Towards a Human Rights Framework for Guardianship

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Overview

- History of guardianship in a human rights context
- Human rights or social justice?
- Challenges to the notion Western notion of the individual, autonomy and “choice and control”
- To achieve just outcomes for decision making for and by adults with impaired decision making capacity we need to balance and interrogate competing rights
- Importance of upholding, economic and cultural rights in protecting the lives of the disadvantaged
Guardianship in an historical context

- The only benevolent framework for considering the rights of adults with disability had been the charitable model.
- With de-institutionalisation, guardianship legislation moves to a rights based model in the late 20th and early 21st century.
- Functional or social definition of capacity, means the person is capable of -
  (a) understanding the nature and effect of decisions made about the matter; and
  (b) freely and voluntarily making decisions about the matter; and
  (c) communicating the decisions in some way.

*Guardianship and Administration Act 2000 (Qld)*
United Nations Convention on the Rights of Persons with Disabilities

Article 12 - “Equal recognition before the law”:

1. States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity, and
4. “States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse...
The National Disability Insurance Scheme

“As the words choice and control become the mantra of service policy and principles, important questions need to be asked. What is choice and the conditions for it and when do we really have it?”

“In a social justice framework, a major focus is on the person in community, on the relationships between people, and the interaction between individuals, community and the state.”

“Rather than emphasising individual rights and freedom from interference by the state, the social justice approach is based on the state’s active responsibility to meet the needs of its members.”

Differentiates in guardianship between:

(a) Actual appointment and method of appointment, and
(b) Standard by which appointee is to act.

Recommends a “new lexicon” - replacing “guardian” with “representative.”
Questioning the concept of “capacity”

- “…ethicists have long disputed whether persons with intellectual disabilities are ‘morally considerable’ or possess ‘full moral status’ to be considered the fitting subjects of justice” - Gerard Quinn, AGAC Conference, Sydney 2016

- “Rawls himself acknowledged that according to the principle of need - citizens’ basic needs (e.g. food, shelter, and access to social and cultural opportunities) should be met prior to applying both the liberty and equality principles of justice” Flynn & Arstein-Kerslake

- Rejecting ‘binarism” and replacing “capacity” with “vulnerability” - Margaret Isabel Hall
Questioning the Enlightenment concept of “autonomy”

- “...a highly atomized conception of the person - the proverbial masterless man with no organic ties to others and wandering abroad seeking (self-seeking) his own fortune. ...” - Gerard Quinn

- The feminist challenge of “relational autonomy” - Laura Davy and Jennifer Nedelsky
What of “collective rights” or the right to community?

*United Nations Convention on the Rights of Persons with Disability* -
- The right to family life - article 23
- The right of participation in public life - article 29
- The right to participate in cultural life, recreation, leisure and sport - article 30

*International Convention on Civil and Political Rights*
- “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language” - article 47

*International Convention on the Rights of Indigenous Peoples*
What of economic, social and cultural rights?

**United Nations Convention on the Rights of Persons with Disabilities**

- To live independently and be included in the community, to choose their place of residence - article 19
- The right to education - article 24
- Enjoyment of the highest attainable standard of health - article 25
- Habilitation and rehabilitation services in the areas of health, employment, education and social services - article 26
- Work and employment - article 27
- Adequate standard of living and social protection - article 28
- Participation in cultural life, recreation, leisure and sport - article 30

**AND -**

**International Covenant on Economic, Social and Cultural Rights**
“When we talk about the struggle to achieve human rights, we should not just be referring to the global struggle, but also to the necessity of a struggle at the individual decision making level to interpret and apply the range of human rights in a way that achieves a just outcome for the individual - those with impaired decision making and others - as a member of the wider community.”
References

- Brolan, Claire E, Robert S Ware, Miriam Taylor Gomez and Nicholas G Lennox. “The right to health of Australians with intellectual disability.” *Australian Journal of Human Rights* 17(2) (2011) pages 1 to 32
- Carter, Barbara. “Seeking the essence of guardianship: beyond anship, Melbourne, October 2012, at page 4


