

PROMOTING AUTONOMY AND DIGNITY LATER IN LIFE

A REVIEW OF GUARDIANSHIP AND ADMINISTRATION IN QUEENSLAND

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‘The elderly, the frail are our society . . . They worked and loved and lived – and can continue to do so. They are our parents and grandparents, our carers and neighbours and they are every one of us in the not-too-distant futures.’ (Karen Hitchcock, ‘Dear Life: On Caring for the Elderly’ (2015) 57 *Quarterly Essay* 1, 70)

ABSTRACT

The demands of an ageing population require reassessment of the systems designed to support older people. This article positions Queensland alongside the global paradigm change which has seen a movement from a paternalistic past to a modern human rights approach to disability. By incorporating elements of supported decision making and mediation techniques into guardianship and administration, Queensland has established a commitment to a human rights approach which promotes autonomy and dignity for older people with cognitive impairment. Despite international pressure to completely abandon protectionist principles, Queensland carefully retains a last resort option to appoint substitute decision makers to act on behalf of a person with serious impairment. In doing so it strives to strike a balance between the need to protect the vulnerable and promote their autonomy. However, without viable alternatives, it is likely that a person may enter into guardianship or administration prematurely. Therefore, while guardianship is a last resort in theory, this is not always the reality. This article recommends introducing four tiers of supported decision making in addition to mediation structures independent to the existing Queensland Civil and

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Administrative Tribunal's (QCAT) hearing process. This will ensure that guardianship and administration is a last resort both in theory and practice. Furthermore, it will restore dignity and autonomy to people later in life.

I BACKGROUND

A The Focus on Age Related Cognitive Decline

As populations across the world age at an increased rate, structures which effectively promote the wellbeing of older people are vital.¹ This is true for Australia. According to the 2015 Intergenerational Report, in 2054-55, the amount of people aged 65 and over is predicted to more than double the number today.² Therefore, it is not surprising that dementia is overtaking lifelong intellectual impairments as the leading disability experienced by adults subject to guardianship.³

The ageing process presents a number of unique challenges associated with cognitive decline. People with lifelong intellectual disabilities and those with age related cognitive impairment are dealt with under the same international and domestic law.⁴ Yet older people experience disability differently to those with lifelong intellectual impairment. They are people who once lived fully independent lives but gradually lose their autonomy as a result not only of the ageing process, but also of how society responds to this stage in life. Clearly, there is a need

¹ HelpAge International, *About Global Age Watch* (2014) Global Age Watch International Index 2015 <<http://www.helpage.org/global-agewatch/>>. The Global Age Watch International Index was recently designed using data from the World Health Organisation and similar organisations to rank nation-states according to the quality of life afforded to older people. The index takes into account income security, health status, capability and enabling environment. Australia is currently ranked 17th.

² J B Hockey, *2015 Intergenerational Report: Australia in 2055* (Commonwealth of Australia, 2015) 1.

³ John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 *Australian Social Work* 26, 14.

⁴ See, eg, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); *Guardianship and Administration Act 2000* (Qld).

to assess whether the guardianship and administration system sufficiently addresses the needs of older people. Disturbing accounts of older people feeling loved and cared for but not worthy of being listened to,⁵ inspired this article to examine the extent to which Queensland's current system promotes autonomy and dignity later in life.

B The Paradigm Shift

Global attitudes towards disability have dramatically evolved from a paternalistic past to a modern human rights focus. In the 20th century, a medical approach to adult guardianship dominated laws and attitudes.⁶ People with impaired decision making were institutionalised while personal and financial decisions were left to medical staff and the state.⁷ However, the rights movement inspired deinstitutionalisation and a movement towards community based care and support.⁸ This was influenced by growing respect for the rights, autonomy and dignity of people with intellectual impairments. In 2006, the United Nation's 'most revolutionary international human rights document' was designed to reflect this paradigm shift.⁹ The United Nations Convention on the Rights of Persons with Disabilities (CRPD) bolsters 'respect for inherent dignity, individual autonomy including the freedom to make

⁵ Karen Hitchcock, 'Dear Life: On Caring for the Elderly' (2015) 57 *Quarterly Essay* 1, 1 quoting Roger Angell. See also ABC, 'Atul Gawande on Healthcare Reform', *Health Report*, 15 June 2015 (Norman Swan and Atul Gawande). Gawande recounts a nursing home director's opinion that people are primarily concerned with safety when selecting an aged care facility for their parents rather than whether their parents will be lonely or have choices. Gawande quotes the director stating that 'safety is what we want for those we love, and autonomy is what we want for ourselves'.

⁶ Shih-Ning Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35 *Sydney Law Review* 133, 137.

⁷ Office of the Public Advocate, 'A journey Towards Autonomy? Supported Decision-Making in Theory and Practice' (Literature Review, Queensland Government, Department of Justice and Attorney-General, February 2014) 3.

⁸ Terry Carney and David Tait, 'Adult Guardianship: Narrative Readings in the "Shadow" of the Law?' (1998) 21, 2 *International Journal of Law and Psychiatry* 147, 147.

⁹ Michael Perlin, "'Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law' (2013) *Penn State Law Review* 1, 16.

one's own choices and independence of Persons'.¹⁰ The CRPD was met with significant international support. People with disabilities and their representative organisations played a significant role in formulating the convention which received more opening signatures than any other human rights treaty.¹¹

The CRPD recognises that people with disabilities are active members of the community with rights rather than people in need of charity.¹² The emphasis has turned to 'ability rather than disability, capacity rather than incapacity, and rights rather than protection'.¹³ While acknowledging debate concerning the interpretation of the CRPD, this article examines how the aspirations of the CRPD should be applied to the older generation.

One of the biggest phenomena to accompany this paradigm shift is growing recognition for dignity in risk.¹⁴ According to this concept, rather than protecting an older person's best interests, an adult with impaired capacity is afforded the opportunity to make bad or risky decisions like other adults.¹⁵ Atul Gawande, a surgeon and author, illustrates this concept in an interview on the *Health Report*. He describes radically modernised aged care facilities which are built around kitchens rather than nursing stations.¹⁶ In these facilities, people have access to all sorts of food and drinks which means that a person with diabetes may choose to have a soft drink.¹⁷ Although this may have negative health implications, it is a choice

¹⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 3(a).

¹¹ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Person's with Disabilities' (2008) 8 *Human Rights Law Review* 1, 2-4.

¹² *Ibid* 3-4.

¹³ Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-making for People Lacking Capacity* (2010) xi.

¹⁴ Office of the Public Advocate, 'A Journey Towards Autonomy?', above n 7, 6.

¹⁵ *Ibid*.

¹⁶ ABC, above n 5.

¹⁷ *Ibid*.

available to younger adults with diabetes. Opponents to this concept may argue that allowing older people to willingly put their health at risk will put undue pressure on the health system. Despite this view, limiting a person's right to make every day decisions is a significant affront to their dignity. In order to treat older people on an equal basis with others, they should be afforded the same opportunity to take risks.

