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To Whom It May Concern

Submission to the Australian Law Reform Commission's inquiry into barriers to equal recognition before the law and legal capacity for persons with disabilities.

FROM: [redacted]
ADDRESS: [redacted]
MOBILE PHONE: [redacted]
EMAIL: [redacted]

Dear ALRC,

There are several aspects of NSW guardianship legislation which create barriers which prevent persons with cognitive disabilities from obtaining equal recognition before the law and exercise their capacity to make independent decisions. For the purposes of this submission I wish to address the matters outlined in your inquiry's terms of reference and your Issues Paper 44 (IP 44). –

"State and territory laws

6. The principal focus of this Inquiry is on Commonwealth laws and legal frameworks. The Terms of Reference direct the ALRC to have regard to, or to consider how, Commonwealth laws and legal frameworks interact with state and territory laws in the areas under review. However, as the subject matter of the Inquiry is the ability of people with disability to exercise legal capacity, and as laws concerning guardianship of people are state and territory based, the Inquiry necessarily will involve a consideration of state and territory laws and practice in these areas."

My mother's situation is a text book example of the manner in which NSW guardianship legislation has denied her human and common law rights in direct contravention of the principles elucidated in the UN CRPD.

In December 2009 my mother was sent, against her will, to the [redacted] Nursing Home. [redacted] hospital's geriatric registrar with the cooperation of my mother's enduring guardian forced my mother into the nursing home without consulting my mother. At the time I was my mother's primary live in carer. She needed assistance to manage her affairs due to dementia. During the months prior to my mother's admittance to [redacted] hospital with a dislocated shoulder my mother had begun to drink heavily. Her abuse of alcohol combined with dementia made her unmanageable as she became quite belligerent and could not be persuaded to attend to essential domestic matters such as showering and managing her incontinence issues which she has had to deal with since a botched prolapsed bowel operation she underwent in the early 2000s.

In order to challenge my mother's enduring guardian's decisions I went to the Guardianship Tribunal after explaining the options available to my mother, with her assent. The Guardianship Tribunal placed my mother under the care of the Public Guardian. The Tribunal also put my mother's finances under the control of the NSW Trustee & Guardian.

After several years without alcohol I concluded that there was a real possibility that my mother could be appropriately assisted to return to live in her own home on the proviso that she has no access to alcohol. My mother expresses a desire to return to live in her own home every time I visit her, usually at least once every week.

On [redacted] 2012 my sister [redacted] and I attended a Guardianship Tribunal hearing after submitting a proposal that we be appointed joint guardians for our mother replacing the Public Guardian, with the intention of exploring the possibility of returning our mother to live in her own home with [redacted] and I providing 24 hour live in care and the support of a Commonwealth funded Home Care Package (previously designated Extended Aged Care at Home packages), for which ACAT has found my mother eligible.

In his reasons for the decision to refuse [redacted] and my applications to be appointed joint guardians for our mother the presiding Guardianship Tribunal member [redacted] wrote –
"They ([redacted] and I) appear to have totally misread the evidence about their mother's decision-making capacities. They believe she is fully capable of making decisions about where she resides."
Mr [redacted] totally ignored our mother's common law right to live in her own home, regardless of whether or not she has 'legal capacity'. The common law acknowledges that every citizen has the right to live in their own home providing that in so doing they do not present a danger to themselves or others.

Also in his reasons for refusing our application to become our mother's joint guardians Mr [redacted] wrote –
"In order for a guardian to make decisions in Mrs [redacted] best interests he or she must be able to understand her needs and be able to give appropriate consideration and weight to the medical and professional opinions and recommendations relating to her condition, treatment and care. The evidence suggests that neither Mr [redacted] nor Ms [redacted] is able to do this."
Mr [redacted] assertion conveniently ignores the fact that I arranged for a comprehensive independent assessment by a Hammond Care assessor, in order to determine whether my mother could be appropriately cared for in her own home. As I informed the Tribunal on [redacted] that assessment was prevented from being completed by my mother's Public Guardian [redacted]. For details of the manner in which the Public Guardian refused my mother access to a Commonwealth program designed to support persons with cognitive disabilities to live in their own homes, please read my affidavit dated 2 December 2013 which is included with this submission.

In regard to Mr [redacted] and most of the determinations concerning my mother, concocted by office bearers employed by the Guardianship Tribunal and the NSW Trustee and Guardian, I quote the following passage from Advocacy for Inclusion's most erudite article 'Supported Decision Making, Legal Capacity and Guardianship' dated August 2012 as it accords with my own observations and conclusions-

"Article 12 of the CRPD requires signatories to support people with disabilities to effectively exercise legal capacity on an equal basis with other members of the community, and have autonomy in regards to property, health and lifestyle. Current guardianship legislation directly contradicts these obligations. There are also major concerns regarding a lack of procedural fairness afforded to people subject to guardianship applications, including issues with transparency, accountability, meaningful review processes and access to independent support."

Under current NSW Guardianship legislation there is no provision for assisted decision making. Once a person is defined as being totally or partially incapable of managing his or her person their common law rights are extinguished regardless of their capacity to make decisions according to their own preferences. Neither the NSW Guardianship Act 1987 nor the NSW Trustee and Guardian Act 2009 take into

account the fact that other than in extreme cases, such as a person disabled by being in a permanently comatose state or suffering complete brain death, persons with psychosocial disabilities (e.g. Dementia) are capable of making decisions consistent with their character and values.

The current situation whereby a person loses their legal rights once found to lack legal capacity is plainly unjust. Guardianship authorities have in recent years begun to pay lip service to the fact that apart from extreme cases, people with cognitive disabilities are capable of making decisions for themselves based on their own values and intellectual capacity

The Public Guardian's information booklet (ISBN 978-0-9758344-4-2) for family, friends and service providers claims they will talk to the person under guardianship and consider their views before making decisions for the protected person. However s21 (2A) of the Guardianship Act 1987, repeated in several sections of both the Guardianship Act and the NSW Trustee and Guardian Act, states-

"the guardian of a person the subject of a guardianship order has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity."

So there is no legal requirement that a person classified as not having "legal capacity" to have their views or decisions respected.

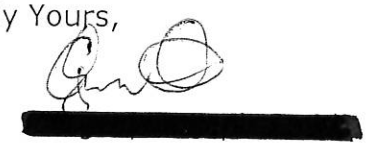
Clearly s21 (2A) contradicts the General Principles, Section 4 of the Guardianship Act 1987 (repeated in Section 39 of the NSW Trustee and Guardian Act 2009) – "the freedom of decision and freedom of action of the person should be restricted as little as possible."

The legal fiction that an appointed Public guardian can make decisions on behalf of a person whom they do not know and do not understand as though they are the person themselves must be discarded and expunged from both Acts.

In conclusion

In order for the directives embodied within the UN CRPD to be reflected in NSW guardianship legislation, both the Guardianship Act 1987 and the NSW Trustee and Guardian Act 2009 will have to be extensively overhauled if not re-written.

Faithfully Yours,



Bon Mot of the day *'Cronyism breeds bigotry, bigotry is one of the mainstays of injustice and corruption'.*

PostScript – My mother and I are urgently in need of a legal representative to represent us in the NSW Supreme Appeals Court in our appeal against the NSW Trustee and Guardian's decision to sell my mother's home against her will. The matter is set down for hearing on [redacted] this year. Any recommendation or referal to a legal practitioner with knowledge of this area of law would be greatly appreciated.

Thank you.