conducted. However, due to difficulties recruiting participants in a short time frame, the research team decided to pursue individual interviews instead.

Nine individuals⁵⁷ participated in a semi-structured interview with the researcher at the location of one of the partner community based service providers. The participants ranged in age from 38–58 years of age. Participants had been diagnosed with a range of conditions including Asperger’s Syndrome, Depression, Schizoaffective disorder, and Dissociative Identity Disorder.

⁵⁷ Due to the limited sample size the results of this pilot study are not highly generalisable.

The interviews were loosely based on two broad questions:

- What challenges do you experience when engaging in consumer transactions? and
- What supports would be helpful?

The interviews were conversational in nature and the researcher adopted a flexible approach, exploring different lines of inquiry across the interviews. This approach was chosen because participants displayed varying degrees of ability to both interpret the questions asked and to provide a response. In addition, each participant had a unique experience of undertaking transactions.

Group Two – Service Providers

A range of service providers were sought for this pilot study, including members of disability support services, community legal centres, and industry. To recruit service providers, a method of purposive (targeted) sampling was used, in which the research team purposively invited particular service providers to participate due to their relationship to the issue under examination. Given the strong industry focus of this research project, assistance was provided by the Business Development Manager at the Melbourne Law School. A number of meetings took place with various companies to explain the project and negotiate the conditions of participation.

Semi-structured interviews were conducted with ten participants including:

- 3 Consumer advocates⁵⁸
- 2 Community lawyers
- 4 Finance industry representatives
- 1 Insurance industry representative

The interviews were conducted at the participant's workplace or the University of Melbourne. The questions asked of service providers were:

- What challenges do consumers with mental and intellectual impairments face when making transactions?
- What current policies and practices exist to respond to "vulnerable" consumers, including those with mental and

⁵⁸ The consumer advocate is a consumer law specialist based in a Community Legal Centre and provides assistance and representation to vulnerable and disadvantaged persons involved in consumer disputes.

intellectual impairments?

- What could be improved? and
- Would a supported decision-making model be viable in practice?

Data Analysis

The interview data was analysed using NVivo (qualitative analysis) software. A general inductive approach was taken to the analysis of qualitative data to develop a thematic framework. As findings emerged from the qualitative data they were checked by the research team to ensure they reflected the research context and questions. This enabled higher level themes to appear and to be contextualised by their supporting sub-themes. The qualitative analysis process was conducted by the researchers, one of whom conducted the interviews. Use of multiple researchers enabled cross-checking of coding and themes to ensure that analyses were credible.

Ethical Considerations

Ethics approval was obtained from the University of Melbourne, Mind Australia, and Scope Australia.

The following ethical considerations were upheld in the pilot study:

- Informed consent: Participants were provided with a Plain Language Statement (PLS) and a consent form prior to participating in the study. The PLS clearly outlined, in an accessible format, what was involved in the pilot study, including that the interview be audio-recorded.
- Voluntary participation: All participants were informed that participation in the study was entirely voluntary. Written and verbal consent was obtained from all participants prior to their participation in the interviews.
- Anonymity: All data was de-identified to ensure that participants remained anonymous, including the audio-recordings which were provided to the professional transcribing service. Pseudonyms or professional roles are used in this report (for example, support worker, lawyer). Where information was particularly sensitive, potentially defamatory, or private in nature, it was excluded.

The following further considerations were taken for Group One

participants:

- Recognising that some individuals might experience difficulties with written comprehension, the researcher, prior to the beginning of each interview, communicated the information on the PLS and consent form verbally to the participant. This involved retelling the information in an accessible manner (for example, speaking clearly and slowly, repeating information and checking understanding).
- Substitute consent from a guardian or any person or organisation authorised by law was not obtained in this pilot study. Rather, the participant was not eligible to participate if this was required, because the research team did not believe that secondary consent is appropriate in the context of the current subject matter. However, supported decision-making was encouraged (for example, via discussing the project with a friend, family member, support worker).

Findings

The pilot study findings are arranged in two general parts which correspond with the questions asked of participants in the interviews — Challenges and Supports.

The two industry sectors represented in Group Two were finance and insurance. Interviews with professional staff working as accessibility and inclusion experts, para-legals, and in the design of new products provided insight into the key challenges they believed were faced by individuals with decision-making impairments. A focal point of these interviews was the viability of a SDM model in practice.

The key themes emanating from this discussion included the difficulties with identifying consumers who have mental and intellectual impairments, including the importance of upholding consumer privacy and mindfulness not to discriminate, the need for cultural change within companies to better understand mental health issues, the importance of staff training and the challenges associated with high turnover of front-line staff, and the difficulty implementing SDM across large, national businesses with numerous products and departments.

Challenges

The Impact of Mental and Intellectual Impairments

When asked what the main challenges were when engaging in consumer transactions, most participants spoke about the relationship between their consumer behaviour and their impairments. Consumers explained that fluctuations in their mental health had an impact upon the decisions they made as consumers:

I guess I got myself into trouble partly because of this almost obsessive compulsive thing. And I was getting messages if you like to say that it's "okay, it's all good, you're doing the right thing, you need this stuff" etcetera, and in reality I didn't ... to explain like I've done all of this but it's not because I'm greedy necessarily or just frivolous or whatever even though it appears that way. It's actually because I've got myself into a mess because I really didn't know what I was getting myself into and the reality of the situation was not part of the deal.

(Consumer 1)

I've had problems with depression, and you get caught in this situation where if technology's failing and you have to — and I've got friends like this too — if you have to make critical decisions and you've got depression, you tend to slip up.

(Consumer 5)

The consumer advocates interviewed mentioned the relationship between mental health issues and consumer behaviour:

What I've seen often times over the years, really tragic stories of people who in sort of a manic state go out and spend huge amounts of money will often — they either have credit available to them or will go and get credit and often lie to get credit because they're delusional essentially and then spend it on crap, like buy jewellery, just stuff that they really don't need. They'll then come down and be stuck with 10s of thousands of dollars of debt, which is devastating. I think it's a really tragic reminder for them of their manic state. But it's also — I think it really impairs their ability to move on with their lives because they're burdened by a whole bunch of debt.

