



SHOULD DETENTION AND OTHER
RESTRICTIVE PRACTICES FOR USE ON
PEOPLE WITH DISABILITY BE A
FUNCTION OF GUARDIANSHIP? TO
WHAT EXTENT SHOULD RIGHTS GUIDE
THE AUTHORISATION REGIME OF
DETENTION AND OTHER RESTRICTIVE
PRACTICES IN SOUTH AUSTRALIA?

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Introduction

People with disabilities are some of the most vulnerable members of the South Australian community and often need additional support and services to ensure their well-being.¹ Sometimes, in receiving support and services, people with disabilities are subjected to restrictive practices (RP).² According to the South Australian Office of the Public Advocate (OPA), a restrictive practice is "when you restrict the rights of someone you are caring for or stop them from doing something they want to do, to protect their safety or the safety of others."³ This essay examines explicitly to what extent rights should guide the authorisation process and whether guardianship should have a role in authorising RP. It will be argued that the rights of a person should guide any authorisation process for RP and that therein, guardianship authorisation of RP is inconsistent with a rights-based approach, and the authorisation of RP, to a large extent, should not be a function of guardianship. To reach this conclusion, the essay will examine the factors that have shaped the current legal framework for the authorisation of RP. It will assess why a broad interpretation of guardianship powers is inconsistent with acceptable human rights standards for authorising RP and why using guardianship legislation for authorising detention is inappropriate. In doing so, this essay will examine key human rights frameworks, such as the *Convention on the Rights of Persons with Disabilities* and the *International Covenant on Civil and Political Rights*.⁴ Additionally, the perspectives of scholars and the legal precedent set in the Full Court of the Supreme Court of

¹ Australian Human Rights Commission, 'Statistics and Factsheets on Disability Rights' (Web Page, 2023) <<https://humanrights.gov.au/our-work/education/statistics-and-factsheets-disability-rights>>.

² National Disability Insurance Scheme Quality and Safeguards Commission, 'Behaviour Support under the NDIS Commission' (Fact Sheet, July 2020) 3 <<https://www.ndiscommission.gov.au/sites/default/files/2022-02/fact-sheet-behaviour-support-under-ndis-commission-july-2020-final.pdf>>.

³ Office of the Public Advocate (SA), 'Restrictive Practices' (Web Page, 2023) <<https://www.opa.sa.gov.au/guardianship/restrictive-practices>>.

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

South Australia case, *Public Advocate v C, B* ('C, B'),⁵ will be explored to assess further the extent to which detention and RP align with the protection of human rights and the need for a rights-based authorisation regime away from guardianship in South Australia.

Relevant Rights for People with Disability and Restrictive Practices

In discussing to what extent rights should guide the authorisation of RP and the role of guardians in authorising RP, it is essential to discuss fundamental rights, principles and frameworks applicable concerning the use of RP with people with disability. Many disability advocates regard Articles 14, 15, and 16 of the CRPD as fundamental rights essential to discussions on RP.⁶ Due to the recognised significance of these rights, this essay will focus on articles 14-16 and whether they should guide RP's authorisation. Article 14 of the CRPD requires state parties to ensure that persons with disabilities enjoy the right to liberty and security on an equal basis; they must not unlawfully or arbitrarily deprive persons with disabilities of liberty, and they cannot justify such deprivation solely based on disability.⁷ If persons with disabilities face deprivation of liberty, state parties must provide protections under international human rights law and treat them according to the Convention's principles, including providing reasonable accommodations.⁸ Article 15 requires that state parties prevent anyone from being subjected to torture or cruel, inhuman, or degrading treatment or medical or scientific experimentation without their free consent. State parties must take

⁵ (2019) 133 SASR 353 ('C,B').

