

To the Legal Affairs and Community Safety Committee of the Queensland Parliament

A submission regarding the Guardianship and Administration Act and Other Legislation Amendment Bill 2017

From John Tracey

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Hello,

I am the administrator, guardian for legal matters and full time carer for my stepson who is a thirty five year old man who has impaired capacity and is a previous client of the (former) Adult Guardian and Public Trustee.

This submission is specifically about Clause 7, Replacement of s 11 (Principles for adults with impaired capacity).

This proposed amendment replaces the current statutory presumption of capacity and obligation of all who exercise power under the Act to abide by the General principles including the presumption of capacity, with a mechanism to extinguish legal capacity and an exemption from the general principles for all who exercise power under the Act.

In a nutshell, my submission is that this proposed amendment breaches articles 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which has been ratified by Australia.

Please consider CRPD Article 12 - "Equal recognition before the law 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."

At present the GAA's statutory presumption of capacity is fully consistent with Article 12 of the CRPD. This is a good thing that should not be undermined, as the proposed amendment would.

If this amendment is passed a person with impaired capacity can legally be stripped of all statutory and common law rights and legal capacity, which are transferred to a substituted decision maker. This is not equal legal capacity.

These issues are particularly important when a person with impaired capacity has a complaint and wants to initiate legal action against their substituted decision maker. If the amendment were passed, a person would have no legal agency to complain or initiate legal proceedings as that power would lie exclusively with the accused party which is of course a conflict of interest. It is also a breach of Article 13 of the CRPD - "Access to justice 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all proceedings, including at investigative and other preliminary stages."

This proposed amendment steers against the national and international tide of disability human rights reform. It is a regressive move back to paternalistic “substituted” decision making and away from modern human rights best practice of “supported” decision making.

The proposed amendment also undermines the general principles of the Guardianship and Administration Act’s General principle 1 – presumption of capacity, General principle 2 - equal rights and General principle 7 - involvement in decision making to the maximum of the persons capacity.

The proposed amendment breaches Federal and State Discrimination laws that prohibit the removal of legal rights on the basis of impairment.

I suggest that the basic flaw of the proposed amendment is that it does not differentiate between legal capacity and factual capacity which are as different from each other as fact and law are before a court.

Legal capacity is a common law human right of legal agency, the most basic of all human rights which is held equally by all people including people with impaired capacity. Statutory capacity such as the GAA’s first general principle – the presumption of capacity and section 80K’s right of an impaired person to be an active party before QCAT are also legal capacity. Legal capacity and rights cannot be proven or rebutted by evidence, they are matters of law.

Factual capacity is the actual capacity of a person to understand, make and communicate decisions, that is proven or rebutted by evidence such as a medical assessment.

The proposed amendment extinguishes universal statutory and common law capacity on the basis of evidence and as such is legally flawed.

The present Guardianship and Administration Act, Federal and State anti-discrimination laws and the CRPD all outline a paradigm of supported decision making where a person of any capacity or impairment has an inherent right to make their own decisions, has support to make decisions and is involved in decisions to the maximum of their capacity. This paradigm locates legal capacity and rights with the person them self and provides support to the extent of the impairment for that person to fully exercise their capacity and rights equal to any other person.

The old paternalistic paradigm of substituted decision making is where a person with impaired capacity has no inherent legal rights or capacity and decisions are made by a substituted decision maker who is the exclusive agent of rights and capacity held on behalf of the person. The proposed amendment is based on the old paradigm.

The CRPD outlaws substituted decision making and enforces legal capacity for people with impaired capacity. The United Nations Committee on the Rights of Persons with Disabilities, the body responsible for monitoring compliance with the CRPD, has clearly communicated to Australia that substituted decision making contravenes the convention, which was the trigger for the ALRC and QLRC reports into capacity and guardianship.

Please consider an excerpt from the UN Committee on the Rights of Persons with Disabilities’ concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013) -

“Equal recognition before the law (art. 12) 24. The Committee notes that the Australian Law Reform Commission has been recently commissioned to inquire into barriers to equal recognition before the law and legal capacity for persons with disabilities. However, the Committee is concerned about the

possibility that the regime of substitute decision-making will be maintained and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity..”

I note that at present QCAT routinely extinguishes statutory and common law capacity on the basis of rebuttal of capacity and appoints substituted decision makers, as if this proposed amendment was already law. This has been illegal. There is nothing at present in the Guardianship and Administration Act, or any other legislation, to authorise the extinguishment of any legal rights by rebuttal or any other method.

In our own matters before QCAT, the Tribunal has argued that the extinguishment of my stepson’s legal capacity including the right to initiate legal action, to appeal QCAT decisions, to be advised by a lawyer and to instruct a lawyer, in regard to complaints against substituted decision makers the Public Trustee and former Adult Guardian, is authorised by the contract common law principle of rebuttal of capacity.

QCAT has been legally wrong to apply contract common law rebuttal to extinguish human and legal rights for three reasons –

1/ Common law does not extinguish statutory capacity such as the first and second principles of the GAA as sovereign legislation is a higher law than common law.

2/ the courts must not interpret legislation to remove rights unless the legislation itself states this intent in clear language and the GAA has no language or provision for the rebuttal or extinguishment of rights.

3/ the rebuttal of capacity in contract common law only voids a contract, it does not in any way remove or reduce the legal capacity or rights of the person with impaired capacity. Even when the capacity of a party to a contract has been rebutted, that person still has the common law right to fair and reasonable delivery of necessities that were subject of the contract. Despite the contract being voided, the person with impaired capacity loses no common law rights in rebuttal. In our family’s matters before QCAT, the Tribunal has relied on the Court of Appeal decision “Bergmann v Daw” to justify the extinguishment of legal capacity by way of rebuttal. However the decision specifically states that the GAA does not remove any rights from the person with impaired capacity and its purpose is to protect those rights. Bergmann v Daw decision paragraph 42 – “ Also, it would be wrong to view this legislation as detracting from common law rights. Rather, the Act is remedial in nature and protective of the rights and property of incapacitated persons.”

QCAT has been acting illegally and contrary to the CRPD in extinguishing legal rights up until this point. This proposed amendment appears to be a change to the law to accommodate QCAT’s illegal and paternalistic practice. I urge the parliament to instead consider changing QCAT to accommodate the law and international standards of human rights.

In conclusion I draw the committee’s attention to the history of Australia’s ratification of the CRPD and urge the committee to make a positive rather than a negative contribution to the implementation of the convention in Queensland. Australia was one of the nations most committed to the UN adopting the CRPD. However in 2008 when the UN adopted the convention, Australia was unable to ratify it because all Australia’s guardianship jurisdictions were based on substituted decision making which is outlawed in the convention. As a result, Australia eventually conditionally ratified the convention, the condition being that Australia understands the convention to allow substituted decision making as a last resort. However all Australia’s guardianship jurisdictions including Queensland continued to routinely order substituted decision making. In 2013 the UN

Committee on the Rights of Persons with Disabilities informed Australia that it was breaching the convention and urged Australia to abandon the condition of ratification and ensure Australia's guardianship laws conformed to the convention.

I urge the committee, the parliament and the government to uphold international and best practice principles of disability human rights law and reject this proposed amendment.

Thank you for considering my submission

John Tracey