II SUPPORTED DECISION MAKING VS SUBSTITUTE DECISION MAKING

This dramatic evolution in guardianship has been accompanied by growing debate on how it should be expressed. Despite a general consensus on the need for a rights based approach, remnants of a paternalistic past continue to have a strong influence across the world through substitute decision making.¹⁸ In Queensland, substitute decision making occurs through the appointment of a guardian to make personal decisions on behalf of a person, or an administrator for financial decisions. A guardian may be a family member, friend or the Public Guardian.¹⁹ Similarly, an administrator may be a private company trustee, relative, friend or the Public Trustee.²⁰

Despite debate on the wording of the CRPD, the United Nations Committee on the Rights of Persons with Disabilities ('the CRPD Committee') is opposed to substitute decision making

¹⁸ See, eg, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of New Zealand*, UN Doc CRPD/C/NZL/CO/1 (31 October 2014) 3; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Brazil*, UN Doc CRPD/C/BRA/CO/1 (29 September 2015) 4; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany*, UN Doc CRPD/C/DEU/CO/1 (13 May 2015) 5.

¹⁹ Queensland Government, *Who Can Apply for the Appointment of a Guardian* (7 October 2015) <<http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/who-can-apply-for-the-appointment-of-a-guardian>>.

²⁰ Queensland Government, *Who Can Apply for the Appointment of an Administrator* (27 March 2012) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/matter-types/administration-for-adults-matters/who-can-apply-for-the-appointment-of-an-administrator>>.

and encourages all signatories to adopt supported decision making structures.²¹ While substitute decision making gives power to a third party to make decisions on behalf of a person with impaired capacity,²² supported decision making assists adults to make their own decisions by helping them understand the nature of the decision,²³ what choices they have and assisting them to communicate their decision or interpret their wishes.²⁴ To that end it enables people to maintain their legal capacity and right to self-determination.

A Debate Surrounding Article 12

International support for supported decision making is found in Article 12 of the CRPD which provides for ‘equal recognition before the law’.²⁵ It maintains that the state should support people with disabilities to exercise ‘legal capacity on an equal basis with others’.²⁶ Legal capacity is vital to ‘civil, political, economic, social and cultural rights’.²⁷ It is what enables a person with a disability to make important decisions concerning their health, work and education.²⁸ However, the meaning of article 12 has attracted significant debate. During negotiations to form the convention there was debate between states who, on the one hand

²¹ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th sess, UN Doc CRPD/C/G/C/1, (19 May 2014) 6 [26]–[28].

²² Australian Human Rights Commission, ‘Age and Choice: A Human Rights Approach for Ageing and Health’ (2012) 17.

²³ Office of the Public Advocate, ‘Decision Making Support in Queensland’s Guardianship System’ (Issues Paper, Queensland Government, Department of Justice and Attorney-General, November 2014) 4.

²⁴ Office of the Public Advocate, Decision Making Support in Queensland, above n 23, 4; Andrew Byrnes et al, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons With Disabilities and its Optional Protocol* (United Nations 2007) 89-90.

²⁵ *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.

²⁶ *Ibid.*

²⁷ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th sess, UN Doc CRPD/C/G/C/1, (19 May 2014) 2 [8].

²⁸ *Ibid.*

wanted to create a forward looking document which made an unalienable commitment to a human rights model of disability law, and those who identified a need for substitute decision making in limited circumstances.²⁹ As a result, the language of article 12 is somewhat ambiguous. Article 12 states that measures relating to legal capacity should be for the ‘shortest time possible’ and subject to ‘safeguards’ such as freedom from conflict, respect for the adult’s preferences and regular review.³⁰ There is arguably scope for substitute decision making although only in limited circumstances.³¹ Australia took this perspective when it signed the CRPD and issued the following declaration:

Australia declares its understanding that the CRPD allows for fully supported substitute decision making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.³²

This declaration highlights the common tension in liberal democracies between a desire to protect the vulnerable and a commitment to promote individual autonomy.³³

However, in the general comment on article 12, the CRPD Committee interpreted Article 12 to mean that legal capacity is an inherent right afforded to everyone regardless of their mental capacity.³⁴ Therefore, the Committee declared that it must never be diminished by substitute decision making and instead, the preferred approach is supported decision making which

²⁹ Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 429, 441-6.

³⁰ *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.

³¹ Dhanda, above n 29, 460-1; Chesterman, above n 3, 31.

³² *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

³³ John Chesterman, ‘Modernising Adult Protection in an Age of Choice’ (2015) 73 *Australian Journal of Public Administration* 517, 517.

³⁴ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th sess, UN Doc CRPD/C/G/C/1, (19 May 2014) 3 [14].

respects ‘the rights, will and preferences of persons with disabilities’ as opposed to an objective assessment of their best interests.³⁵ In its concluding observations on Australia in 2013, the CRPD Committee raised concerns about Australia’s approach and urged Australia to ‘take immediate steps to replace substitute decision making with supported decision making.’³⁶

Despite the CRPD Committee’s recommendations, this article prefers Australia’s interpretation and recognises that it is not practical to eliminate substitute decision making altogether. Rather, mechanisms should be put in place to ensure that guardianship and administration are measures of last resort. There may be times where Queensland’s responsibility to protect the disadvantaged outweighs its duty to uphold an adult’s wishes. However, where appropriate, the system should take a least restrictive approach with a view to prioritising the wishes of the individual.

There are many circumstances where guardians and administrators are compelled to make decisions on behalf of older people who undoubtedly lack the mental capacity to make those decisions for themselves. For example, an older person in a non-responsive condition who has not issued an advanced health directive may need a guardian appointed to make vital health care decisions.³⁷ In these circumstances, the CRPD Committee recommends exercising supported decision making by arriving at a decision based on a best interpretation of the ‘will and preferences’ of the individual rather than an assessment of his or her objective best

³⁵ Ibid 4 [17], 6 [29].

³⁶ Committee on the Rights of Persons with Disabilities, *Concluding observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 Oct 2013) 2, 4.

³⁷ See generally Queensland Government, *Alternative Arrangements to Tribunal Appointments* (28 August 2014) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/matter-types/administration-for-adults-matters/alternative-arrangements>>. Through an advance health directive, persons with capacity can record their wishes in regards to future medical treatment. It remains effective when a person loses decision making capacity and remains in place until the adult dies.

interests.³⁸ In this way, the older person receives ‘support by representation’.³⁹ Attempts to distinguish supported decision making and substitute decision making on this basis are feeble. The lines between guardianship and supported decision making are being blurred. In most circumstances it would be natural to assume that what is in the best interests of the person would align with their wishes. While substitute decision makers in Queensland have the power to make decisions on behalf of an individual, they are obliged to exercise this power in a way which promotes the wishes of the individual.⁴⁰

There are also unique circumstances, such as those which involve elder abuse, where a protectionist approach is necessary. In a recent matter before QCAT, the Public Guardian was appointed to make decisions regarding a 93 year old woman’s accommodation, health care, services, legal matters and contacts.⁴¹ Additionally, QCAT issued a warrant to remove the woman from the home she resided in with her son.⁴² There was ample evidence to show that she was at an ‘immediate risk of harm’ from her son.⁴³ He repeatedly refused to take her to the hospital for pain associated with a blocked bowel.⁴⁴ Support services could not visit the home because he intimidated staff.⁴⁵ Furthermore, there was evidence of domestic violence.⁴⁶ Although the woman told the tribunal that she wanted her son to make decisions for her, she was clearly intimidated by him.⁴⁷ Therefore, it is unlikely that her direction to the tribunal

³⁸ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th sess, UN Doc CRPD/C/G/C/1, (19 May 2014) 4 [17], 6 [29].

