



LA TROBE
UNIVERSITY

LIVING WITH DISABILITY
RESEARCH CENTRE



Crossing the Great Divide: How NSW public guardians make decisions within competing domestic and international frameworks

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Presentation Overview

- Thesis topic, aim and methodology 2 mins
- Background Concepts 10 mins
- Grounded theory on how NSW public guardians make decisions within competing domestic and international frameworks
 - A Human Rights Substitute Decision-Making Outcome Typology 5 mins
 - Comprises four Substitute Decision-Making Outcome Types
 - Facilitating full legal capacity 5 mins
 - Enabling mental capacity 5 mins
 - Realising Will and Preferences 5 mins
 - Prioritising Harm Prevention 5 mins
 - Implications 3 mins

Thesis Topic



Understand the Substitute
Decision-Making Process and Practice of
New South Wales Public Guardians in
the Context of Article 12 of the United
Nations Convention on the Rights of
Persons with Disabilities (UNCRPD)

Thesis Topic

- Australia has obligations to conform with Article 12 of the UNCRPD, which mandates
 - equality of legal capacity
 - the provision of support to exercise that legal capacity

BACKGROUND

BUT DO WE?

- The UNCRPD Committee's view is that Australian legislation does not comply
- Yet this is 'law on the books'

Thesis Aim

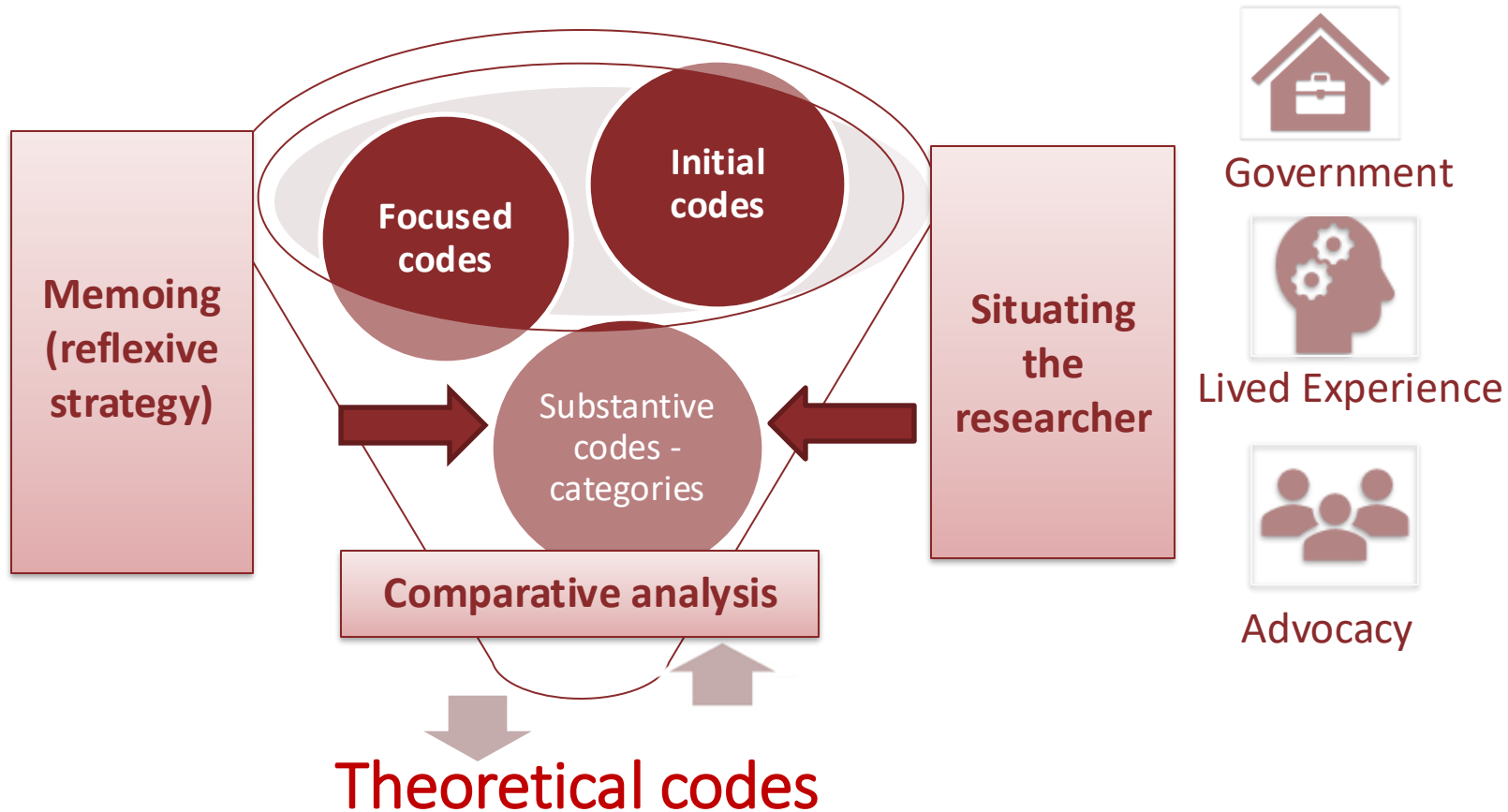
- Look beyond the theoretical prescription of the *Guardianship Act 1987 (NSW)* to understand
 1. everyday, on-the-ground substitute decision-making process and practice of NSW public guardians
 2. whether process and practice align with key elements of Article 12 of the UNCRPD, and to what degree
- A realistic baseline from which to understand what needs to be done to move further toward Article 12 implementation