(Lawyer)

[They] make decisions in the moment, rather than thinking through how things might play out in the weeks and months to follow. You're much more vulnerable to going the quick fix, which is getting your hands on some easy money.

(Lawyer)

People don't know their rights. Definitely don't know their rights, I think particularly in the vulnerable client group we're talking about. They don't even know that there's a law that protects them. They don't even know that they've got a legal issue ...

(Consumer advocate)

The emotional impact of engaging in unfair or unsuitable consumer transactions was also deemed to be greater for consumers with mental and intellectual impairments:

For a client who can't manage it themselves, they need to find help. It's difficult to find help and when they do find help, it's harder to understand how that sits within their life. And I think the emotional costs are probably greater if you have difficulty processing that information.

(Lawyer)

I think it resonates with me more because the emotional impact is often greater. But also it sits within a cluster of a whole bunch of problems so that the social, financial, emotional impact is amplified. To put that in terms of a human story, it's like this client — yeah, it's not just the Harvey Norman contract they're battling. They might be battling with their housing security, struggling with money anyway, might have a credit card — a debt collector chasing them for something else. And so the emotional impact is worse.

(Lawyer)

Financial Hardship and Access to Suitable Products

Financial hardship was a dominant theme which imposed particular challenges for consumers in this study. Eight of the nine consumers interviewed stated that they were experiencing financial hardship and were seeking stable employment. A

key challenge that the participants encountered was a lack of access to suitable (typically meaning affordable) products in the marketplace. Some participants explained that they had previously needed to apply for products, such as loans and credit cards, to purchase basic goods — such as clothing or a mobile phone — despite that these financial products were not affordable for them, and therefore not suitable. This further exacerbated their financial hardship, for example because interest accrued and they could not meet the repayments.

The consumer advocates interviewed strongly believed that within the marketplace there is a significant lack of suitable products available:

There's already a lot of poorly designed, poorly distributed products. So they're not designed to give consumers what they're really wanting or needing or expecting and they're not sold in a way that allows consumers to fully understand the bargain they're entering into. And there I'm thinking about, say, pay-day loans, consumer leases, there's a whole host of education products being sold door-to-door, solar panels being sold door-to-door on finance. There's a very long list. I think that those products affect consumers generally but I expect that someone experiencing an ABI [Acquired Brain Injury] is more susceptible to entering into those products.

(Consumer advocate)

Participants spoke of having disclosed their financial situation to the companies with which they were making transactions, yet were still offered products that they felt were not suitable or appropriate for them:

They actually did sign me up because I did explain to them that I had financial difficulties and I'm still paying stuff off with other companies. So I did say all of that, I was very upfront. And the guy seemed to think that I would have no trouble with the credit check. So I did get the feeling though that not enough importance was placed on that.

(Consumer 2)

I spoke very clearly to the tellers . . .” If you were to offer me a credit card, go ahead. Be prepared to write it off within two weeks because you're not getting anything from me, because

I'm saying to you I don't want it." [Teller] "Oh but you have a credit" [consumer] "No. Not my problem if I've got that on my file." ... I actually said to them, go ahead. But I've told you I don't want a credit card, your clause says that I can only use money which I've got in my account. You are giving me something, which I didn't particularly want, and now you're telling me I'm paying fees for it. If I did this three or four times over a year, I daresay that's going to be more than any annual fee you pay for a credit card which you're going to end up writing off anyway...

(Consumer 3)

Participants expressed a desire for companies to err on the side of caution when lending, for example by undertaking rigorous financial checks:

I do think that even though it might mean that this time around say look we haven't really got anything that can fulfil your requirements. Then that in a way to me would actually be better business. They might miss out on me this time around but who knows in six–12 months' time I could be getting some part-time work. Just because I'm on a pension now and I could have paid off a lot of those other debts in a year or two's time. If they're thinking more forwardly then I'm more likely to return.

(Consumer 2)

... less emphasis on "yes I've just ticked the box and got my commission or signed up another person". So I think the whole way it's been structured by these companies ... if it's part of their remit if you like, if it's part of their culture. And not only that, if it's actually written into their training and so forth that this is what you're meant to do when you encounter this situation.

(Consumer 7)

Despite reforms to lending regulations, such as the introduction of "responsible lending" under the *National Consumer Credit Protection Act 2009 (Cth)*, consumer advocates related experiences of attending the Victorian Civil and Administrative Tribunal (VCAT) to represent clients for whom financial assessments were not conducted adequately.

Cooling-Off Periods

Given the often fluctuating nature of the impact of mental health issues, consumers explained how they might be driven to transact when they were unwell: they might purchase products that were unsuitable for them later regretting the transaction, while being left with the financial burden and associated stress.

As far as barriers, if you were unwell that could be a moment there where you just sign something and you're not with it, you're just not with it mentally. That's where the challenge is there.

(Consumer 9)

Cooling-off periods are one such mechanism that may assist consumers to determine whether a product is suitable for them. However, as highlighted by consumer advocates:

When you speak to vulnerable people, people with disability, they often don't take much notice of, or don't understand the effect of cooling-off rights, don't know how to exercise them, don't feel confident in exercising them. And at any rate they think they've got a good deal, so they're just waiting for the 10 days to lapse so they can take delivery of what they signed up to buy.

(Consumer advocate)

A lot of the clients that I see they've got no idea that a cooling-off period exists and those things are clearly not explained to them by people who come to the house to sell the products.

(Lawyer)

Some participants suggested a concept similar to a "cooling-off period" would assist them to manage their transactions better — a period of reflection, perhaps encouraged by the company or facilitated by a supporter, which is enforced before they actually decide to transact, rather than occurring after they have initiated the transaction. However, for such a mechanism to be imposed, disclosure of the consumer's circumstances and flagging of such on the consumer's file would be essential and may be an unjustifiable compromise to privacy.