³⁹ Volker Lipp and Julian O. Winn, ‘Guardianship and Autonomy: Foes or Friends?’ (2010) 5 *Journal of International Aging, Law & Policy* 41, 54.

⁴⁰ See *Guardianship and Administration Act 2000* (Qld) sch 1.

⁴¹ *SBG* [2015] QCAT 287, 8[31].

⁴² *Ibid* 6 [23].

⁴³ *Ibid* 6 [22].

⁴⁴ *Ibid* 5 [14].

⁴⁵ *Ibid* 4 [14].

⁴⁶ *Ibid*.

⁴⁷ *Ibid*, 6 [20].

was a true reflection of her wishes. In this situation, a welfare approach was necessary for the woman's immediate safety.

The Office of the Public Advocate (Queensland) has uncovered increasing pressure to appoint guardians and administrators following recent federal aged care reforms.⁴⁸ According to its position article, aged care facilities in Queensland are now insisting upon the appointment of a substitute decision maker before accepting an older person into an aged care facility.⁴⁹ This occurs despite the fact that many family members are prepared to assist their older relatives to make decisions regarding placements into aged care facilities, without resorting to formal guardian and administration appointments.⁵⁰ This leaves QCAT in a precarious situation; although the Act compels QCAT to use guardianship and administration as a method of last resort,⁵¹ the refusal to appoint a guardian or administrator would prevent older people who choose to enter into an aged care facility from realising that decision.

QCAT has responded to this pressure by developing a procedure to appoint guardians and administrators only for the time necessary to complete the relevant paper work and arrange finances to enable the older person to gain entry into an aged care facility.⁵² Following a 'hearing[s] "on the papers"', a guardian or administrator may be appointed for a term ending 28 days after the older person is placed into an aged care facility.⁵³ This procedure is only

⁴⁸ Office of the Public Advocate, 'National Aged Care Reforms' (Position Paper, Queensland Government, Department of Justice and Attorney-General, 7 October 2015); See, eg, *Approval of Care Recipients Principles 2014* (Cth) s 6(c).

⁴⁹ *Ibid* 3.

⁵⁰ Office of the Public Advocate, National Aged Care Reforms, above n 48, 3.

⁵¹ See *Guardianship and Administration Act 2000* (Qld) ss 13, 7, 60.

⁵² See generally Queensland Civil and Administrative Tribunal, 'Annual Report 2013-2014' (Report, State of Queensland, 30 September 2014) 14. The clearance rates for guardianships matters between 2012-2013 and 2013-2014 dropped by 8%. It is therefore likely that the aged care reforms are contributing to a backlog in guardianship applications.

⁵³ Office of the Public Advocate, National Aged Care Reforms, above n 48, 3.

utilised in circumstances where impaired capacity is evident and there is no disagreement regarding the appointment.⁵⁴ Under these circumstances, the appointment of a guardian is necessary due to the external pressure imposed by the aged care reforms and aged care providers. While the reluctance by aged care providers to recognise that many older people still have capacity to make decisions with or without support is a cause for concern,⁵⁵ QCAT exercises a least restrictive approach by ensuring that autonomy is restored as soon as possible by ultimately removing the substitute decision maker.

The Australian Law Reform Commission, in its review of Commonwealth Disability Laws acknowledged that substitute decision making may be required in difficult cases.⁵⁶ However, it recognised that this should not inhibit the creation of legal frameworks which provide for supported decision making.⁵⁷ In the words of human right's advocate, Dr John Chesterman, 'what is clear is that the convention obliges countries to use guardianship as little as possible, and to limit as much as possible, the power, the Guardians have.'⁵⁸ To achieve this, Queensland should adopt a formalised system of supported decision making, with legislation and services separate to the existing *Guardianship and Administration Act 2000* (Qld) ('the Act').

⁵⁴ Ibid.

⁵⁵ Ibid. The position paper also described a growing trend for aged care facilities to require older people to have an Enduring Power of Attorney (EPOA) before entering the aged care facility. Many aged care providers recognise its authority immediately, rather than waiting for the person's capacity to deteriorate. While this article focuses on QCAT, the Public Advocate suggests that further research into the application of EPOA's and similar instruments by aged care facilities is needed.

⁵⁶ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Summary Report No 124 (2014) 17.

⁵⁷ Ibid.

⁵⁸ Chesterman, 'The Future of Adult Guardianship in Federal Australia', above n 3, 31.

B Strengths of the Queensland Model

Under the Act, Queensland skilfully integrates elements of supported decision making into the guardianship and administration framework. In many ways, the Act is committed to a human rights model of guardianship. The Act strives to promote autonomy and dignity by striking ‘an appropriate balance’ between the rights of an adult with impaired capacity to exercise autonomy with their right to receive support in decision making.⁵⁹ In order to appoint a guardian or administrator, two steps must be satisfied. Firstly, the presumption of capacity must be rebutted based on a functional assessment of a person’s capacity.⁶⁰ To rebut the presumption, a person must fail to understand the ‘nature and effect of decisions’, fail to make decisions ‘freely and voluntarily’ or fail to communicate their decisions in ‘some way’.⁶¹ According to the Explanatory Memoranda to the Act, communication in ‘some way’ includes reasonable methods of communication such as symbol boards.⁶² Secondly, by adhering to the least restrictive approach, QCAT must only make an appointment if there is a recognised need.⁶³ For example, an appointment may be necessary if there is an unreasonable risk of harm to the adult or their needs cannot otherwise be met.⁶⁴ In theory, by establishing such a high threshold, guardianship and administration should be a method of last resort.

The Queensland system acknowledges that decision making capacity lies on a spectrum.⁶⁵ Guardianship and Administration orders may be limited to specific categories of decision

⁵⁹ *Guardianship and Administration Act 2000* (Qld) s 6.

⁶⁰ *Ibid* ss 7, 13; See generally Dhanda, above n 29, 431.

⁶¹ *Ibid* sch 4.

⁶² Explanatory Memorandum, *Guardianship and Administration Bill 1999* (Qld) 33.

⁶³ *Guardianship and Administration Act 2000* (Qld) ss 12(1)(b)-(c).

⁶⁴ *Ibid*.