AIM

Methodology – Grounded Theory

Formation of Theories



Derived from Charmaz, 2014; Corbin & Strauss, 1990b; Glaser, 1978, 1998; Glaser & Strauss, 1967; Strauss, 1987

Design and method

WHO?

- 7 NSW public guardians
- All 3 NSW Public Guardian Offices
- Covering 9 of 10 NSW regions
- Included regional, rural, remote

HOW?

- Purposive sampling
- Experience
- Rich, relevant data from diverse range of demographics
- Recruitment via NSW Office of Public Guardian
- Voluntary

WHAT?

- 1:1 semi-structured, intensive interviews
- Between 50 to 120 minutes
- At NSW Guardian's offices
- Written interview transcripts constituted the data

Background Concepts

- Fundamental to understanding thesis' grounded theory
- Authorising environments of NSW Public Guardians



Domestic – *Guardianship Act 1987*
(NSW) – Direct/Formal authorising
environment



International – Article 12 UNCRPD –
Indirect/Informal authorising environment

(Alford & Greve, 2017; Australian Public Service Commission, 2021; Moore, 1995, 2013; Salamon, 2002)

- Both/And thinking

Domestic authorising environment - NSW Guardianship Act



- Common law presumption of mental capacity
- Guardians appointed when NCAT determines a person lacks mental capacity (decision-making ability)
- Functional assessment of decision-making ability
- Binary approach
- Guardians must apply General Principles when making substitute decisions
- General Principles include
 - best interests is paramount consideration
 - person's views must be considered
 - family relationships important
 - protection from neglect, abuse and exploitation - safeguards
 - least restrictive safeguards
- Review of orders

Domestic authorising environment - NSW Guardianship Act

- NSW Public Guardians see Guardianship Act as:
 - antiquated
 - paternalistic
 - conservative
 - risk averse

The legislation is old, and quite rightly needs updating (Isaac)

[Guardians] are up against a very protectionist system. It's paternalistic and ... quite often view[s] people from a ... negative aspect first. Not [from] a positive strengths base (Lisa)

International authorising environment - Article 12 UNCRPD



- Central to the UNCRPD
- Most controversial article
- Supported decision-making is a safeguard to protect decision-making rights – 12(4)
 - provides for appropriate and effective safeguards to prevent abuse under human rights law
 - respects rights, will and preferences
 - proportional to degree to which it affects a person's rights and interests
- Equality of legal capacity - 12(2)
- Legal capacity = legal standing (holding rights) + legal agency (acting on rights) – inalienable
- Universal capacity model
- Legal capacity is distinct from mental capacity
- Provide support to exercise legal capacity – 12(3)

Article 12 UNCRPD

- UNCRPD Committee's view – Article 12 precludes substitute decision-making regimes
 - legal agency is removed
 - functional test that links legal and mental capacity
 - focus is safeguarding to protect a person from harm, not their decision-making rights
 - decisions based on 'best interest' of the person – to the detriment of their other rights and will and preferences



