Supported Decision-Making

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Under the law in Queensland, everyone is presumed to be able to make their own decisions when they are aged 18 and over, despite their actual decision-making ability. This presumption can only be set aside by a tribunal or court. This means that parents' authority as guardians of their children ceases to have any effect when their children reach 18.

When someone aged 18 or over lacks the ability to make some decisions (or lacks capacity) there is no need to seek formal authority to make decisions for them, whether as guardian, for a non-financial decision, or administrator, where the decision is financial. A lack of capacity is not enough: there has also to be a need for someone to be given formal authority. The law recognises and encourages informal decision-making – decision-making by the person who lacks capacity with the assistance of others. For example, where a parent assists their adult son or daughter to manage their own money, and their son or daughter's financial interests are protected as a result of that informal support, there is no need for anyone to be appointed as their administrator.

While the law in Queensland recognises and encourages informal decision-making, there are no rules or guidelines or practice arrangements to guide families in supporting their family members with informal decision-making. The law recognises the role of an individual's personal network of family and friends in assisting someone to make decisions, but provides no framework within which that assistance might best be given. It is left to each family or network of supporters to muddle their way through.

Nor is this informal decision-making support recognised by many of the agencies and businesses with whom an individual might have day to day dealings, such as banks. This often forces families and individuals to seek formal authority through the appointment of a guardian or administrator, to meet the needs of an outside agency, which could be avoided if the agency recognised the role of informal decision-makers. Where someone has no family or friends to assist them as informal decision-makers, a formal appointment is likely to be necessary.

The concept of supported decision-making aims to give structure and formality to informal decision-making, through negotiated supported decision-making agreements. A recent forum facilitated by Queensland Advocacy Incorporated (QAI) and the Health Law Research Centre at QUT brought together a number of people to discuss their experiences with supported decision-making.

The current driving force behind the move towards supported decision-making is contained within the UN Convention on the Rights of Persons with Disabilities. Article 12 of the Convention recognises a universal right to legal capacity and to people receiving the support they need to exercise their legal capacity. Speakers at the forum discussed the two different ways to provide such support. The first is through legislation and the second through a relationship based agreement. Legislative recognition can occur through statements of principles contained within legislation, such as in Queensland guardianship legislation and the Commonwealth NDIS Act, or through legislative recognition of specific agreements. There are some overseas examples of the legislative recognition of specific agreements but none exist in Australia.

Speakers at the forum who gave examples of supported decision-making all spoke of the use of specific relationship based agreements. Agreements seem to have common features: who provides the individual with support in their decision-making, what areas of decisions are covered by the agreement, and the type of support provided. Support can cover providing information about decision-making, assistance with weighing up options, and assistance with communicating decisions. Agreements can also cover how to manage disagreements and conflicts of interest. The key point is that the individual who needs support with decision-making chooses the person who provides that support. While these agreements have no support in legislation, all speakers argued that they bring substantial benefits to individuals. One speaker was a man with disability who spoke of the benefit to him of having such an agreement.

The most interesting speaker at the forum was an academic from India, Professor Amita Dhanda, who had played a pivotal role in developing the terms of Article 12 in the Convention.

She argued that Article 12 dismantles centuries of prejudice in our legal system, prejudice against those we label as lacking in capacity. She said that the right to universal legal capacity should be seen as a duty for all of us to uphold. If it is seen merely as an entitlement, the support some people need to exercise that right will be seen as a paradigm of incapacity, not capacity. We will become locked in a debate about who should receive support and who not. Her challenge was for all of us to admit we need support with decision-making. If we focus only on providing support to people with disability, we will continue the stigma associated with dependence and the "gains of legal capacity could be lost in the travails of support". We need to recognise the myth of human independence and acknowledge the universality of human neediness. A focus on providing universal support for decision-making will, she argued, deepen solidarity between all of us in uncertain times.

Where does that leave families struggling with these issues day to day? There is no reason why families could not put supported decision-making agreements in place, to firm up and clarify aspects of their existing informal arrangements. There will need to be safeguards so that those who lack discernment are protected, but any approach in this area requires safeguards. As a number of speakers at the forum noted, there is a difference between supported decision-making and protective measures, with one pointing out that it can be an illusion that bringing in substituted decision-making, such as through a formal appointment, actually offers protection.

The key, as always, will be for people to be available to provide the support for decision-making, now and in the long term. Families are well advised to do the work on network building sooner rather than later. Offering support to decision-making is one important role for individuals in a support network such as a support circle, particularly when the key family members are no longer able to provide the support their family member needs.

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