⁶⁵ Katherine Martin, ‘Using Capacity Assessments to Maximise Individual’s Autonomy: What Information Might Assist a Tribunal?’ (2015) 37(4) *InPsych: The Bulletin of the Australian Psychological Society Ltd* 20, 20; Cf Lisa Barry and Susannah Sage – Jacobson, ‘Human Rights, Older People and Decision Making in Australia’ (2015) 9 *Elder Law Review* 1, 3-5. While Queensland law recognises that a person may have capacity in regards

making and this was confirmed in *Bucknall v Guardianship and Administration Tribunal (No 1)*.⁶⁶ According to that case, if a tribunal determines that a person does not have capacity in respect to one matter, they are still presumed to have capacity in other matters or the same matter when it is reviewed.⁶⁷ This demonstrates that Queensland is committed to a least restrictive approach, whereby a person's autonomy is only restricted in limited circumstances.

Once a guardian or administrator is appointed, he or she must adhere to general principles committed to upholding the wishes and interests of the older person. These principles contained in Schedule 1 include, but are not limited to, recognising that the adult shares in the same human rights as others, encouraging self-reliance and maximising participation in decisions affecting the adult's life.⁶⁸ Schedule 1 also provides for 'substituted judgement' whereby a guardian must interpret the adult's views and wishes based on their previous actions, if reasonably practicable.⁶⁹ This is particularly useful for older people who once experienced full functioning mental capacity that has declined over time. For example, an administrator could look to an older person's previous bank transactions to ascertain the amount normally spent on family gifts. Therefore, even when a guardian or administrator is appointed, priority is afforded to the wishes of the individual. Kohn, Blumenthal and Campbell criticise aspects of the American guardianship system for leaving people with impaired capacity to feel lonely and isolated because they are not involved in decision-

to some matters but not others, it fails to appreciate that a person's capacity to make decisions about a particular matter may fluctuate.

⁶⁶ [2009] 2 Qd R 402.

⁶⁷ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) iv; *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402, [28], [33], [43].

⁶⁸ *Guardianship and Administration Act 2000* (Qld) sch 1.

⁶⁹ *Ibid.*

making about matters which affect their lives.⁷⁰ The principles enshrined in Schedule 1 attempt to avoid such an outcome by encouraging maximum participation in decisions.

Guardianship and administration systems are often criticised for focusing on the ‘best interests’ of persons with impairment rather than their will and preferences.⁷¹ For example, in New South Wales, Western Australia and the Northern Territory, guardians and administrators must consider the views of the individual, however the paramount consideration is on the best interests of the adult.⁷² In contrast, Queensland guardians must take into account the wishes of the individual and encourage the individual to ‘make their own decisions’ so long as it adheres to General Principle 7(5) and is ‘consistent with the adult’s proper care and protection’.⁷³ Therefore, while Queensland maintains concern for the welfare of the individual, the legislation refrains from making it the paramount consideration, thereby preserving the importance of the adult’s wishes.

That being said, the Queensland Law Reform Commission has recommended that Queensland completely abandons the ‘best interests approach’ by replacing 7(5) with the requirement to act:⁷⁴

- In a way that promotes and safeguards the adult’s rights, interests and opportunities;
- and

⁷⁰ 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, 1119.

⁷¹ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th sess, UN Doc CRPD/C/G/C/1, (19 May 2014) 6 [27].

⁷² Office Of the Public Advocate, ‘Autonomy and decision making support in Queensland: A targeted overview of guardianship legislation’ (overview of legislation, Queensland Government, Department of Justice and Attorney-General, February 2014) 2; *Guardianship Act 1987* (NSW) s 4; *Guardianship and Administration Act 1990* (WA) s 4(2); *Adult Guardianship Act 1988* (NT) s 4.

⁷³ *Guardianship and Administration Act 2000* (Qld) sch 1; Office of the Public Advocate, *Autonomy and Decision Making Support in Queensland*, above n 72, 2.

⁷⁴ Queensland Law Reform Commission, above n 67, ii.

- In the way least restrictive of the adult's rights, interests and opportunities.

For the reasons explored above, completely disregarding the welfare of the individual is a step too far. Instead, Queensland strives to uphold the preferences of the individual while appreciating the need to protect them when the need arises, by treating each matter on a case by case basis.

C Limitations of the Queensland Model

Guardianship or administration depends on a declaration of impaired capacity which therefore reduces a person's legal capacity. Not only is this an affront to a person's civil rights but the stigma which accompanies such a determination can be particularly harmful.⁷⁵ Such a determination is likely to have a negative impact on one's esteem and sense of self as they perceive less control over their lives.⁷⁶ Although the adult has the opportunity to substantially participate in decisions, ultimate decision making powers rests with the guardian or administrator. Through reduced decision making, the individual may experience additional decline in their decision making ability which may lead to learned helplessness and isolation.⁷⁷ This is concerning for older people who already have a heightened risk of depression.⁷⁸ In contrast, if they remain cognitively active then this is likely to lessen the impact of cognitive decline.⁷⁹

⁷⁵ Kohn, Blumenthal and Campbell, above n 70, 1120; Robert D. Dinerstein, 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making' (2012) 19(2) *Human Rights Brief* 1, 3.

⁷⁶ Dhanda, above n 29, 436; Kohn, Blumenthal and Campbell, above n 70, 1120.

⁷⁷ Dhanda, above n 29, 436; Then, above n 6, 140.

⁷⁸ Tanya Davison, Marita McCabe and David Mellor, 'Improving the Detection and Management of Depression in Aged Care,' (2008) 30(6) *InPsych: The Bulletin of the Australian Psychological Society Ltd* 14, 14.

⁷⁹ Deary et al, 'Age-associated Cognitive Decline' (2009) 92 *British Medical Bulletin* 135, 147.

Compromising legal capacity on the basis of impaired mental capacity is problematic when disability is viewed as a social construct. The CRPD adopts the perspective that disability and mental capacity are not ‘naturally occurring phenomenon’.⁸⁰ Instead, capacity is subject to the social and political environment.⁸¹ It is a result of an individual’s relationship with their built environments.⁸² Socially constructed barriers to education, employment and participation disable a person from exercising their human rights.⁸³ Rather than promoting equality, guardianship and administration reinforce this construct by limiting a person’s right to exercise legal capacity.

In the absence of a clearly defined, separate system for supported decision-making it is nonetheless possible for tribunal members, guardians and administrators to exercise traditional protectionist actions before those which maximise autonomy.⁸⁴ The Act, Schedule 1 Principle 7 maintains that the ‘adult must be given any necessary support ... to participate in decisions affecting the adult’s life’,⁸⁵ but fails to provide an informative framework on how that support will be achieved or the standard of support required. Furthermore Principle 7 states that the ‘adult’s right to participate, to the greatest extent practicable, in decisions.....must be recognised’ but again fails to provide guidance on how that can be achieved.⁸⁶ The Office of the Public Guardian attempts to fill this gap through a free

⁸⁰ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th sess, UN Doc CRPD/C/G/C/1, (19 May 2014) 4.

⁸¹ *Ibid.*

⁸² Dinerstein, above n 75, 2.

⁸³ United Nations Department of Public Information, *Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights* (May 2008) United Nations Enable <<http://www.un.org/disabilities/default.asp?id=476>>.

⁸⁴ South Australian Office of the Public Advocate, ‘Annual Report 2012’ (Report, Office of the Public Advocate, 4 January 2013) 54.