Article 12 ... is emblematic of the paradigm shift of the convention.... The deceptively simple proposition that persons with disabilities are 'subjects' and not 'objects' — sentient beings like all others deserving equal respect and equal enjoyment of their rights. (Quinn, 2010, pp. 3-4)

Both/And Thinking

- Concept generally applied in psychology and leadership
- Tool used by NSW Public Guardians
- Assists to navigate the two polarised authorising environments
- Contradictory realities can be true at the same time
- Realities not viewed as right or wrong, they are managed
- Managing polarity means accepting the paradox

(Manderscheid & Freeman, 2012; Smith et al., 2016; Terry, 2001)

**How wonderful
that we have met
with a paradox.
Now we have some
hope of making
progress**

(Niels Bohr, n.d, as cited
in Smith et al., 2016, p. 70)

Both/And Thinking

- Guardians' manage the paradox of opposing authorising environments
 - stay inside the ambit of the direct authorising environment – the conservative Guardianship Act
 - while delivering a less paternalistic, more empowering approach to substitute decision-making – in line with the indirect environment 12.

**Guardians
instinctively
wonder, 'How can
we simultaneously
do both X and Y?'**

- They do this by
 - Remaining flexible and acting strategically to reimagine a decision-making context that links more closely to Article 12
 - Intuitively, instinctively

A Grounded Theory

- Explains how NSW public guardians use both/and thinking to
 - make substitute decisions
 - within competing domestic and international authorising
 - to effect one of four distinct Decision-Making Outcome Types

So, there's this social model of disability. And rights, umm, human rights ... with people with disability being front and centre (Julie)