Disclosure of Impairments

In order to access suitable products, disclosure of mental and intellectual impairments was identified by companies and advocates as essential. If the consumer engages in a transaction for a product which is not suited to his or her financial circumstances then there are limited options for redress, especially if the individual did not disclose his or her circumstances to the company. As one consumer advocate explained:

The way the law works, if the person — the trader isn't aware that there's any issue of vulnerability with that person, they don't have to do anything different than they would engaging with any adult doing a transaction. So, and I respect that, and that makes sense ... But that in itself causes a lot of problems, because people present as not having an issue, and may buy you know, five mobile phones and that's due to their incapacity or mental illness or their inability to make good decisions for themselves and things like that, and then we'll see the fallout of that and trying to resolve the problem when the trader, in legal terms, has done nothing wrong. So, in law, we don't have a strong case to say "You've done the wrong thing, you shouldn't have sold it to this person" ... but that said, the impact is — can be devastating.

(Consumer advocate)

However, the discrimination that prevails around mental health issues, and disability more generally, creates barriers to disclosure. In addition, some forms of mental and intellectual impairments are particularly difficult to identify if consumers do not disclose them:

We can all talk about respecting people with disability and people with mental health issues, but not everybody walks into a branch or into a telco shopfront with a sign on their forehead or a sign on their chest, whatever it is, saying "I identify as having a mental health issue. Can you please treat me with respect?" And that exists for so many people in society. You can't necessarily walk in somewhere and have someone know that you speak English as a second language. None of us wear signs on our forehead or our chests, to be honest.

(Consumer 7)

Identifying customers and their accessibility needs is sometimes a challenge because also customers don't necessarily open with that or even admit or acknowledge that they have a disability. That's probably where we find a lot of challenges, and we find that internally with our people as well. Some people not necessarily identifying themselves with having a disability. So in that case, you can't then be having a file on them ... there's that real challenge around knowledge.

(Bank representative)

I see a wide range of people, and people are at different stages of how they feel about disclosing, and each — obviously, respect that completely. So I've had clients that I will go through and say "How were you acting at the time? Would they have known that you have this problem?" And those types of things. And the client — so, I've got one with OCD [obsessive compulsive disorder]... that's the last thing she would ever do. Because she was so intent on being ok ... there weren't any very big red flags, because she was intent on not showing them, and when she found that she couldn't cope because of her OCD, she still wasn't disclosing and she was trying to get them to agree to a change that would work for her but still not disclosing.

(Consumer advocate)

A representative from the finance industry related two experiences wherein the company did not become aware that the consumers had some form of decision-making impairment until after the consumers had participated in the transaction. The bank was notified by others who knew these consumers:

I can give an example where a young lady deemed to have lacked the capacity to deal with financial transactions, she purchased a motor vehicle and she applied for an application to borrow funds from the bank. We weren't aware of her mental status, then a week later her parents approached the branch, concerned, and said "How could this have happened? My daughter is under a financial management order" ... So her parents were the guardian and also her administrator and said "Well she can't enter into these contracts because she has a learning disability" unbeknown to the branch, she presented okay. We went through our prudent assessing process, which she was approved, however that transaction was reversed,

given that the administrator had put us on notice and presented us with evidence to say that her daughter lacked financial understanding capacity, to enter into contracts and we had to reverse that transaction.

I remember another one we had in Queensland, that a gentleman was unstable and he purchased a house then he approached us for the finance, but he approached us on one of his better days and it wasn't until one of his relatives says "Well my brother is unstable and has mental illness and he can't fulfil this" ... it was a very expensive home. Why the real estate agent or the solicitor didn't also pick up on it, we don't know, but we were able to withdraw the application, given that we were put on notice of the condition of the brother.

(Bank representative)

With many companies shifting away from face-to-face service provision and to digital access or international call centres, knowledge of consumers' needs will become increasingly more difficult:

The question — when this came up — that I sort of stopped to ask myself is around well if we take an application online, you know, we can ID someone but we don't necessarily have any sense of what their cognitive ability is ...

(Bank representative)

You can apply and you can ID yourself online for a product, but I don't know what your cognitive ability was to do that. It just happened. So that is an area that's kind of — I think that's a tough one.

(Bank representative)

What you'll find is there are examples where there are local relationships, and there are individuals, so customers that are supported with a local team that know this person and their needs really well. But quite often what you'll find is that outside of that probably local branch environment, if you think call centres, so you're talking to any individual, they might not necessarily know the customer. We're not necessarily identifying unless that customer has specifically requested

what their accessibility needs are.

(Bank representative)

Even when a consumer does voluntarily disclose that they have some form of mental or intellectual impairment, it did not necessarily follow that staff responded appropriately:

“Have you got a disability?” I said “yes”, I don’t have to specify what type of disability ... This person, who is a lawyer with about 30,000 letters after his names, wants to know if I can read or write! Well I’ve just read his freaking form in two seconds flat, got most of it right ... and he wants to know if I can read or write? I wonder what kind of idiot this clown is, and that’s social stigma ... the point was that if I’m in front of him reading out the thing and I’ve actually written down what the answers are, it’s quite obvious that I could read or write, well I’d like to think that it would be.

(Consumer 5)

It’s too hard to deal with people. You know if you make a mistake or miss a payment because you’ve had personality switches, you’re the biggest monster in the world and even if you say “Well look it’s because I have an illness” they’re more inclined to just dump you, than help you sort it ... for a long time I was very sick and didn’t look like a regular other person. So I didn’t want to go in and again get that poor treatment. I’ve even had people kind of laughing going “Are you sure you really want this?” And things like that ... sometimes I would forget things and I would get a little bit muddled up, so I’ll need to ask more questions at that time and they’ll laugh or they’ll just look at me like I’m an alien or something like that, you know what I mean.

