Symposium Address Notes for Association For Good Government meeting

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The subject of this symposium is the proposition that a person is entitled to the fruits of their labour. The right to have your personal priorities respected in relation to how

your financial assets are managed is a human right enshrined in the UN Declaration

of Human rights which our national government, along with many others signed and ratified in the aftermath of WWII. More recently our national government signed and ratified the UN Convention on the Rights of People with Disabilities, which includes people with intellectual disabilities such as dementia.

After 6 years of representing my mother at numerous hearings at NCAT and the NSW Supreme Court in order to prevent the NSW Trustee and Guardian from selling her

home against her wishes it has become apparent that NSW Guardianship law is heavily weighted against the human rights principles propounded in the UN conventions just referred to.

**Common law rights extinguished for ‘protected’ persons.**

A central principle of the common law is that a person is entitled to enter into any contract or financial arrangement providing that the person is cognisant of the responsibilities, terms and conditions entailed in agreeing to that financial arrangement. The common law also states that a person is bound by any specific financial arrangement they have entered into unless it can be shown that the person

did not understand the material ramifications of the specific arrangement entered into.

In other words a person judged to be of sound mind is bound by each specific

financial arrangement entered into, unless it can be shown that that person did not comprehend the terms of that specific financial arrangement.

A persons legal status changes dramatically immediately when that person is

declared to lack ‘legal’ mental capacity. For example where a person is diagnosed

as suffering from dementia by a clinical psychologist, geriatric specialist or neurologist.

Under current NSW guardianship law (similarly in the other states and territories)

loss of ‘legal’ capacity to make decisions for oneself in regard to the management of one’s financial assets is deemed to be absolute. The common law requirement that a person’s capacity or lack of capacity to comprehend the nature of each specific agreement or proposed undertaking, must be proven, no longer holds, once a person is declared to lack “legal” capacity.

A persons rights to manage their own affairs both financial and personal are extinguished upon a person being declared to lack ‘legal’ mental capacity where upon their affairs will most likely be subject to decisions made on their behalf, by a previously assigned power of attorney, or enduring guardian chosen by the person before the person was declared to lack legal capacity, or a trustee or guardian appointed by a court or tribunal.

In guardianship law a person declared to have lost ‘legal’ capacity is termed a

‘protected’ person.

The NSW Trustee is routinely assigned to manage a ‘protected’ person’s financial affairs in circumstances where there is dispute, typically amongst family members, as to the preferred option for managing the ‘protected’ persons financial and personal

affairs. In the majority of instances where disputes are bought before NCAT’s

guardianship division the NSW Trustee and/or the NSW Public Guardian are

assigned management of the ‘protected’ persons affairs.

The ‘protected’ person is then assigned an official case manager, employed by

the NSW Trustee and/or a case manager employed by the Public Guardian.

The case manager assigned may or may not have an in depth understanding of

the Act under whose provisions they are required to manage the ‘protected’

persons affairs. Case managers are also subject to both official and unofficial

policy directives handed down from their institutional hierarchy.

Whatever the competency of the assigned case manager they are operating

under the provisions of NSW guardianship law which contain contradictory clauses.

Which brings me to the essential contradictions, in my view, which exist in current

NSW guardianship law.

To understand how contradictions developed, in current guardianship

law an excursion into the history of guardianship law is in order.

The principal statutes of NSW guardianship law currently in force are the NSW Trustee and Guardian Act (2009) and the Guardianship Act (1987). Almost identical statutes

are in force in the other states and territories, containing almost identical provisions.

Australian guardianship law was transplanted to our shores modelled on English guardianship law which dates back to the Parens Patrie provisions of Feudal times, which in turn has its genesis in ancient Roman law.

We shall not delve back into ancient Roman law we shall start instead with the

Lunacy Act (No 45) of 1898 a mere 121 years ago. I say mere because 121 years

is considered to be much the same as yesterday in legal circles. Legal precedents,

often referred to as case law, are routinely cited during court room hearings even though the cases cited may have been decided hundreds of years ago.

Section 128 (2) Part VIII of the Lunacy Act provides-

“Management of the estates of insane persons and patients.

(1.) General powers and duties of Master in Lunacy.

(2.) Powers and duties of Master in respect to estates of insane patients.

128. (1) For the purposes of this Act the Master (of Lunacy) may do such acts and exercise such powers with respect to an estate committed to his management and care as the patient himself could have done if sane, and may, in the name and on behalf of the patient, execute and sign deeds and instruments under the “Real Property Act,” or any Act passed, or to be passed, amending or consolidating the same), transfers of shares, receipts, releases and other documents, which shall be as effectual as if executed and signed by the patient himself while sane, and shall be acted upon accordingly by the Registrar General and all other persons without any obligation to inquire whether the person on whose behalf the Master purports to act be a patient or not.”

The Lunacy Act of 1898 was replaced by the Protected Estates Act (1983), section 26 repeats section 128 of the Lunacy Act, although the language is modernised, the legal meaning remains the same-

“26 Execution of documents

(1) For the purposes of managing the estate of a protected person the Protective Commissioner (who replaced for the Master of Lunacy) shall have, and may exercise, all such functions as the protected person has and can exercise or would have and could exercise if under no incapacity.

(1A) For the purposes of managing the estate of a protected missing person, the Protective Commissioner has, and may exercise, all the functions that the protected missing person has and can exercise or would have and could exercise if the person were not missing.”

