

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

Organisation: University of Sydney
Name: Professor Ron McCallum
Position: Professor of Labour Law, Faculty of Law
Telephone: 9351 0252
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Professor Ron McCallum AO

Professor of Labour Law
Faculty of Law
Building F10
University of Sydney
Sydney NSW 2000
Tel direct: +61 (0) 2 9351 0252
Tel mobile: +61 (0) 411 880 228
Email r.mccallum@usyd.edu.au
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Ms Lynn Race
New South Wales Legislative Council
Standing Committee on Social Issues
Parliament of New South Wales
Sydney NSW 2000
via email lynn.race@parliament.nsw.gov.au

Dear Ms Race,

**Re Inquiry into Substituted Decision-Making for People Lacking Capacity
Legislative Council
Standing Committee on Social Issues**

I write with respect to the inquiry into substituted decision-making for people lacking capacity, which is being undertaken by the Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales. Please accept my apologies for failing to meet the deadline for written submissions. I hope that the Standing Committee will accept this late and brief submission.

United Nations Convention on the Rights of Persons with Disabilities

On 16 July 2008, the Australian Government ratified the United Nations Convention on the Rights of Persons with Disabilities. On 3 November 2008, As Australia's candidate, I was elected to one of the twelve positions on the United Nations Committee for the Rights of Persons with Disabilities, one of whose functions it is to monitor the efforts of ratifying States Parties to the United Nations Convention on the Rights of Persons with Disabilities. Australia is a ratified States Party and will be delivering its initial report to this Committee in the middle of 2010.

The Inquiry

Articles 12, 14, 17 and 19 of the United Nations Convention on the Rights of Persons with Disabilities, I suggest, impact on this inquiry into substituted decision-making. These articles provide:

"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 recognize 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.
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 in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - a. Enjoy the right to liberty and security of person;
 - b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 17 - Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 19 - Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."

It can be seen, I suggest, that Article 12 of the Convention is at the very centre of any consideration of substituted decision-making. In my submission, it is imperative that the laws of New South Wales on substituted decision-making must fully comply with Article 12 and related articles of the United Nations Convention on the Rights of Persons with Disabilities.

Day of General Discussion

At the second meeting of the United Nations Committee on the Rights of Persons with Disabilities which will be held in Geneva from Monday to Friday, 19 to 23 October 2009, Article 12 will be fully discussed. On Wednesday 21 October, the first of the Committee's general days of discussion will take place, and it will centre upon the scope and operation of Article 19 of the Convention. At this general day of discussion, we members of the Committee hope to learn much about Article 12 from expert speakers and from our discussions.

Appearing before the Standing Committee on Social Issues

If it is both appropriate and timely, I would be honoured to appear before the Standing Committee on Social Issues, to recount my experiences as a member of the United Nations Committee on the Rights of Persons with Disabilities at our general day of discussion on Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

Sincerely,
Professor Ron McCallum AO