⁸⁵ *Guardianship and Administration Act 2000* (Qld) sch 1.

⁸⁶ *Ibid.*; Department of Justice and Attorney General, ‘Queensland Government’s Response to Queensland Law Reform Commission Report: A Review of Queensland’s Guardianship Laws’ (Report, Queensland Government,

Guardianship Information Service (GIS) which provides information about ‘good decision making practices’.⁸⁷ However, guardians are not required to undergo compulsory training or access the GIS. Therefore, it is easy to see how ‘age stereotyping’ may lead a guardian to assume that an older person is not capable of participating in the decision making process and subsequently make a decision without adequate and effective consultation with the adult.⁸⁸

Without adequate supported decision making structures, guardianship may be entered into prematurely. As the South Australian Office of the Public Advocate states, ‘if the more intrusive intervention of guardianship is specifically defined in legislation and provided by the state for free, there will be little incentive to consider alternatives, particularly if the exact nature of these alternatives is uncertain’.⁸⁹ Tribunals in their very nature are easily accessible. This combined with a lack of less restrictive alternatives means that guardianship applications are made before other options are explored.⁹⁰ In 2014, the Queensland Office of the Public Advocate recognised that it is possible for guardians and administrators to be appointed in circumstances where it is unnecessary, because persons are able to make decisions for

1 July 2014) 9. The Queensland Law Reform Commission recommended amending General Principle 7 (1) to make it more comprehensive and designed to promote an ‘adults rights, opportunities and interests’ in accordance with the CRPD. The Queensland Government accepted part of the proposal in 2014, however, it is yet to be fully implemented.

⁸⁷ Office of the Public Guardian, *Information for Guardians* < <http://www.publicguardian.qld.gov.au/adult-guardian/information-for-guardians>>.

⁸⁸ Australian Human Rights Commission, above n 22, 17. The Australian Human Rights Commission (AHRC) explains how older people are vulnerable to abuse and intimidation due to their physical frailty, rather than their mental capacity. Therefore, the AHRC encourages the federal government to protect older people by improving community safety rather than taking away older people’s right to make decisions.

⁸⁹ South Australian Office of the Public Advocate, above n 84, 55.

⁹⁰ See David Tait and Terry Carney, ‘Too Much Access?: The Case For Intermediate Options To Guardianship’ (1995) 30 *Australian Journal of Social Issues* 445, 445-7, 458.

themselves but simply require some support.⁹¹ Therefore, while guardianship is a measure of last resort in theory, this is not the reality.

Finally, the full range of benefits which flow from supported decision-making is limited within a guardianship framework because substitute decision making conflicts with the foundations of supported decision making. Supported decision-making is centred on a person's competency whereas substitute decision making is premised on their incompetence.⁹² Simultaneously upholding the values of guardianship and supported-decision making is somewhat incongruous. The Chair of the NSW Standing Committee on Social Issues explains that:

It is not possible to make a decision on behalf of someone else without taking away their right to make that decision themselves. It is not possible to protect a person from the consequent business of their own decision without taking the position that we know better than they where lie their best interests.⁹³

Although substitute decision making may be required as a last resort, autonomy cannot be fully realised when supported decision making is confined within the guardianship and administration framework.

D A Legal Framework for Supported Decision Making

The Act impliedly recognises informal support systems. According to s 5(c)(iii) the tribunal must keep in mind that an adult's decision making capacity may be influenced by their support network.⁹⁴ In other words, a person may avoid a guardianship or administrative order if they have family and friends actively offering support. However, the lack of legislative and

⁹¹ Office of the Public Advocate, 'Decision Making Support in Queensland', above n 23, 14.

⁹² Dhanda, above n 29, 448.

⁹³ Standing Committee on Social Issues, above n 13, xi.

⁹⁴ *Guardianship and Administration Act 2000* (Qld) s 5(c)(iii); Office of the Public Advocate, Decision making support in Queensland, above n 23, 11.

administrative mechanisms to regulate this support has resulted in a number of challenges. Firstly, people who do not have family or friends willing to take on the role of supporters but who may be capable of realising capacity with support, are more likely to be subject to a guardianship or administration order than someone with a supportive network. Secondly, without legal recognition of their role, supporters encounter barriers to accessing information about the older person.⁹⁵ It is vital for supporters to obtain access to information, such as bank statements and legal documents in order to assist the adult to assess relevant information. Finally, informal supporters often lack the tools and education to provide appropriate support. This article proposes regulating supported decision making in order to overcome these challenges and introduce transparency into the support network.

Critics of formalising supported decision making argue that a net widening effect may take place, where families formalise supported decision-making in circumstances where informal support is adequate and the adult is not at risk of a guardianship order.⁹⁶ Therefore, imposing supported decision-making orders in circumstances where they are unnecessary may ‘inadvertently expand the reach of guardianship’.⁹⁷ In contrast, formalising this process will empower and educate family and friends to be involved in decisions without taking over.⁹⁸ Furthermore, this article envisions a system distinguishable to guardianship where people voluntarily enter into a supported decision making arrangement rather than having it imposed upon them. Additionally, it is likely to improve the quality of support provided.⁹⁹ This was the experience in the South Australian Supported Decision Making Project. Twenty six people with intellectual impairments entered into an agreement with a friend or family

⁹⁵ Office of the Public Advocate, ‘Decision Making Support in Queensland’, above n 23, 9.

⁹⁶ *Ibid* 27.

⁹⁷ *Ibid*.

⁹⁸ *Then*, above n 6, 143.

⁹⁹ *Ibid*.

member to support them in making health care, lifestyle and accommodation decisions. An evaluation of the trial concluded that the informal arrangements prior to participation in the trial were more restrictive than the trial because family members had tended to make informal decisions on behalf of the adult rather than supporting them to arrive at their own decisions.¹⁰⁰ In contrast, the project gave the adult the skills and confidence to work with their supporter and exercise their own judgement.¹⁰¹

Despite increasing popularity for supported decision making, the CRPD Committee is yet to endorse a particular model of supported decision making. There have been a range of models developed. Although each model has unique nuances, they can be divided into two broad categories. The first category is where the adult's full legal capacity is maintained. The adult has the final say on the decision which affects them, although they are provided with support to reach and communicate that decision. The second category is where the adult's legal capacity has been compromised through shared decision-making power however, it is not completely subsumed. The following three examples illustrate potential models for supported decision making.

Flynn and Arstein-Kerlake devised a framework for supported decision making which maintains that the 'will and preferences' of the individual are paramount.¹⁰² The focus is not on whether the adult has legal capacity, but instead turns on what support they need to exercise the legal capacity which is inherent in every individual.¹⁰³ The role of the supporter is always to identify the relevant 'will and preferences' of the individual rather than influence

¹⁰⁰ South Australian Office of the Public Advocate, above n 84, 65.

¹⁰¹ Ibid 63.

¹⁰² Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10, 01 *International Journal of Law in Context* 81, 88-102.