The Typology of Guardians' Human Rights Substitute Decision-Making Outcomes

The Typology's four Decision-Making Outcomes Types

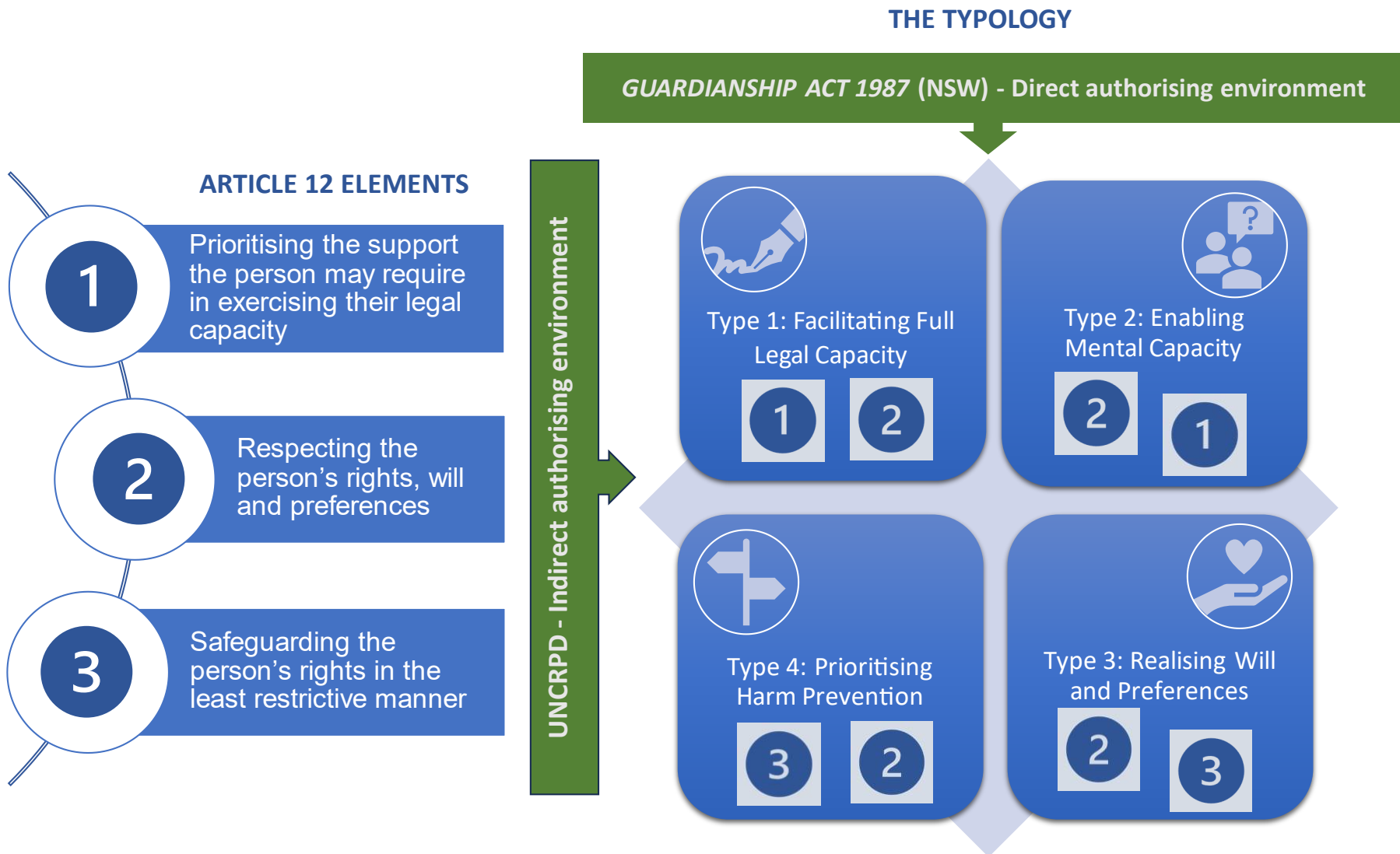


Decision-Making Outcomes Types alignment with Article 12

Each Decision-Making Outcome Type embodies, to varying degrees, the following key elements of Article 12:

- 1** Prioritising the support the person may require in exercising their legal capacity to the highest degree possible (Article 12(3)).
- 2** Respecting the person's rights, will and preferences (Article 12(4)).
- 3** Applying appropriate and effective safeguarding to prevent abuse in the least restrictive manner (Article 12(4)).

The Typology's relationship to Article 12 elements



Outcome Type One - Facilitating Full Legal Capacity

CONTEXT

- Article 12 – equality of legal capacity – legal standing and legal agency
- Guardianship Act removes legal agency by appointment of guardian – removes person's ability to action their rights
- Person no longer has full legal capacity

AIM

- Facilitate restoration of person's full legal capacity
- By working to get the person released from the guardianship order (by NCAT)



Outcome Type One - Facilitating Full Legal Capacity

BOTH/AND THINKING

- Guardians use their role to ‘champion lapses’ rather than make a substitute decision
- Seeking release from guardianship order
- Paradox – facilitating handing back of decision-making to person order – legal capacity – within authorising environment that removed it in the first place

Because as soon as I met him, I figured straight away there is no way this man should be under guardianship. So, my goal then is to get him off (Lisa)



Outcome Type One - Facilitating Full Legal Capacity

- Guardians champion lapses in two circumstances

BOTH/AND THINKING

1. Acknowledge overreach of the Guardianship Act
 - recognise person has mental capacity, and
 - no need for safeguarding

2. Consider person's right to decision-making autonomy and dignity of risk to outweigh their right to protection from harm
 - person is refusing to comply with the order, and
 - enforcing it will cause more harm to them than if they were released from it



Outcome Type One - Facilitating Full Legal Capacity

- Most closely links with the intent of

1

Article 12(3) – to provide the support the person may require in exercising their legal capacity

2

Article 12(4) – to respect the rights, will and preferences of the person

ARTICLE 12 ALIGNMENT

- Guardians do not *uphold* full legal capacity but *facilitate* the regaining of it
- Guardians do not have authority under the Guardianship Act to discharge a guardianship order



Outcome Type Two – Enabling Mental Capacity

- Article 12 – legal capacity is distinct from mental capacity (decision-making ability) – cannot be linked
- Guardianship Act conflates these – legal capacity can be removed after assessment of mental capacity
- Hand back decision-making to the person despite them being under substitute decision-making

CONTEXT

AIM

- Distinct from Outcome One because person remains under guardianship

There are examples where you can just go ‘everybody else, like it doesn’t matter what you think, this person, there’s still some capacity there. Why aren’t we trying our best (to enable it)?’ (Rose)



Type 2: Enabling
Mental Capacity

Outcome Type Two - Enabling Mental Capacity

BOTH/AND THINKING

- Guardians create a space in which decision-making autonomy can exist – Article 12
- Even within substitute decision-making legislation that denies it – Guardianship Act
 - ie: guardian appointed after functional assessment deems mental capacity (decision-making ability) lacking
- Guardians are decoupling legal and mental capacity on a practical level
- Guardians do this in two ways