(Consumer 4)

Adequate training for front-line staff is important to informing appropriate responses to consumers with mental and intellectual impairments (as discussed later).

Some participants in the pilot study felt that disclosing that they have a mental health issue, but not the specific nature of it, would uphold their right to privacy and is something they felt comfortable doing:

I know that it's difficult because there's privacy and all the rest of it, but if they can get a picture of how many devices you've already got and whether you actually — and I know there's the argument why should they be responsible for you, if you want the product and you can afford it then fine ... it doesn't have to be about you personally, they don't have to know about what medications you are or aren't on or what your lifestyle is ...

(Consumer 2)

The risks associated with disclosing include that consumers with mental and intellectual impairments could be treated poorly, disqualified from accessing certain products, or cut-off from transacting altogether. One representative explained that this is currently occurring in the insurance sector, where it is almost impossible for an individual with a pre-existing mental health issue to qualify for life insurance.

Respect for privacy and mindfulness not to discriminate against consumers were central themes to the discussion of disclosure.⁵⁹

The decision made at one point, is it blowing on a person later on and what does that mean for that person's autonomy. I think that's a really complicated issue.

(Lawyer)

We accommodate people the best we can, unfortunately we're not fully aware of some people's personal circumstances and we need to be extremely careful about that, we can't make accusations about someone's state of health; we've got to respect them and respect their privacy. And they're able to engage in products and services, if it's suitably available to them and suitably for their needs.

(Bank representative)

59 This was also found in a 2006 study of telecommunications contracts: Chris Atmore, Derek Wilding and Elizabeth Beal, *Not So Special: Telecommunications Contracts, Disability and Unfair Practices* (2006) Communications Law Centre.

I'm very conscious of neither wanting to over or under estimate the ability of people with disabilities to manage their own affairs. I guess it's a really difficult balancing act, in this kind of area, in this policy area. That once you say "oh well, all of these additional hurdles have to be cleared" in dealing with people with intellectual disability or other forms of impairment. I would hate to make what would otherwise be accessible, to people in the marketplace, appropriate products. You don't want to risk discriminating against people, accessing ordinary goods and services, because of their disability status.

(Lawyer)

Consumer advocates suggested that a "flagging system" would be useful to keep a record of the consumer's status so that staff were aware and could respond to the consumer appropriately. However, representatives from the finance industry were sceptical of this approach:

You want to be treating them within the context of being a customer and then identifying that they might have a specific need, as opposed to, kind of, alarm bells, "You over here" sort of thing. I just think from an inclusive perspective, you'll always struggle. You can set the best system up in the world but I'm not sure that it would actually be utilised with this audience.

(Consumer advocate)

Poor Understanding of Products

A lack of understanding of products was identified as a barrier to equitable participation in consumer transactions for the participants in this study. It was apparent that most consumers did not fully understand the products they had transacted for, including such things as loan terms, the accrual of interest, repayment schemes, and mobile phone plans and associated entitlements (for example, data usage). As one consumer advocate explained:

One client took out a credit card, was actually offered the credit card at the bank, which I think happens a lot ... banks

offer credit cards to people, and so it's not necessarily a decision that someone makes. And a client, thinking this is a great idea because I'm struggling, can't afford to pay my rent, buy my groceries. But not understanding more complex concepts like interest. So a lot of the clients I work with don't know what interest is and that's not explained as a part of that transaction by the bank.

(Consumer advocate)

As is evident in the following excerpts, some participants had a poor understanding of contractual obligations:

Even me who appears to do their research still has no idea. And I still don't fully — because I'm more concentrating on the end goal, which is getting my thing at the end of the day, a lot of it is to do with not really being cognitively aware of what's actually happening. As we said it's hard enough ...

(Consumer 2)

Raj was really cool; because he basically told me don't pay your contract out in the first year. Which I thought was really weird, but they need to get the interest up on the loan first, before you pay it back.

(Consumer 1)

I've had home and contents insurance and I still have insurance on the Go MasterCard, which I'm not actually sure I need because I'm on a pension.

(Consumer 9)

The lack of understanding of credit contracts was described as a significant issue in the finance industry:

They may be able to conduct over the counter transactions, or ATM transactions. However, they may not fully understand the terms and conditions of the account. For example, not giving your card or access to anyone else without your authorisation.

(Bank representative)

Inaccessibility of Product Information

A direct contributor to the inability of consumers with decision-making impairments to understand products seems to be the apparent inaccessibility of product information, such as terms and conditions, which outline the consumer's contractual obligations. One participant explained the challenges that he faces:

Well, it's always a challenge. I'm just saying, with my Asperger's, anything that requires something that's complex, it's not clear cut, it's not documented properly you know. I understand all the technical stuff, but as an example — when I tried to study at [university], it's the pedantic stuff, it's all the form filling, it's all the rigmarole of stuff that doesn't allow flexibility, it's all that sort of stuff. It's hard to explain, but I mean I actually have a document that someone at the council of education explained — he has problems with organising things. And, I struggle and I try and organise things, to make sure that I don't fall foul of these things, but I still do.

(Consumer 5)

To make the concept of interest more accessible he proposed:

How about stopping with the forms and let me speak to a person who will navigate through working something out, because all this trying to pigeonhole people, especially people with Asperger's into one category, into one nice pigeonhole, it's not going to work.

(Consumer 5)

Another consumer explained that he experiences difficulties with attention and memory which were exacerbated when having the contract terms and conditions read to him:

That policy thing that takes like half an hour it felt like. My mind is starting flipping out, I've got a pretty short attention span, so I'm losing my shit after all this talking.

(Consumer 1)

This participant also encountered difficulties when the terms and conditions were presented in written format:

I've a really short attention span. Like I get a bit dyslexic, I'd

be after the first page, oh this is too much.