¹⁰³ Ibid 90.

their decision.¹⁰⁴ Flynn and Arstein- Kerslake devise methods to make this framework flexible and appropriate to a range of circumstances. For example, they suggest that people with dementia may include a term in a support contract detailing circumstances where they should be given support even though they may be refusing it verbally.¹⁰⁵ At no point is the supporter given power to make a decision ‘on behalf of’ the adult and even where there is disagreement between supporters about the wishes of the adult, discussion must focus on the ‘will and preferences’ of the adult rather than the merits of the decision.¹⁰⁶

In Yukon, Canada, an adult who does not need a guardian but struggles to communicate their decisions, has the opportunity to voluntarily enter into a supported decision making agreement with a friend or relative.¹⁰⁷ The ‘associate decision maker’ is entitled to access information for the adult and use this to help the adult form a decision and communicate it.¹⁰⁸ The associate decision maker’s role is to assist the adult to implement their decision rather than to make a decision on the adult’s behalf.¹⁰⁹

Co-decision making or shared decision making is a concept which lies between guardianship and full autonomous decision making. The adult is granted decision-making capacity but only when they are assisted by a co-decision maker.¹¹⁰ This system exists in the Canadian provinces of Alberta, Quebec and Saskatchewan.¹¹¹ In Saskatchewan a contract is only effective at law if it is signed by the co-decision maker and the adult.¹¹² In this sense, the

¹⁰⁴ Ibid 94.

¹⁰⁵ Ibid 96.

¹⁰⁶ Ibid.

¹⁰⁷ *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, s 4(a).

¹⁰⁸ Ibid s 5.

¹⁰⁹ Office of the Public Advocate, ‘A Journey Towards Autonomy’, above n 7, 17; *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, s 5(2).

¹¹⁰ Then, above n 6, 151.

¹¹¹ Ibid; See, eg, *Adult Guardianship and Co-decision-making Act*, SS 2000.

¹¹² Then, above n 6, 153; *Adult Guardianship and Co-decision-making Act*, SS 2000, C.A-5.3, s 16(1).

adult only has legal capacity to enter a contract if the co-decision maker agrees to it. Nevertheless, the co-decision maker is obliged to sign a contract proposed by the adult unless it is objectively unreasonable and is likely to cause harm to the adult.¹¹³ This test of reasonableness detracts from an adult's right to make risky decisions.¹¹⁴ It prevents decisions which seem unreasonable to others but make sense to the individual. Despite this, co-decision making gives weight to an adult's decisions, while recognising their need for intensive support and safeguards.

This article envisions a legal framework for supported decision making arrangements which integrates these different models. Similar to the Yukon system, an older person agrees to receive support from a nominated friend, relative or even professional. Access to a professional supporter such as a social worker will ensure that people who do not have an existing support network are not disadvantaged. Furthermore, the supporter will have a legally recognised status which allows for access to information. Importantly, responsibilities of supporters and the right to access supported-decision making structures should be enshrined in legislation and implemented with services to ensure that older people who are socially isolated have access to support.

This article proposes a tiered model whereby different levels of support are available on a spectrum from the least restrictive, to the most restrictive options. To illustrate:

- Tier 1: autonomous decision making and informal support,
- Tier 2: formal supported decision making,
- Tier 3: formal co-decision making,
- Tier 4: Substitute decision making through guardianship and administration.

¹¹³ Then, above n 6, 153; *Adult Guardianship and Co-decision-making Act*, SS 2000, C.A-5.3, s 17(2).

¹¹⁴ See Office of the Public Advocate, *A journey towards autonomy*, above n 7, 6.

This approach is similar to the stepped model proposed by the South Australian Office of the Public Advocate.¹¹⁵ The stepped model contains nine methods of decision making arranged from minimal to increasing intervention from the law.¹¹⁶ While it contains supported and co-decision making options, it recognises the power of tribunals to impose these arrangements.¹¹⁷ The tiered model departs from the stepped model by reducing the number of supported decision making structures and ensuring that the only arrangement imposed by QCAT is substitute decision making. In order to maximise an adult's autonomy, it is essential that tiers 1 – 3 are entered into voluntarily. Furthermore, the simplified tiered approach concentrates resources on devising four effective methods of support, rather than spreading resources thinly across a wider range of support.

Further research is required to expand upon these models of support and ensure that they respond to the needs of older people with age related cognitive decline. Although useful, current research is limited because it focuses on intellectual impairment more generally. Queensland, New South Wales, and Victoria in conjunction with industry partners and researchers, have embarked on a project to promote quality support by developing training programs for people who give decision making assistance.¹¹⁸ The project will be concluded in 2019.¹¹⁹ The study focuses on people with intellectual disabilities and people who have acquired brain injuries.¹²⁰ While it has potential to improve the quality of all forms of

¹¹⁵ South Australian Office of the Public Advocate, above n 84, 54-8.

¹¹⁶ Ibid 55, 58.

¹¹⁷ Ibid 58.

¹¹⁸ Office of the Public Advocate, 'Project Fact Sheet: Effective Decision-making Support for People with Cognitive Impairment' (23 July 2015) Queensland Government: Department of Justice and Attorney-General <http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/430999/Effective-decision-making-support.pdf>.

¹¹⁹ Ibid 1.

¹²⁰ Ibid.

decision making support, more targeted studies are required to examine suitable support for older people.

By establishing supported decision making as a viable alternative to guardianship and administration, older people will retain their legal capacity and independence. The presence of support is not indicative of a person's impairment, but rather their capacity. In order for a tiered model of support to be effective, external agencies such as banks and aged care facilities need to recognise that through support, a person can realise their full legal capacity. QCAT already recognises that a person may retain this capacity with support from their informal network. Therefore, this recommendation aims to complement the existing system by strengthening and formalising the support available through legislative recognition and accessible arrangements.

III ELDER MEDIATION

Mediation is a form of assisted decision making,¹²¹ whereby a mediator guides parties through discussions to recognise the issues and reach a solution. In contrast to tribunal hearings, mediation empowers parties to resolve disputes through consensus rather than determination. Pursuant to Section 75 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the Tribunal may refer a matter to mediation. In 2014-2015, QCAT settled 51% of minor civil disputes and 85% of other matters through mediation.¹²² However, people subject to guardianship and administration hearings are sparsely represented in these figures. Mediation in its pure sense has been under-utilised in guardianship and administration cases

¹²¹ Laurence Boule, *Mediation: Principles, Process, Practice* (Sydney, LexisNexis Butterworths, 2nd ed, 2005) 27.

¹²² Queensland Civil and Administrative Tribunal, 'Annual Report 2014-2015' (Report, State of Queensland, 30 September 2015) 26.

across Australia.¹²³ This is true in Queensland where most guardianship matters proceed straight to tribunal hearings. Although the tribunal skilfully incorporates elements of alternative dispute resolution into hearings, pure mediation is deemed inappropriate for guardianship and administration matters.¹²⁴ This article challenges that view by arguing that where possible, older people have a right to retain the power of self-determination through mediation. Therefore, QCAT ought to incorporate elder mediation (a term used to describe mediation for older people) into its practices.