Type 2: Enabling
Mental Capacity

Outcome Type Two - Enabling Mental Capacity

BOTH/AND THINKING

1. Respecting the presumption of mental capacity – NSW common law
 - even though Guardianship Act displaces presumption
 - in practice guardians informally reinstate presumption – reflecting Article 12's ethos
- Paradox - employ the presumption within the substitute decision-making structure under which it was refuted
- Often for small decisions, but also discrete components of more significant decisions



Type 2: Enabling
Mental Capacity

Outcome Type Two - Enabling Mental Capacity

BOTH/AND THINKING

2. Endorsing the person's decision

- Guardianship Act appoints substitute decision-maker – no legal recognition of person's decision-making ability or decision
- in practice guardians empower person to make a decision

■ Paradox

- guardians 'rubber stamp' decision – providing legal authority
- once valid, decision can be acted on - rights, will and preferences implemented



Type 2: Enabling
Mental Capacity

Decision-Making Outcome Type Two - Enabling Mental Capacity

- Most closely aligns with the intent of

2

Article 12(4) – to respect the rights, will and preferences of the person

**ARTICLE 12
ALIGNMENT**

- Potentially some alignment with

1

Article 12(3) – to provide the support the person may require in exercising their legal capacity (vicarious legal agency)



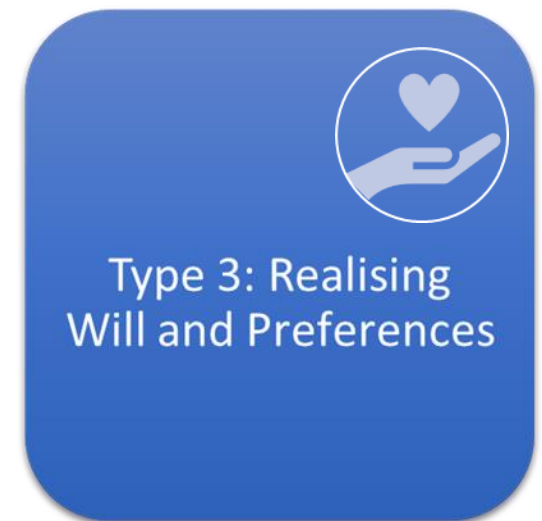
Type 2: Enabling
Mental Capacity

Outcome Type Three – Realising Will and Preferences

- Decisions have person's best interest as paramount – Guardianship Act
- Best interest test based on reasonable person's objective view – focused on protection from harm
- Not compliant with Article 12 - will and preferences
- Person's views need only be considered

CONTEXT

But it's in the human rights context. What's their right to have [this] outcome? Because they've said this is important to them (Julie)

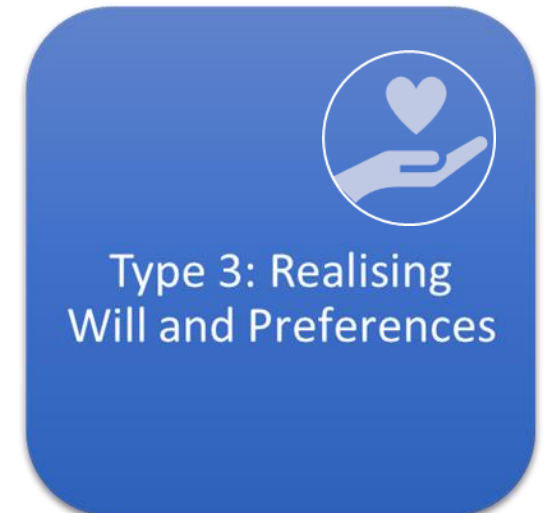


Outcome Type Three – Realising Will and Preferences

- Make a decision that realises the will and preferences of a person to the greatest extent possible
- Decisions closely reflects but not identical to decision person would have otherwise made
- Guardians enhance and reinforce the person’s views by recognising them as integral to best interests
 - expands the ambit of best interests
 - shifts focus from objective reasonable person best interests standard to more subjective one
 - will and preferences central to reimagined standard

