Preamble

Australia, as with the United States of America and Canada (and unlike countries such as England and New Zealand) has a federal system of Government. Australia comprises six states and two territories. As a nation Australia ratified the Convention on Rights of Persons with Disabilities in July 2008 and the Optional Protocol in August 2009. However, although there is both Federal and State/Territory Legislation in respect of prohibiting discrimination, on the grounds of disability, it would appear that it is more honoured in the breach than the observance, should discrimination occur. Furthermore, legal redress may be difficult due to limited access to justice for those who are disadvantaged through disability, finances and/or age.

Adult Guardianship Legislation

Although there is no Federal legislation relating to guardianship all states and territories have legislation in respect of adult guardianship. Underpinning this legislation are general principles which govern persons who exercise functions pursuant to the legislation. These principles, in effect, reflect the General Principles found in Article 3 of the Convention

a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
b. Non-discrimination;
c. Full and effective participation and inclusion in society;
d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e. Equality of opportunity;
f. Accessibility;
g. Equality between men and women;
h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

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For example in New South Wales\(^4\) the principles state

(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.\(^5\)

In practice the various Tribunals, when hearing matters relating to guardianship, underpin their decisions using a person centred approach, by reference to the principles outlined above.

However, it may be argued that the power of Tribunals to make plenary orders in respect of financial matters is in fact a breach of Article 12 of the Convention\(^6\)

The reality

If one of the statutory authorities is appointed, (by a Tribunal), as Financial Manager or Guardian, the policy governing their role is to utilise an assisted/supported decision making process wherever possible. But not all decision making for persons with impaired capacity is directed, in the first instance, by the various Tribunals. For example for medical and dental decisions should there not be a formal guardian appointed for medical or dental treatment (either by the Tribunal or the person themselves prior to loss of capacity) then, using a hierarchical structure\(^7\) there is provision in the various legislation for a “person responsible”.\(^8\) In descending order this can be the spouse in a close and continuing relationship\(^9\), someone who has care of the person\(^10\) or a close friend or family member. However, it is at the level of guardianship on a daily basis that the theory and best of intentions often collide. Although the best interests of the person requiring assistance may be paramount in the eyes of the person assisting, a lack of knowledge associated with the principles and the ability to put them into effect, may result in a situation of substituted, rather than assisted decision making occurring. In these situations the person with impaired capacity may in fact have all

\(^4\) Where this panel member currently resides

\(^5\) Guardianship Act 1987 (NSW) s4

\(^6\) Article 12 Equal Recognition before the law

\(^7\) The top of the hierarchy is the appointed guardian

\(^8\) Guardianship Act 1987 (NSW) s33A

\(^9\) Provided that the spouse is not under a guardianship order

\(^10\) But not in a professional capacity
their decisions made for them in respect of their activities of daily living.

Publications such as the ‘Capacity Toolkit’\textsuperscript{11} assist in overcoming this knowledge deficit. The Toolkit emphasises six basic principles to be followed, when assisting persons make decisions. These principles are:

1. Always presume a person has capacity;
2. Capacity is decision specific;
3. Don’t assume a person lacks capacity based on appearances;
4. Assess the person’s decision-making ability – not the decision they make;
5. Respect a person’s privacy;
6. Substitute decision-making is a last resort.

Support for private guardians can also be found with the various offices of the Public Guardians who have Private Guardian Support Units. These units provide a confidential pro bono service for legally appointed guardians (that is, appointed either by the person themselves prior to losing mental capacity, or by the relevant Guardianship Tribunal).

**Promising practices**

In South Australia a Supported Decision Making Project was undertaken during 2010-2012.\textsuperscript{12} The model provided a “non-statutory supported decision making agreement” with the aim of maximising the autonomy of people with a disability and is consistent with Article 12 of the Convention. On evaluation of the project it was found that “…the project provided specific benefits to most participants…[which] included increased confidence in decision making, improved decision making skills, and a feeling of greater control in a persons lives.”

New South Wales is currently undertaking the state’s first supported decision making trial related to financial management. The pilot “…aims to develop and test a range of options that enhance decision making control an individual has in their life”. The overall goal will be to “…reflect the United Nations Convention on the Rights of People with Disabilities.”\textsuperscript{13}

There is light at the end of the tunnel – and it’s not an incoming train!

\textsuperscript{11} New South Wales Attorney General and Justice ‘Capacity Toolkit’ available at http://www.diversityservices.lawlink.nsw.gov.au

\textsuperscript{12} Office of the Public Advocate at http://www.opa.sa.gov.au

\textsuperscript{13} NSW Trustee $ Guardian Annual Report 2012-2013 at http://www.tag.nsw.gov.au
Questions – assisted decision making

**Tom is 85 years of age** and has been diagnosed with dementia. A heavy smoker throughout his life Tom has suffered diminished blood flow particularly to his lower left leg, over the last few years. The doctors recommend an above knee amputation.

As his legal guardian for medical and dental treatment decisions you

a. Tell Tom that he is to have an operation to make his leg better;

b. Tell the doctor that this is a medical decision and do whatever he/she thinks is necessary;

c. Spend time with Tom finding out his understanding of what is happening and support his decision – whatever it may be.

**Phillipa is 25 years of age** and suffered brain injury as a result of a motor vehicle accident. Phillipa has begun a sexual relationship with a 40 year old male who also has an acquired brain injury. The health professionals think it would be “in Phillipa’s best interest” if she had a pap smear and blood taken for a full screening for sexually transmitted diseases.

As her legal guardian appointed with an accommodation and community services function you

a. Agree with the health professionals and book Phillipa for the procedures as soon as possible;

b. Discuss the situation with Phillipa, and support her decision as her legal substituted decision maker – whatever the decision may be;

c. Do none of the above as it is not within your function.