A The Case Against Mediation

Mediation is built on a presumption that parties have capacity to partake in the mediation process and consent to an agreement.¹²⁵ Opponents of elder mediation take the view that this is problematic for a person with impaired decision-making ability.¹²⁶

QCAT incorporates alternative dispute resolution techniques into guardianship and administration hearings and it is therefore argued that mediation separate to the hearing is not necessary. In doing so, it overcomes the expense, stress and adversarial nature of traditional court proceedings.¹²⁷ QCAT actively encourages parties to be involved in resolving disputes and forming an outcome.¹²⁸ Tribunal members incorporate mediation strategies such as signposting, reality testing, acknowledgement and reframing into hearings.¹²⁹ Although

¹²³ Robyn Carroll and Anita Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (2010) 28 *Windsor Year Book of Access to Justice* 53, 56.

¹²⁴ Julie Ford and Pam Goodman, 'Multitasking for Tribunals – Integrating Alternative Dispute Resolution into the Hearing Process in the Guardianship and Administration Jurisdiction in the Queensland Civil and Administrative Tribunal' (Paper presented at National Elder Mediation Conference, Adelaide, 15 October 2012)

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¹²⁵ Carroll, above n 123, 66.

¹²⁶ *Ibid.*

¹²⁷ Carroll, above n 123, 57.

¹²⁸ Ford and Goodman, above n 124, 1.

¹²⁹ *Ibid.* 2.

tribunal members are responsible for making final determinations, they are required to understand and implement the adult's wishes where possible. In circumstances where the 'legal rigour' of a formal decision is necessary, the tribunal format is extremely beneficial because it values the wishes of the adult and enables them to be a part of the decision making process.¹³⁰

A significant limitation of mediation is that even after the older person and their family participate in guided problem solving, they may fail to arrive at an agreement.¹³¹ For health care matters and living arrangements, time may be of the essence. Additionally, failing to reach a solution may cause unnecessary stress for the family and older person who are then ultimately forced to apply to the tribunal to resolve the matter.

B *The Case for Mediation*

An 'all-or-nothing' view of capacity is outdated and fails to recognise that decision making capacity falls on a spectrum.¹³² At times cognitive impairment may limit a person's ability to reach an agreement during mediation. However, there are cases where people have the mental capacity to make a decision, but simply require support to realise this capacity. This support can be provided during the mediation process.

Mediation is constrained within the format of a hearing. While incorporating alternative dispute resolution techniques into hearings is useful, it also gives rise to a number of

¹³⁰ University of Western Australia, *Sixth Annual World Summit on Mediation with Age-Related Issues* (2013) <<http://www.unisa.edu.au/research/centre-for-peace-and-security/our-research/world-summit-on-mediation-with-age-related-issues/>>.

¹³¹ See Bobbette Wolski, 'QCAT's hybrid hearing: The Best of Both Worlds or Compromised Mediation?' (2013) 22 *Journal of Judicial Administration* 154, 158.

¹³² Jennifer L. Wright, 'Making Mediation Work in Guardianship Proceedings: Protecting and Enhancing the Voice, Rights, and Well-Being of Elders' (2014) *Journal of International Aging, Law & Policy*, 1, 10; Martin, above n 65, 20; See also Jennifer Moye and Daniel C. Marson, 'Assessment of Decision-Making Capacity in Older Adults – An Emerging Area of Practice and Research' (2007) 62B(1) *Journal of Gerontology* 3.

challenges. Firstly, QCAT hearings are open to the public which makes discussions on sensitive issues challenging.¹³³ Older people and their families may prefer the privacy of mediation to discuss personal issues such as health care, private family matters and finances.¹³⁴ Additionally, there is friction within these hearings between a need for individualism and a need for consistency in determinations.¹³⁵ In contrast, mediations are flexible and creative solutions may be tailored to the unique needs of the individual,¹³⁶ rather than merely deciding whether or not to appoint a guardian or administrator. Finally, while QCAT strives to be informal and accessible,¹³⁷ it has failed to completely separate itself from the adversarial court system it evolved from. Tribunal rooms resemble watered down court rooms. Members sit at a bench at the front of the room while the older person and their relatives or friends are positioned at a desk a few meters from the front bench. In contrast, mediation avoids this intimidating adversarial setting and promotes collaboration by encouraging all parties to sit around one table in a combined effort to reach a solution. Parties are encouraged to discuss their needs and interests in a trusting environment. Such an environment is more amenable to sustaining positive relationships within families than an adversarial setting.¹³⁸

¹³³ Ford and Goodman, above n 124, 2; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(e). An object of the Act is to ‘enhance the openness and accountability of public administration’.

¹³⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 78(1). In most cases, QCAT mediations must be held in private.

¹³⁵ Ford and Goodman, above n 124, 2. *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(d). An object of the act is to ‘enhance the quality and consistency of decisions by decision-makers...’

¹³⁶ Bobette Wolski, ‘Re-assessment of QCAT’s Hybrid Hearing and Arb-med-arb Under s 27D of the Commercial Arbitration Act’ (2014) 3 *Journal of Civil Litigation and Practice* 156, 158.

¹³⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b).

¹³⁸ See Wolski, above n 136, 169.

Mediation promotes therapeutic jurisprudence; a legal philosophy concerned with enhancing the wellbeing of participants in the legal system.¹³⁹ According to the broad application of therapeutic jurisprudence, the therapeutic benefits are not confined solely to the older person but may also be felt by relatives and friends.¹⁴⁰ Research suggests that people respond favourably to legal proceedings when ‘participation, dignity and trust’ are present.¹⁴¹ These three elements enable mediation to promote autonomy and wellbeing in older people with cognitive deficits. Firstly, it achieves this by exercising a least restrictive approach.¹⁴² It encourages older people with the support of their informal network to collaborate with others in an atmosphere of trust, rather than having a restrictive order imposed upon them.¹⁴³ Secondly, bypassing a hearing means that older people are spared the indignity of embarrassing and demeaning cognitive capacity tests which are often used to inform expert evidence in guardianship and administration hearings.¹⁴⁴ Thirdly, mediation may prevent premature guardianship applications. Family members are often motivated by considerations other than simply the adult’s welfare to apply for guardianship orders.¹⁴⁵ These include altruism, conflict in blended families, money, and the need to establish authority between

¹³⁹ The Australian Institute of Judicial Administration, *The Concepts of Therapeutic Jurisprudence* <<http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/the-concept-of-therapeutic-jurisprudence>>.

¹⁴⁰ Michael P Depson, ‘Therapeutic Jurisprudence in Philosophical Perspective’ (2008) 2(1) *Journal of Law, Philosophy and Culture* 239, 245.

¹⁴¹ Ellen A Waldman, ‘The Evaluative- Facilitative Debate In Mediation: Applying The Lens Of Therapeutic Jurisprudence’ (1998 – 1999) 82 *Marquette Law Review* 155, 161. Although this article is primarily concerned with disputing parties rather than guardianship matters, it offers insight into the general benefits of mediation by facilitating ‘participation, dignity and trust’.

¹⁴² Karen Williams, ‘Elder Mediation in Australia’ (2013) 7 *Elder Law Review* 1, 3.