(Consumer 1)

In the opinion of one consumer advocate there is a problem with the inaccessibility of contracts for consumers in general:

... regardless of whether you've got mental health problems or some sort of impairment, with consumer contracts. I think they're really difficult to understand and counter-intuitive. And that's why we have unfair contract terms regulations and things like that. But I don't think that those regulations necessarily ameliorate the problem.

(Consumer advocate)

Similarly, a representative from the insurance industry stated the following regarding Public Disclosure Statements:

Nobody has been able to yet crack this issue, so the vast majority of people can't read a PDS, we know that ... this is one of the problems the insurance industry is facing — is that there's a lot of people who say that we use ... lots of fine print and long words and jargon, which we probably do, I don't deny it — and how do we actually make it into a form that's actually digestible for the vast majority of the population, because we know they're not doing it now.

(Insurance representative)

For consumers who experience challenges with literacy, one participant suggested the use of videos depicting scenarios in which a consumer engages in a transaction:

... to actually put this on the TV screen of two people actually playing this, about a person talking with a financial counsellor. "I went to borrow \$20; I paid \$25 back" and put it into a verbal format where people could watch it. At a hockshop you've got a TV there and the video ... what that contract means and what it actually does cost, as opposed to putting it in writing ... I would be inclined to say that if it went into video format to keep it accessible, have subtitles anyway ... I'd be making a very good case, it should be a sign language interpreter as well. After all, the people that are hearing impaired are a big

part of the community as well, and they have to reach their contracts too.

(Consumer 3)

Lack of Confidence

Some consumers in the pilot study stated that they lacked the confidence to participate in transactions with big companies:

I think the key challenge would be confidence that I would be dealt with properly, you know dealt with like any other person. Confidence that I won't get an immediate knock back. Even not knowing enough about my past to know whether I'm eligible to go and do something, that's really hard.

(Consumer 4)

I think sometimes for some it comes down to confidence. Some people living with mental health conditions are affected by self-esteem and confidence issues. I think also that people who identify with intellectual disabilities feel similar things for their own personal reasons, but in very, very similar ways in regards to self-confidence, self-esteem ...

(Consumer 7)

Having the confidence to say "no" and decline an offer to make a transaction was also identified as a significant issue for vulnerable consumers, particularly in the context of door-to-door sales:

Being in someone's face, being in someone's home, and that is about pressure selling, and it is about pushing people to make decisions they wouldn't make in a different environment, and that's where a lot of vulnerable people are targeted. So, your telecommunications, your energy companies. And it's progressed — solar companies, all sorts of companies, and it rotates with who's doing it at the time, but a lot of the education signups were done from door-to-door selling. That's the latest outrageous thing.

(Lawyer)

This can be a common issue for persons with an intellectual

impairment due to “acquiescence bias”⁶⁰ whereby they are more likely to please those with whom they interact. This may also be a problem relating to elderly consumers who may be socially isolated, as one consumer advocate explained:

What we’ve found is that also part of the profile is these people withdrawing from society, they may have lost a partner, may not have family, be on their own, they’re vulnerable and there’s no support and effectively these people just go under the radar ... there’s no support group, there’s no family, the spouse may have died, they might have been married for 50 years, all of a sudden they’re on their own ... So they’ve presented in a situation of isolation, of loneliness, they’re in a state where these people who are vulnerable from others, because they want to earn the trust with people they befriend and that trust is abused.

(Bank representative)

Communication Barriers

For individuals with mental and intellectual impairments, communication with others may be difficult. For example, they may experience difficulty expressing their desires and wishes, or in interpreting information that is communicated to them:

Part of it is that I’m dyslexic when I hear numbers; they have to be chunked together. For example, if the number was 1 3 5, and the operator calls back 1 3 5, I process it as 5 3 1, and the operator then gets frustrated because I’d call them back in reverse. It is not done intentionally, I don’t process that information.

(Consumer 3)

One consumer decided to change to pre-paid vouchers for her mobile phone service because communication was such a significant challenge:

I did have a plan, and that got so complicated that I switched

60 Zak Toomey, ‘Changing the FCRA Opt-Out into the FCRA Opt-In: A Proposal for Protecting Mentally Disabled Consumers from Manipulative Credit Card Marketing’ (2009) 12 *Journal of Gender, Race & Justice* 621, 625 citing Celia B Fisher et al, ‘Capacity of Persons with Mental Retardation to Consent to Participate in Randomized Clinical Trials’ (2006) 163 *American Journal of Psychiatry* 1813, 1818.

to vouchers. Then I could keep a handle on what was going on and I didn't have to deal with people in service really. I could just go and buy a chip, buy the voucher and it was much less painful. So, I've gone around things a different way and I don't do anything that I don't need to do, because it's too hard to deal with people.

(Consumer 4)

Supports

Support Required

When asked what supports would be useful when participating in consumer transactions, the participants mentioned the following:

Just having someone there so that if you have moments, because a lot of people get anxiety and then they can't talk. So if someone's there, they can kind of start off themselves and if they get into any trouble, the other person can say "Well what's she's actually aiming for here is" ... because it's really easy for anyone with any diagnosis to have anxiety or panic attacks really. So I think it would be great, it would make a huge difference.

(Consumer 9)

... one thing that I've noticed is if there's supports, then people can feel more comfortable, and they can access more things. And just the fact that some people are really in an unstable stage, whereas that can be maybe something they could say "Well okay, we'll just get you stabilised and then we'll revisit this in a couple of months and see if that's still what you want to do. And then we'll support you in doing that."

(Consumer 4)

I mean actually having someone tell you what actually things mean on the bill is probably a really good idea ... just ring them up and say "oh this is your water company or this is your electric and gas company, do you understand what's happening on your bill?". You say "no". They say "well I just want to run through it with you anyway, this is what the bill looks like; this is what you have to pay; this is your user fees", all that sort of stuff.