In turn the Protected Estates Act (1983) was replaced by the NSW Trustee and Guardian Act (2009). Section 57 of the Act and currently in force provides-

“**57 NSW Trustee has all functions of managed person** (cf PE Act, s 26 (1) and

(1A))

(1) For the purposes of its protective capacities in respect of a protected

person or patient, the NSW Trustee has, and may exercise, all the

functions the person or patient has and can exercise or would have and

could exercise if under no incapacity.

(2) For the purposes of its protective capacities for a managed missing

person, the NSW Trustee has, and may exercise, all the functions that

the person has and can exercise or would have and could exercise if the

person were not missing.”

Please note sections (1) and (1A) of the Protected Estates Act and sections (1) and (2) of the NSW Trustee and Guardian Act confer the same rights to ‘protected’ persons whether the “protected” person is missing or not, that is no rights whatsoever.

Sections of the Guardianship Act (1987) have virtually identical provisions to those I have just read out.

Based on the sections of guardianship law which I have just read out you might conclude that guardianship law has changed little in hundreds of years and

you would be right, only the names have changed.

However there has been a NEW section added to both the NSW Trustee and Guardian Act (2009) and the Guardianship Act (1987). The NEW provision is identical in both Acts although the General Principles in the Guardianship Act has one additional clause.

The relatively new sections are section 39 of the NSW Trustee and Guardian Act (2009) and Section 4 of the Guardianship Act (1987), often referred to as the General

Principles. The General principles sections have no historical precedent in NSW guardianship law prior to the two Acts currently in force.

From the NSW Trustee and Guardian Act -

“**39 General principles applicable to Chapter**

It is the duty of everyone exercising functions under this Chapter with

respect to protected persons or patients to observe the following

principles:

(a) the welfare and interests of such persons should be given

paramount consideration,

(b) the freedom of decision and freedom of action of such persons

should be restricted as little as possible,

(c) such persons should be encouraged, as far as possible, to live a

normal life in the community,

(d) the views of such persons in relation to the exercise of those

functions should be taken into consideration,

(e) the importance of preserving the family relationships and the

cultural and linguistic environments of such persons should be

recognised,

(f) such persons should be encouraged, as far as possible, to be

self-reliant in matters relating to their personal, domestic and

financial affairs,

(g) such persons should be protected from neglect, abuse and

exploitation.”

From the Guardianship Act -

**“4 General principles**

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

(a) the welfare and interests of such persons should be given paramount consideration,

(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,

(c) such persons should be encouraged, as far as possible, to live a normal life in the community,

(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation,

(h) the community should be encouraged to apply and promote these principles.” (the extra clause I referred to earlier)

The new sections appear to have been simply tacked on to the existing Acts taking no account of the fact that they contradict the sections of the Acts quoted earlier which confer absolute power to make substitute decisions on behalf of the ‘protected’ person to employees of the NSW Trustee and the Guardianship Division of NCAT.

How can a person “be self-reliant in matters relating to their personal, domestic and financial affairs,” whilst they remain subject to guardianship law provisions, reflecting ancient attitudes to intellectual disabilities, which confer absolute power to substitute decision makers?

Note that the new General Principles sections purportedly give legislative force to the Australian government’s ratification of the UN Charter of Human Rights and the Australian government’s ratification of the UN Convention on the Rights of People with Disabilities.

In it’s current form NSW guardianship law leaves it to employees of the NSW Trustee and the NSW Guardianship Division, tribunals and courts to interpret which of the contradictory provisions of current guardianship legislation are applicable.

The provisions of current guardianship law derived from ancient attitudes to mental capacity allow substitute decision makers to make decisions without regard to a ‘protected’ persons priorities, even the provisions in a persons will executed when they were of sound mind can be ignored.

Should a member of the ‘protected’ person’s family or indeed the ‘protected’ person themselves decide to challenge a decision made by an officer employed by the NSW Trustee or NCAT’s guardianship division they face a set of ‘legal’ obstacles which are

heavily weighted against them, particularly at NCAT level.

One of the canons of justice is the no bias rule. Magistrates, judges, and even NCAT adjudicators are required to consider the submissions from parties to a dispute impartially. The no bias rule is intrinsic to natural justice and procedural fairness.

Instances of bias favoring the NSW Trustee and Guardian, by NCAT adjudicators during my appeals against the NSW T&G’s decision are documented and would, I believe, carry weight in any constitutionally recognized Court of law. My studies

of case histories at NCAT level also indicates many instances of bias.

That there is a propensity towards bias in the NCAT decision making process, stems from several incongruities:-

Requiring government affiliated bureaucrats to impartially assess decisions made by fellow bureaucrats creates an ideological hurdle which even higher courts sometimes fail to surmount. This form of bias could more succinctly be labeled ‘cronyism’ or institutional bias.

The NCAT Act, under which NCAT adjudicators operate, notionally allows adjudicators to dispense with ‘rules of evidence’ so they may gather and accept or ignore evidence as they choose.

Whilst I can understand the motive behind the framing of the Civil and Administrative Act – to provide dispute resolution considerably more cheaply than constitutionally recognized Courts, the lack of rules of evidence creates scope for institutional bias at NCAT level which is considerably less likely to pass for justice before constitutionally recognized Courts.

CONCLUSIONS

If the Australian states and territories are to put into practice the principles enshrined in human rights conventions signed and ratified by our national government, state based guardianship laws are in urgent need of a legal makeover. For starters the General Principles should be clearly mandated as a priority to be observed by

persons making decisions on behalf of others.

The presumption that a ‘protected’ person with intellectual disabilities, such as dementia, has absolutely no capacity or legal right to make their own decisions, must be removed from current NSW guardianship law.