¹⁴³ *Ibid.*

¹⁴⁴ Marie Mune, ‘The Use and Abuse of Cognitive Function Tests’ (Paper presented at Sixth Annual World Summit on Mediation with Age Related Issues, University of South Australia, 29 April – 1 May 2013) 1.

¹⁴⁵ Carroll and Smith, above n 123, 59–60.

conflicted siblings.¹⁴⁶ Mediation as an alternative to a tribunal hearing has potential to filter out these cases and prevent older people from being deprived of their right to legal capacity for reasons other than their welfare. Therefore, the therapeutic benefits of mediation in conjunction with an older person's ability to retain autonomy during mediation make it an attractive alternative to QCAT hearings.

Support for elder mediation is gaining momentum. In 2010 the Queensland Law Reform Commission recognised the value of alternative dispute resolution (ADR) in its review of Queensland's guardianship laws. The Commission recommended that guardianship matters which are influenced by family conflict should be referred to dispute resolution.¹⁴⁷ The Commission suggested that ADR has potential to resolve the dispute and create a better outcome for the adult affected.¹⁴⁸ Furthermore, it suggested that greater community awareness about the benefits of mediation will encourage families to resolve appropriate matters through mediation rather than a QCAT appointment.¹⁴⁹ In 2013, the University of South Australia hosted the 6th Annual World Summit on Mediation with Age Related Issues. Following the conference, the Elder Mediation Australasian Network was established to 'develop professional ethics, standards and certification for elder mediators', raise awareness and knowledge about elder mediation, and encourage referrals to mediation tailored to older people.¹⁵⁰ Therefore, Australia is building the expertise and resources to facilitate mediation for older people.

¹⁴⁶ Ibid.

¹⁴⁷ Queensland Law Reform Commission, above n 67, xix.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid vol 3, 60.

¹⁵⁰ Elder Mediation Australasian Network, '*Elder Mediation Australasian Network - eman*' (2015) eman <<http://elder-mediation.com.au/>>.

C Elder Mediation as a Distinct Practice

Mediation may be part of the guardianship and administration process or a means of avoiding it altogether. In either case, mediation is only appropriate in circumstances where it is suitable to bypass the capacity test.¹⁵¹ Mediation requires people to exercise legal capacity by agreeing to outcomes. Therefore, it would be absurd to ask someone to agree to whether or not they have legal capacity, because they need legal capacity to make that decision. However, the Canadian Centre for Elder Law suggests that mediation can avoid the question of capacity. For example, mediation may be used to determine who will be appointed as a guardian and what powers they have without declaring that a person lacks capacity.¹⁵² This may be useful in circumstances where a bank or aged care facility is demanding the appointment of a guardian or administrator to sign legal documents. Although this still involves appointment of a substitute decision maker, and therefore remnants of paternalism, it enables an older person to exercise their power of self-determination in selecting a guardian and the terms of guardianship. Furthermore, mediation may be used to avoid guardianship altogether. Mediation may resolve issues which prompt concerned family members to make a guardianship application, such as whether an older person should move into an aged care facility or how they should manage their finances.

In order to be successful, mediation must be tailored to the unique features of matters concerning older people. Some of the unique characteristics of elder mediation include the likelihood that it will involve several parties, from a range of generations, presenting a variety of issues.¹⁵³ The need for mediation is often prompted by life events such as the death of a

¹⁵¹ Canadian Centre for Elder Law, *Elder and Guardianship Mediation*, Report No 5 (2012) 32.

¹⁵² *Ibid* xiii.

¹⁵³ *Ibid* 24.

partner or financial concerns.¹⁵⁴ The adult may need assistance from a support person and a history of family conflict and emotion may influence the participant's perceptions of the issues.¹⁵⁵ Furthermore, elder abuse and undue influence are also concerns.¹⁵⁶ In an informal mediation context, there is a risk that older people may agree to decisions or limitations which are not a true reflection of their wishes.¹⁵⁷ This may be due to family pressure and a desire to please their relatives, subtle abuse or coercion by family or friends.¹⁵⁸ Therefore, mediators must have the skills to identify these issues and protect an adult's rights.¹⁵⁹ Furthermore, mediators need to recognise circumstances where an adult's rights will be better protected within a tribunal hearing, where the pressure is taken away from the older person and the tribunal member is able to objectively scrutinise evidence to arrive at a fair outcome.¹⁶⁰ In order to safeguard against ageism, skilled mediators should carefully assess an individual's circumstances before denying access to mediation.

The Canadian Centre for Elder Law's report, 'Elder and Guardianship Mediation' assessed mediation practices in Canada, the United States and other jurisdictions.¹⁶¹ The report made the following recommendations for best practices for elder mediators;¹⁶²

- Specialised training in elder mediation,
- An understanding of adult guardianship law,

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Emma J Butt, 'Canadian Centre for Elder Law (CCEL) – Elder and Guardianship Mediation Project' (2013) 7 *Elder Law Review* 1, 7–8.

¹⁵⁷ Joan Braun, 'Elder Mediation: Promising Approaches and Potential Pitfalls' (2013) 7 *Elder Law Review* 1, 5–7.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid 5-6.

¹⁶⁰ See Braun, above n 157, 3.

¹⁶¹ Canadian Centre for Elder Law, above n 151, xiii.

¹⁶² Ibid xv.

- Assessment of whether the parties are capable of meaningful participation, either with or without support,
- Impartial mediation,
- Ensure that all parties can be heard and effectively communicate their concerns,
- Awareness of power imbalances and preventing mediation from being an instrument for coercion,
- Pre-mediation interviews (these may assist mediators to understand family dynamics and identify elder abuse),¹⁶³
- Participants should not be obliged to reach an agreement.

Mediation has the potential to avoid the embarrassment of capacity determinations and empower the individual to exercise control over decisions which affect them. QCAT has the capacity to refer matters to mediation and this should be utilised for matters concerning age related cognitive decline. There is growing support internationally for elder mediation, however in order to protect an older person's rights, mediators must be trained to identify and respond to the unique dynamics of age related decline. Australia is developing the resources and skills to tailor mediation to older people. Therefore, QCAT ought to embrace this opportunity to carefully use mediation to prevent unnecessary guardianship and administrative appointments.

IV CONCLUSION

This article commends aspects of Queensland's adult guardianship and administration laws which reflect a human rights approach to disability. Under the current system, older people are entitled to participate in decisions which affect them and expect outcomes which reflect their wishes. Queensland strives for this by skilfully integrating ADR techniques and

¹⁶³ Braun, above n 157, 9.

supported decision making into the guardianship and administration regime. That being said, the full benefits of supported decision making and mediation are confined within this system where a person's right to legal capacity is compromised. Without viable alternatives to guardianship and administration, it is likely that older people and their families seek QCAT appointments prematurely. Therefore, a separate framework for supported decision making and elder mediation should be introduced outside of guardian and administrative appointments and tribunal hearings. Further studies and resources will be required to adequately tailor these services to the unique needs of older people and their families. Ultimately, this will ensure that guardianship is a measure of last resort in theory and in practice.

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