(Consumer 1)

... having a third party there would be awesome because it just means that you can openly discuss things to do with what you might be going to — and it's obviously there's things where you don't want someone telling you "you should run with this". Basically there's ways of saying things to people so they can make up their own minds.

(Consumer 2)

I think that how they could be supported is to have someone sit with them or something if they did not understand it, and someone that was savvy on that situation, to actually have support in signing a contract and saying "Okay, these are the details. What can you afford? What can't you afford? These are the pros and cons" ... a support worker or something that can sit with them etc., and talk to them about "Okay, we're about to sign a contract. Do you understand what's happening in this contract?" and have someone that knows — is savvy in that area, to go through that contract with them and to basically say "Look, this, this, this and this, and this is what the contract is about" basically.

(Consumer 9)

In the opinion of one consumer advocate:

I'm thinking often you're dealing with a client and you're really mindful that they're not making what I would objectively see as a rational financial decision in different aspects of their life, which is fine, that's the choice people can make. And sometimes it's not bad enough to get state trustees appointed, which has serious financial consequences anyway. But people do need some guidance and some help and I think having someone — as a community worker, having someone that you could refer to would be really, really helpful.

(Consumer advocate)

These perspectives all reflect SDM in operation.

Suggested Approaches to Providing Support

Support to assist consumers to gather information and weigh up the options that are available to them was mentioned by consumer advocates as a viable solution to the problem of consumers not being able to access products that are suitable to their needs.

Consumer advocates proposed a model in which the supporter acts as a conduit between the company and the supported person (the consumer):

I don't know how it would work, but maybe it's then marketing those safe products, to the types of people that have the role of being supported — who support the decision-making. So they can bring it to their client's attention.

(Lawyer)

Maybe the organisations could have accredited or approved products. If there was a representative organisation that supported those people, playing that decision-making role, with the people they assist, and then maybe that network might be a way of sharing safe appropriate products, or companies that have been given the stamp of approval for dealing sensitively with people with impaired cognition.

(Lawyer)

A good analogy might be the buyer's advocate, when you go buying a house, someone that does the bidding for you. It's that kind of idea, that you say "look I want to go out in to the marketplace, I need a new phone, I need a new fridge". So you've got someone to say, "well I know which businesses are going to do the right thing by you". It's about getting on the front foot and meeting needs, before the person goes out spontaneously to try and meet their own needs.

(Lawyer)

Ideally you'd have a model where you've got an individual worker who is actually project managing for the client, all the different supports that client needs. So that it avoids that referral roundabout that people get on, that the client's get on. They're far too vulnerable and dealing with far too many crises to be managing all the different agencies they've got to go to.

(Lawyer)

... it would be more just the person coming to them and saying "I'm looking at this, what should I be aware of?" And then that advocate being able to say "These are the issues

with that kind of product or service when you transact with that entity, be aware of X, Y and Z.” So that could be useful, actually.

(Consumer advocate)

Similarly, consumers stated that support which enabled them to better understand products, discuss their options, and then select products that are suitable to their needs would be helpful. The provision of such support would allow them to maintain their personal autonomy:

I think it’s a great idea because to be honest I only went with my Go MasterCard and went with this new phone because I thought that that was my best option. But if there was somebody I could call or you could drop into and just say “look this is my situation, I’ve got this phone but these are the reasons why I want to change it, this is what I found so far”. And even if it was on a level a bit like my mental health social support worker — he’ll give me information and say “if you feel comfortable do you want to ... run with that?” ... But it’s just giving someone like myself the ability to be proactive themselves as well, so that “enabling”, if you like. But to be able to have someone to sit down and have a chat to and just say “look I’m thinking about doing what’s the up and down sides really?” It’s not like we’re dumb it’s got nothing to do with that, it’s not like — but I think for the average person a lot of this stuff is hard to navigate.

(Consumer 1)

Dedicated Support Teams

The potential for diversion of consumers with mental and intellectual impairments to a dedicated department, similar to hardship teams which already exist within most companies, was also mentioned:

You ring this number and say you’d like supported assistance to work out what insurance you need, or you’re making a claim but you need supported assistance, and they’ve already incorporated that into their workplace and their call centres, they go “Ok, we know that that goes to that special team” and that special team are aware they’re dealing with someone that needs extra care, so even from a selling point of view,

they're saying — really fleshing out what they need and actually offering the right product ... So a diversion to another team, and a specialist team and an emphasis on it in a company, it does work. We've seen it with hardship teams ... you're dealing with a totally different area of the organisation which is required to work with the client actually come up with an affordable plan. Their requirements [are] different, so it's now changed the whole thing. The idea is their intention and their job is to keep that person's power on, for example. So, they're totally different to the bigger teams.

(Consumer advocate)

A representative from the finance sector mentioned an international model similar to the diversion model described above, noting the costly nature of implementing it:

I know that in the UK, Barclays we've been talking to about some of the great work that they do around accessibility, and they have what they call "care markers" on their systems, which essentially is a flag on the database if a customer which basically says "okay, this person's got vision impairment or is mentally disabled" or whatever it might be, and that helps them make choices about things that they do. So they won't outbound phone call someone that's deaf, or they won't write to someone with a letter who's blind. That's quite good. We've talked about that and we've love to be able to do, but we're talking millions of dollars for us to be able to implement that solution.

(Bank representative)

Accessing Support

When participants turned their attention to the viability of SDM in practice, questions arose surrounding how SDM would be accessed by those in need of support, including how it would be marketed to consumers and who would provide the support:

It needs to be practical. So these changes need to be seen as essential. I think that there's a long, long way to go for that to be part of the mentality with large commercial entities, but some of the support services need to be essential. Some of them already are, however they're not advertised. So advertising is huge ...

(Consumer 7)

Acknowledging that more vulnerable clients tend not to find their way to lawyers. More vulnerable clients tend to have relationships with social workers, with housing workers, with advocates. That is a better way for those clients to access our service.