⁶ CRPD (n 4) art 14-16; Claire Spivakovsky, Linda Steele and Dinesh Wadiwel, *Restrictive Practices: A Pathway to Elimination* (Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2023) 54; Kati Tuokkola & Hisayo Katsui, *From institutions to community living: drivers and barriers of deinstitutionalisation: Case study report: Finland 2018*, Research report produced for European Union Agency for Fundamental Rights, 2018 <https://fra.europa.eu/sites/default/files/fra_uploads/finland-independent-living-case-study-report_en.pdf>; Bernadette McSherry and Yvette Maker. 'Restrictive Practices: Options and Opportunities.' McSherry, B., & Maker, Y. (Eds.). *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses*. Routledge. 2020. 3-15. 6.

⁷ CPRD (n 4) art 14.

⁸ *Ibid* art 14(2).

adequate measures to protect persons with disabilities from such treatment on an equal basis with others.⁹ Article 16 directs state parties to take comprehensive measures to protect persons with disabilities from all forms of exploitation, violence, and abuse. State parties must independently monitor facilities and programs serving people with disabilities to prevent abuse.¹⁰ Further to the CRPD is Article 9 of the ICCPR, which provides the right to liberty and security, stating that no one shall be subjected to arbitrary arrest or detention.¹¹ It requires that any deprivation of liberty follow legal procedures, and that individuals arrested or detained must be promptly brought before a competent court and have the ability to challenge the legality of their detention through appropriate legal remedies.¹²

Are Restrictive Practices Consistent with Human Rights

In deciding if CRPD and ICCPR rights should guide the authorisation of RP, it is crucial to assess whether RP aligns with human rights principles. The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission states that RP aims to protect individuals with disabilities and others when behaviours pose significant risk.¹³ However, some critics argue that RP may prioritise institutional convenience over individual dignity, perpetuating control and failing to address underlying issues.¹⁴ Furthermore, the Victorian Law Reform Commission and advocacy groups like Caxton Legal Centre highlight how RP

⁹ CRPD (n 4) art 15.

¹⁰ Ibid art 16.

¹¹ ICCPR (n 4) art 9.

¹² Ibid; Paul M Taylor, 'A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights' (Cambridge University Press, 2020) 240–280 <<https://www.cambridge.org/core/books/abs/commentary-on-the-international-covenant-on-civil-and-political-rights/article-9-liberty-and-security/8AF572E249301A6EDC7D93397EAE4A8B>>.

¹³ National Disability Insurance Scheme Quality and Safeguards Commission, Regulated Restrictive Practice Guide (February 2020) 5 <<https://www.ndiscommission.gov.au/sites/default/files/2022-02/regulated-restrictive-practice-guide-rrp-20200.pdf>> .

¹⁴ *A Pathway to Elimination* (n 6) 94-102; Hannah Butterworth, Lisa Wood and Susan Rowe, 'Patients' and Staff Members' Experiences of Restrictive Practices in Acute Mental Health In-Patient Settings: Systematic Review and Thematic Synthesis' (2022) 8(6) BJPsych Open* e178 7-9 <<https://doi.org/10.1192/bjo.2022.574>>.

can reinforce cycles of dependency and distress.¹⁵ Despite the challenges around RP highlighted above, it does not necessarily mean that RP are inconsistent with human rights, especially the CRPD and ICCPR rights. There is an argument that authorisation frameworks that prevent misuse and restrict the use of RP solely to situations necessary for safety outside of a person's disability can align with Articles 15 and 16 of the CRPD and Article 9 of the ICCPR.¹⁶ Dr Spivakovsky, in a report published for the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, argues that there should be an immediate legal prohibition of the use of RP on a discriminatory basis against people with disability.¹⁷ The *Pathway to Elimination Report* talks explicitly about the justification to use RP of "risk of harm to others and self" to not be consistent with articles 15-19 of the CRPD because the "risk" is often based upon a person's disability, and not the person themselves.¹⁸ While RP undoubtedly presents challenges regarding their compatibility with human rights, as seen from the above, it is apparent that their use will not stop soon.¹⁹ It is argued that any authorisation scheme should uphold rights to the fullest extent, limiting RP strictly to situations where safety is genuinely at risk, not in response to behaviours solely related to disability. This approach aligns with Articles 14 to 16 of the CRPD, which protects the rights of persons with disabilities to liberty and security, freedom from inhumane treatment, and protection from abuse.²⁰ Therin a strict limitations authorisation regime guided by rights can ensure that the use of RP is not used as a tool of convenience or control, preventing

