From Substitute to Supported Decision Making

UNDERSTANDING THE CHANGING LANDSCAPE OF GUARDIANSHIP LAWS
Presentation to the RANZCP Faculty of Psychiatry of Old Age 2019 Conference


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Structure of presentation

1. Overview of guardianship laws
2. Impact of the UN Convention on the Rights of Persons with Disabilities
3. Supported decision-making and where it has been legislated
4. From ‘best interests’ to a ‘rights, will and preferences’ approach
5. Practical differences
6. Conclusion
What are guardianship laws?

- Laws in each State and Territory governing substitute decision-making for adults who are deemed unable to make their own decisions
- Personal decisions: guardianship
- Financial decisions: attorneys and administrators
- Note: some jurisdictions refer to both financial and personal decision-makers as attorneys and/or permit appointment within the one document
- Where a person has not appointed their own decision-maker, a Board or Tribunal may appoint a guardian and/or administrator if required
Modern guardianship laws
Guiding Principles

- Laws differ in each State and Territory
- Most modern legislation introduced in 1990s
- Guiding Principles often include:
  - The need to adopt an approach that is the least restrictive of a person’s freedom of decision and action as possible
  - Promotion of a person’s best interests
  - Giving effect to a person’s wishes if/where possible
UN Convention on the Rights of Persons with Disabilities (UNCRPD)

- Entered into force 3 March 2008
- Article 12: Equal Recognition before the law
  - Persons with disabilities have the right to recognition as persons before the law
  - Persons with disabilities must enjoy legal capacity on an equal basis with others
  - Parties must take appropriate measures to provide access to supports that may be required for people to exercise their legal capacity
  - Need for appropriate and effective safeguards to prevent abuse
  - Measures must respect the rights, will and preferences of a person
UNCRPD (cont)

- Not intended to declare any new or different rights for people with disability
- State parties must proceed in good faith to give effect to the Convention
- Debate about whether Convention permits guardianship laws
- Australian Government’s view: substitute decision-making (guardianship) permissive where time limited, last resort, subject to safeguards
Australian Law Reform Commission Reports

**Equality Capacity and Disability in Commonwealth Laws (2014)**
- Reviewed the effect of the UNCRPD on Commonwealth laws
- Development of National Decision-Making Principles

**Elder Abuse - A National Legal Response (2017)**
- National Decision-Making Principles reinforced
### ALRC’s National Decision-Making Principles

<table>
<thead>
<tr>
<th>Principle 1</th>
<th>• All adults have an equal right to make decisions that affect their lives and to have those decisions respected</th>
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<tbody>
<tr>
<td>Principle 2</td>
<td>• Persons who require support in decision-making must be provided with access to the support necessary to make, communicate and participate in decisions</td>
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<td>Principle 3</td>
<td>• The will, preferences and rights of a person who requires decision-making support must direct decisions that affect their lives</td>
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<td>Principle 4</td>
<td>• Laws must contain appropriate and effective safeguards</td>
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Key Themes

1. Removal of proof of disability as pre-condition to operation of laws
   Guardianship laws traditionally applied only to people with disability

2. Supported Decision-Making
   Instead of substitute decision-making models like Guardianship

3. Rights, Will and Preferences Approach
   Rather than what is in a person’s ‘best interests’
What is ‘supported decision-making’?

- Person makes their own decision with support
- Supports might be required to help the person
  - Gather relevant information
  - Consider and evaluate alternatives
  - Communicate a decision
  - Implement a decision
- Maximise opportunities for the person to demonstrate their abilities
  - Environment
  - Timing
  - Use of aids
1. Persons who require decision-making support should be supported to participate and contribute in all aspects of life.

2. Persons who require decision-making support should be supported in making decisions.

3. The role of persons who provide decision-making support should be acknowledged and respected – including family members, carers or other significant people chosen to provide support.

4. Persons who may require decision-making support may choose not to be supported.
ALRC Guidelines for assessing support needs

- All adults must be presumed to have the ability to make decisions affecting their lives.
- A person must not be assessed to lack decision-making ability on the basis of having a disability.
- Decision-making ability must be considered in the context of available supports.
- A person’s decision-making ability is to be assessed, not the outcome of the decision.
- A person’s decision-making ability will depend on the kind of decision to be made.
- Decision-making ability may evolve or fluctuate.
Legislated Supported Decision-Making

- Some jurisdictions have recognised the use of supported decision-making within legislation
- Victoria: 2016 enactment of Medical Treatment Planning and Decisions Act – “support person”
- Victoria 2019 amendments to the Guardianship and Administration Act – “supportive guardianship orders”
- Also legislated in Ireland, Sweden, some provinces in Canada, and some states in the US
Other developments

<table>
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<th>NSW</th>
<th>Tas</th>
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Other developments (cont)

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<th>QLD</th>
<th>NT</th>
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<td>2010 Law Reform Commission report did not recommend legislated</td>
<td>2017 reforms did not introduce legislated supported-decision-</td>
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<td>supported decision-making.</td>
<td>making scheme but reflect decision-making rights of people with</td>
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<td>2018 Bill did not introduce legislated supported decision-making</td>
<td>disability</td>
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<td>framework but various reforms highlight use of support: see eg</td>
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<tr>
<td>‘Guiding Principles’</td>
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‘Rights, Will and Preference’ Approach

1. Can the person make a decision with support?
2. Have all reasonable supports been offered?
3. Does a decision need to be made?
If wishes can’t be ascertained, what would they likely want?

Have wishes been communicated in an ACD?

Give practical effect to the person’s views, wishes, preferences
Does it make any difference?

- Sometimes might reach same conclusion
- Current frameworks promote ‘least restrictive’ approaches and require consideration of a person’s wishes
- Common law presumption of capacity applies
What about jurisdictions retaining traditional guardianship laws?

J v Guardianship and Administration Board and anor [2019] TASSC 15

- Interpretation of Tas legislation
- Guiding Principles of Act:
  1. Least restrictive approach
  2. Promote person’s best interests
  3. Carry into effect the person’s wishes if possible
- Background and factual scenario
What about jurisdictions retaining traditional guardianship laws? (cont)

- Justice Wood adopted human rights perspective
- Observed presumption of capacity
- Ability to make ‘bad’ decisions
- Importance of a person’s wishes
- Consideration of questions of harm
- Evaluation of the decision-making process not the outcome
Conclusion: Promoting a human rights approach

- Provide circumstances that enhance a person’s ability to demonstrate their capacities - consider location, time, length of appointment, who attends
- Use of support persons – to gather information, explain information, discuss options and advantages and disadvantages
- Encourage the creation and use of advance care directives to assist a person to convey their views and preferences at times when they may not have the ability
- Decision-specific assessments rather than generalisations – as decision-making ability is context specific
- Guardianship as a last resort
Questions?