

**SENIORS'  
LEGAL  
AND  
SUPPORT  
SERVICE**

**Disability as an Evolving Concept –are Older Persons Involved? The CRPD and new Challenges in Decision-making**

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# **Seniors' Legal and Support service**

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**At Caxton Legal Centre, 1 Manning St, South Brisbane: Ph: 3214 6333**

**SLASS works holistically with clients suffering or at risk of elder abuse**

**SLASS works as lawyer/social worker team**

**SLASS does home visits including nursing homes, hospitals, retirement villages.**

**Referrals come from older person, concerned family, friend or service providers.**

**There are five regional SLASS services across Queensland using a multi-disciplinary approach for older clients.**

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# SENIORS' LEGAL AND SUPPORT SERVICE

## Contents:

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- ❖ Cognitive Impairment?
- ❖ Vulnerability to exploitation
- ❖ Capacity issues
- ❖ The CRPD and the older person
- ❖ The role of the decision maker
- ❖ Substitute and supported decision making
- ❖ The future of guardianship
- ❖ How can the ageing sector use the CRPD effectively?



# Capacity – a legal construct

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The presumption of capacity is the starting point.

Incapacity is NOT:

- ❖ Low intelligence
- ❖ Stupidity
- ❖ Eccentricity
- ❖ Ignorance
- ❖ ..or a history of poor decisionmaking. Many irrational decisions are regularly made by competent clients.

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# Capacity as a legal construct cont

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**The existence of a cognitive impairment does not necessarily imply legal incapacity – beware the “all or none” approach..**

## **Capacity is:**

- Time specific (fluctuating)
- Domain specific (eg, health but not finances or vice versa; eg 92 y.o.client expert in property values, excellent recall of financial matters but home unhygienic, personal appearance unkempt, first impression- complete neglect)
- Decision specific

**Who assesses capacity? It's a legal test...but medical input is required to ensure that the client satisfies the test.**

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# Capacity and elder abuse

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- ❖ Relatives can and do use capacity assessments to further their own desire for power and control – **and to gain access to the financial resources of the client.**
- ❖ They may seek to influence the outcome of an assessment by contacting (and occasionally harassing) doctors and geriatricians for the ‘right’ result.
- ❖ A resourceful family can be **very determined and organised and may present very well.** They may express apparently genuine concern that Mum or Dad may “*hurt themselves*” because their behaviour “*is so out of character*”
- ❖ **SLASS sees a lot of this.**

# Risk Factors for Elder Abuse

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- **Cognitive ability**
- Social isolation for the victim and or perpetrator/s
- Mental health, (drug and/or alcohol addiction)
- **Financially unaware**
- Hostility of the perpetrator/s
- **Gender**
- Relationship between victim and perpetrator
- Cultural issues (i.e. patriarchy)
- **Physical impairment**
- Shared living arrangements with perpetrator/s
- Unresolved traumas
- Caregiver stress (i.e. lack of respite, high responsibilities)
- Intergenerational transmission of abuse
- Low self-esteem
- Feeling ashamed about being abused especially by their children
- Decreased independence due to frail health
- Lack of freedom to make decisions for themselves
- Cutback to health care
- Shortage of trained professionals who can recognise and deal with elder abuse
- Limited sound methodological research available, only a few longitudinal studies( limited potential risk factors - no analyses how risk factors may interact to lead to abuse /neglect)



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**What can it mean when someone else is  
the decision maker?**

The consequences of a finding of incapacity are severe.

Loss of autonomy, independence.

Where a substituted decision maker is appointed, it may be their values and beliefs about what is best for the older person that takes precedence regardless of the level of capacity of the older person.

How can the CRPD help?



## How does the CRPD help? CRPD and the Older Person: ART 12

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“Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” (Art 12 (3))

Concluding Observations and General Comment from Committee of CRPD Oct and Nov 2013 **appear to rule out guardianship and regimes of substituted decision making.....supported decision making is endorsed..**

### **Issues:**

- Many models of supported decision making available – but evaluations? What works well for whom, and when..?
- Few evaluations of guardianship regimes either ..
- Ageing population/increasing numbers of clients with impaired capacity..implications?
- CRPD requires that States Parties focus on supported decision making models

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## Substituted decision making, supported decision making and the general principles (Queensland)

- ❖ For older people in Australia, the prevailing regime for alternative decision making is “**substituted decision-making**”
- ❖ The **Guardianship and Administration Act QLD** and **Powers of Attorney Act QLD** both contain the General Principles – human rights based. These imply that **supported** decision making – where the older person can look to informal networks for support to make decisions – is possible.



## **The General Principles- Guardianship and Administration act 2000; Powers of Attorney Act 1998 QLD**

- **Presumption of capacity**
- **Human rights regardless of capacity**
- **Individual value and worth**
- **Valued role as member of society**
- **Participation in community life**
- **Encouragement of self reliance**
- **Maximum participation, minimal limitations and substituted judgement – provisions of all necessary supports and access to information to enable participation in decision-making**
- **Where substituted decision making- follow what Adult would have wished if possible to ascertain(expressed orally, in writing, by conduct)**
- **Protective aspect**
- **Generally consistent with the CRPD- but often honoured in the breach!**

## Guardianship Tribunal matters- what can go wrong..

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- ❖ **Determined adult** children—may seek to legitimise their control over the older adult via the guardianship process.
- ❖ Older person may seem to **lack credibility** when stressed/anxious.
- ❖ Much family history material which is **untested and detrimental** to the client may be aired in the proceedings.
- ❖ An older person, if not represented, may find himself/herself facing a number of determined relatives, with little support.
- ❖ The **least restrictive alternative** may not be offered unless argued by lawyer or advocate
- ❖ **The hearing may be conducted by phone** – issues with this
- ❖ **Sometimes the adult is not present even when available..**

## PRACTICAL PROBLEMS..AND THE FUTURE OF GUARDIANSHIP

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- **Many older people have small, fragmented extended family networks** –or none at all (particularly where elder abuse a factor)- impact on supported decision making models?
- **The changing nature of family structures** – mobile younger generations; impact of divorce and re-marriage – older person and younger family members
- Many models of supported decision making out there but **lack of empirical evidence of evaluation**
- **Also lack of evaluation of guardianship** /substituted decision making regimes
- **Undue influence** as a factor in both supported and substituted decision making- difficult to monitor and prevent
- Should guardianship be retained? If so under what circumstances?

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## HOW CAN THE CRPD HELP OLDER PEOPLE?

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- **Non-discrimination on the basis of disability (Art 5)**
- Requirement to **combat prejudice and stereotyping (Art 8)**
- Highlights the **importance of equality before the law** for persons with disability (*including those with cognitive issues*) **(Art 12)**
- Secures **effective access to justice**, including provision of age-appropriate accommodations to facilitate participation **(Art 13)**
- All **appropriate measures to prevent exploitation, violence and abuse..gender and age sensitive (Art 16)**
- The right of persons with disability to access life long learning **(Art 24)**
- Access to appropriate health services – **(Art 25)**
- Social protections – **(Art 28)**

## HOW CAN THE CRPD HELP OLDER PEOPLE? CONT.

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- Need to be aware of provisions of CRPD- legal professionals, health workers, social workers, gerontologists, medical professionals, aged care workers and older persons themselves.
- CRPD has amalgamated political, economic, social and cultural rights in one Convention – making history!
- Need to harness NGO and grassroots support for a Convention on the Rights of Older Persons – strong and vital constituency of the CRPD has done a lot of heavy lifting – shown the way.

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