(Lawyer)

The issue of disclosure of mental and intellectual impairments, which was discussed earlier with regards to accessing suitable products, also arose with regards to SDM in practice. For consumers to access a dedicated SDM system, they would likely be required to disclose their circumstances. If the support was being provided by a company, then the same issues around hesitancy to disclose would likely prevail. However, if the support was provided by community based disability and mental health service providers, then such issues would be less relevant.

One consumer advocate proposed that the term “supported person” could be utilised by companies to identify consumers who require additional support when engaging in transactions. Rather than relying on the individual to self-disclose directly to front-line staff, a card could be issued to those who access supports in the community and are therefore in need of additional support. This could then be presented to the company, for example to bank tellers, to notify them that the consumer requires additional support to engage in the transaction:

I think a card or something a lot would use, and some wouldn't, but at least they would be aware that they have that option for when the next hurdle comes and they fall. You know you could use that for next time. So I think it's probably something that could be a good uptake for people with vulnerabilities in that sort of space, that would grow with time, just like they did for pension cards. Some people don't even want to say that they're on a disability support pension, even though it obviously accesses a huge amount of services and discounts and things like that, because they just don't want that label, “disability”.

(Consumer advocate)

Facilitators of Supported Decision-Making

Consideration was given to who exactly would be responsible for

providing support to the consumer. This included two approaches:

- companies having dedicated support teams within their staffing structure to provide support to consumers with mental and intellectual impairments; and
- for community based services to provide support to the individual and act as conduit between the supported person and the marketplace.

One participant expressed the importance of informal supports, such as family or carers, also being involved in the model:

The ability to either have or not have someone come with you as a support. So if I want my carer, or if I've got a good friend that I want to bring along with me to these sessions so they're in the loop as well and then we can talk about it afterwards. Sometimes I have trouble and I do, I need someone else to be almost my secretary to be able to talk it out as well. So there's like that added or not, it might be okay people might say no no I'm happy to do this solo. But let's just say you were the financial person to talk to us through the independent body and if I wanted dad to come in too just to be in the loop to de-stress him or just to be able to get his take on things because I miss stuff a lot of the time.

(Consumer 2)

The same participant explained how personal relationships can also become strained when the individual has a poor history of making transactions:

It's difficult with him because anything to do with money he gets stressed because of my past history, so there's that knock on effect as well. So I'm trying to be responsible, even though it sounds like I'm deceiving him. I'm not really deceiving him I'm just waiting for the least impact on — to paint it in a way how I'm seeing it. It's not as though I'm never going to tell him but I'm being a little cautious let's put it that way.

(Consumer 2)

This speaks to the potential benefit of involving both formal supports (for example, a mandated support provider) and informal supports (for example, family and friends) to facilitate the decision-making process.

Challenges of Implementing Supported Decision-Making

Some participants said that introducing SDM into existing structures of the telecommunications, finance, insurance, and utilities sectors would be exceedingly complex and costly. Therefore, a representative from the financial sector recommended that any SDM scheme should be targeted to a specific product area:

Well we're a major bank. We're exceedingly complicated. We've been around for 175 years. We've got hundreds of products, thousands of processes and literally 20 or 30,000 front line staff in Australia alone. So nothing's easy, which is why it's important to start with the right points in the process, and the people that are designing our front line processes or our systems. And again, there's multitude of systems and some of them work differently in different channels and some of them work differently in different sectors of customers, so a retail customer or commercial customer, if you're a deposit customer or a home loan customer. It's different systems, with different purposes.

(Bank representative)

Similar challenges with the complexity of implementing SDM were also identified for the community sector:

... the problem I think with that model, which of the three is probably the most ideal, is that I just don't see community agencies being able to cover the resource implications. It would just be huge ...

(Lawyer)

As one consumer advocate highlighted, if community agencies are to be responsible for providing dedicated support to consumers with mental and intellectual impairments, then it is important that the supporters are appropriately trained to understand consumer rights:

I've been to some of those training sessions and spoken to community workers, and there is a significant lack of knowledge about people's rights. So you'll have, for example some workers getting clients to sign up to hardship arrangements with payday lenders, in circumstances where the law wouldn't even require the person to pay back the loan.

Those workers are dealing in situations of crisis, so there's no expectation either that they would know or be able to deal with those issues ...

(Consumer advocate)

Cultural Change and Staff Training

Participants were asked to provide feedback on the topic of staff training across the finance, telecommunications, insurance, and utilities sectors.

All of the industry representatives involved in the pilot study stated that their staff currently undertook training with regards to interacting with consumers with diverse needs. However, this training did not typically focus specifically on consumers with mental and intellectual impairments. A representative from the finance sector explained that whilst staff are trained to respond professionally with consumers from a diverse range of backgrounds, their training is not specialist in nature:

I suppose the difficulty for us is that the staff aren't professionally trained to assist with that. I'm not trying to wash that aside, but people who are specialists in this area are going to be social workers or people from the medical profession, at that relationship to understand those key identifiers. With our front-line staff, a lot are trained to assist, but to look even further, I don't know whether we'd be suitably trained or qualified to make that judgement, because we don't want to discriminate our customer or anything like that.

(Bank representative)

The need for staff to receive training to specifically respond to consumers with mental and intellectual impairments was reinforced by participants:

I think there should be a little bit of training around the difference between, when people have a mental illness they often have an acute phase or phases. And that's not the whole person and I think there could be a little bit of training around that sort of thing. You know that, hey yeah, a person can be sick, but that's not been their whole story.

(Consumer 4)

One participant stated that staff should be trained to respond to consumers with mental and intellectual impairments in an appropriate manner:

One of the things I think could be done which they clearly don't do, is that telcos and banks, for example, don't have in their branches specialist people who have particular training, even just general training with people who have challenges in their life. And so these staff, especially in the larger shopfronts and in the larger branches of these companies, if they had people that were trained up really well who were known to be working well with diverse consumers who identify as having a disability, or identify as having social problems or intellectual problems, whatever it might be, or comprehension problems, then I think that the companies would be doing themselves a favour by engaging with consumers of that nature who would otherwise be disengaged and may not even attend the shopfront on the basis that they would be misunderstood, on the basis that they might feel prejudiced against.