AIM

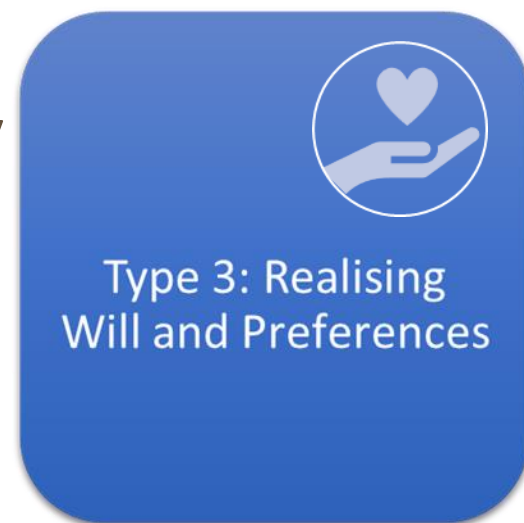
**BOTH/AND
THINKING**



Outcome Type Three – Realising Will and Preferences

**BOTH/AND
THINKING**

- broader focus than just protection from harm
 - harm assessed through will and preference lens
 - does not always equate to accepting risk
 - use stepped approach to manage risk
 - least restrictive safeguards implemented – trials
 - stepped up and down
- Paradox
- while outcome does not align unreservedly with decision person would have made
 - reflects will and preferences to greatest degree possible in protection focused, paternalistic legislation



Outcome Type Three – Realising Will and Preferences

ARTICLE 12 ALIGNMENT

- Most closely aligns with the intent of

2

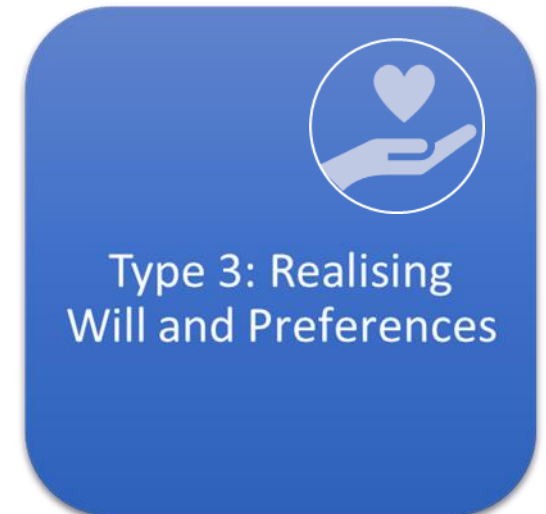
Article 12(4) – to respect the rights, will and preferences of the person

- Reflects the intent of

3

Article 12(4) – applying appropriate and effective safeguarding to prevent abuse in the least restrictive manner

- Distinct from Outcome Type One and Two



Outcome Type Four – Prioritising Harm Prevention

- Safeguards must be relative the extent that they affect rights, will and preferences – Article 12(4)

CONTEXT

- UN Committee says all rights must be protected
- Guardianship Act focused on protection from harm – not will and preferences - protecting *all* rights is difficult

AIM

- To safeguard person from harm



Type 4: Prioritising
Harm Prevention

I try to say to him, ‘You do get into trouble, and you’d be in gaol otherwise’ ... And he believes, he thinks he’ll manage really. So, so yeah, it’s very, it is hard. Decisions that go against people’s wishes are the most difficult decisions really (Isaac)

Outcome Type Four – Prioritising Harm Prevention

BOTH/AND THINKING

- Reinterpreted best interests standard is used – will and preferences integral
- All rights are considered and balanced, but prevention from harm is more likely when
 - risk is immediate and significant
 - decision complexity increases
 - there is a beneficial impact on other rights that have been negatively affected
- Continual monitoring and review of safeguards to stepping down of safeguards so person's will and preference can be given maximum effect



Type 4: Prioritising
Harm Prevention

Outcome Type Four – Prioritising Harm Prevention

ARTICLE 12 ALIGNMENT



- Most closely aligns with the intent of
3 Article 12(4) – applying appropriate and effective safeguarding to prevent abuse in the least restrictive manner
- Potentially aligns with the intent of
2 Article 12(4) – to respect the rights, will and preferences of the person

Implications

- The Typology reveals that
 - NSW Public Guardians' substitute decision-making practice
 - is better aligned with Article 12 obligations
 - than the text of the NSW Guardianship Act suggests

OPPORTUNITIES

Legislative change



Policy, Procedural and Practice Change



Inclusive change



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Thank you

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