(Consumer 7)

My dad has an acquired brain injury, and has very minimal cognition. If I think about his needs, he wouldn't have a clue how to turn a computer on and do any Internet banking or anything like that. But if he was to walk into a branch, which he does because he likes to feel that he can still get out and do things, he could have easily walked in and just given them his Woolies card instead of his credit card. So for him, it's how they respond to that. Or he could walk in and actually forget what he's doing, and say "Oh what am I here for? Who am I?" and so it's how they respond when that is to happen ... As you say, it's invisible, so how do we respond, and in a way that's respectful and appropriate? I think that's probably one of the bigger challenges in terms of those with mental health and cognitive disability.

(Consumer 8)

The high turnover rate of front-line staff was perceived as a potential barrier to the effectiveness of training programs. One consumer advocate stated:

I have real concerns with how front-line staff deal with our clients, and I don't think companies do enough to change the

culture; but equally I recognise that the challenge is mammoth when it comes to front-line staff, just simply because of the turnover.

(Lawyer)

A representative from the finance industry stated:

What I would say is that that stuff is quite hard, because it's not sustainable. You know, our front line staff get hit with dozens of changes every week. Their attention span is so much that staff turnover is high and constant, particularly in the front line roles. Think about call centres and branches. It's high turnover of staff. So anything we do needs to be really sustainable. So, the things that I've been trying to do and focus on is how do we build into product design, how do we build into process, technology, systems, because that lasts forever.

(Bank representative)

Participants suggested that cultural shifts more broadly across companies would be beneficial:

... where it's not only stated that there is a service available, but then all staff are respectfully backing that up, not just the person who is an expert. Using the example or suggestion that I've given to have an expert in these shopfronts, it's not just that expert that needs to be respectful and mindful of their position, it's also the support staff around and within that shopfront or that branch that are also supporting and respecting that person's position, and also behaving in a respectful way.

(Consumer 7)

It's equipping our staff around their values, and so they respect people regardless of their situation, and I actually think that's a huge part of this. Whether it's a disability, whether it's cultural needs and what have you; they would walk into a branch as a consumer, have that staff respond to that, and I think that is a really big part where we can have a significant impact in the community.

(Bank representative)

The emphasis on commission based incentive schemes for staff working within these industries was identified as a barrier to the equitable treatment of vulnerable consumers:

I just can't see them being well equipped to identify all of the complex issues that people present with. I think obviously where there's commission based selling, then front-line staff aren't going to want to see those issues. They're just going to want to see their transaction go through.

(Bank representative)

Call centres, they measure down to their millionth degree, all the KPIs and average handling times, because that's the piece you're paying for as a company, because that's what the staff's salary is made up of. So, if you're only speaking to four people a day, you're not working particularly efficiently compared to speaking to 20 people a day.

(Consumer advocate)

If you're operating on a commission, there is a pretty strong imperative to sign people up whenever you can, and vulnerable consumers are more likely to sign, even if it's not a suitable contract for them. So, maybe looking at incentive type arrangements with staff, whether they're appropriate, when they're facing the general public.

(Lawyer)

Instead of focusing on front-line staff, one representative from the finance industry suggested that the target of training and education be directed to high level staff, such as those who "actually define the processes that the front line staff have to follow. Front line training's good for awareness, but at the end of the day, the front line staff have to do what they're told as far as process goes."

Understanding the challenges faced by consumers with mental and intellectual impairments is not only potentially beneficial to the individuals concerned, but also advantageous to the company's reputation as a leader in accessibility and inclusion:

I think that can be really helpful for someone who's not well, and even from the services to understand sometimes things

do go wrong, sometimes there's a relapse ... sometimes little allowances for illness and things like that, sometimes those little things can make the difference and also create for the, whether it's a little business or a big organisation, can create some real loyalty. Not just from the person themselves, but from the people around them, that go "Hey, did they support you through that? That's really good. You know, maybe we should stick with them as well, if they're that understanding and that good."

(Consumer 4)

4. Summary and Conclusions

Regarding the challenges faced by consumers with mental and intellectual impairments, it should be noted that, due to the limited sample size, these themes are not highly generalisable. However, they do provide an insight into the challenges which may arise when these consumers transact, including the difficulties associated with accessing suitable, affordable products such as:

- lack of confidence to make transactions;
- poor understanding of products being purchased;
- difficulties comprehending forms and terms and conditions,
- communication barriers; and
- the possible relationship between consumption and certain mental health issues.

The views of consumer advocates, who typically encounter consumers once they have participated in an unfair or inequitable transaction and are seeking redress, further contextualise these issues.

When asked what supports they would find helpful, Group One participants all expressed the need for more accessible materials and information, and most suggested that staff receive further training to better understand mental health issues.

When asked for their opinion on the usefulness of some form of SDM, most participants expressed that supports would be helpful in assisting them to access suitable products and to increase their understanding of the product/s they are purchasing.

Participants reflected on who would provide such support, highlighting the potential for community based service providers to act as a conduit for the process. Similarly, consumer advocates reflected the same opinion that SDM would be beneficial, suggesting ways in which SDM could be implemented in practice. Across both groups, the issue of disclosure of decision-making impairments, and the associated discrimination and fear, was a dominant theme.

The research team now plans to conduct consultations with

consumers, industry, and community based service providers to inform the development of models of support. Findings from this pilot study indicate that in developing support models, the following issues should be considered:

- Determining who is best placed to provide support;
- The role of informal support through family members and carers;
- Ensuring that the support model is highly accessible to disadvantaged and sometimes isolated consumers;
- Focusing separate projects on specific areas of industry given the complexity of each sector;
- Considering the delicate balance between protection of rights and empowerment.

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