¹⁵ Caxton Legal Centre, 'Restrictive Practices and Human Rights' (Web Page, 18 December 2020) <<https://caxton.org.au/restrictive-practices-and-human-rights/>>; Victorian Law Reform Commission, Guardianship: Final Report, Report No 24 (2012) 318 [15.1].

¹⁶ Bernadette McSherry and Yvette Maker (eds), *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses* (Routledge, 2020) 13; Valentina Della Fina, 'The Role of the CRPD Committee in Interpreting the Convention on the Rights of Persons with Disabilities' in *The Committee on the Rights of Persons with Disabilities* (Springer, 2023) 171–196.

¹⁷ *A Pathway to Elimination* (n 6) 12.

¹⁸ *Ibid* 7.

¹⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, August 2014) ch 8 13.

²⁰ CRPD (n 4) 14-16.

disproportionate restrictions on liberty and potential discrimination.²¹ By narrowly defining risks and distinguishing them from disability-related behaviours, an authorisation scheme helps avoid degrading treatment or undue compromise of dignity.²² Therefore, the authorisation of RP should, to a large extent, be governed by strict limitations that ensure an authorisation regime, to a large extent, is guided by human rights.

Is the authorisation of Restrictive Practices under guardianship consistent and guided by human rights

To ensure that the authorisation of RP is guided primarily by rights, as proposed by this essay, current arrangements in South Australia must be evaluated for their compliance with rights standards, particularly examining how the authorisation of RP through guardianship aligns with these principles.

Pithy Summary

Currently, in South Australia, three regimes authorise RP for people who have disability outside of the criminal justice system. The first and most prolonged standing is through guardianship,²³ the second is through mental health legislation,²⁴ and the final and newest is through specific disability legislation.²⁵ Briefly, in South Australia, if a person is an NDIS participant, all RP, except detention, are authorised under the Disability Inclusion Act.²⁶ For people who are not NDIS participants, all RP except detention is authorised by a guardian

²¹ Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75(5) *Modern Law Review* 752.

²² Eilíonóir Flynn and Anna Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32(1) *Berkeley Journal of International Law* 124 5.

²³ *Guardianship and Administration Act 1993 (SA)* ('GAA').

²⁴ *Mental Health Act 2009 (SA)*.

²⁵ *Disability Inclusion Act 2018 (SA)* ('DIA').

²⁶ *Ibid* part 6A – Restrictive practices.

under the *Guardianship and Administration Act*, as will be explained in more detail in the subsequent paragraph. In relation to detention in South Australia, only the South Australian Civil and Administrative Tribunal (SACAT) can authorise detention under s 32 of the *Guardianship and Administration Act*.²⁷ This process requires a guardian to either submit the application for detention or be appointed alongside a Section 32 order.²⁸

A Guardian Authorising A Restrictive Practice Other Than Detention in South Australia

An appointed guardian in South Australia gains their powers under s 29 and s 31 of the GAA. Section 29 of the GAA states that if SACAT is satisfied that a person has a mental incapacity, a guardian can be appointed.²⁹ The GAA defines mental incapacity as when a person cannot look after their health, safety, or welfare or manage their affairs due to damage, illness, disorder, delayed development, impairment, or deterioration of the brain or mind, or a physical illness or condition that makes them unable to communicate their intentions or wishes in any way.³⁰ If a person meets the mental incapacity requirement, SACAT may appoint a guardian for them, designating the individual as a "protected person" (PP) under the GAA.³¹ This appointed guardian can make decisions for that person pursuant to powers given to them by s 31 of the GAA, only limited by the principles of the GAA and, if appointed as a limited and not full guardian, the specific area of the PP's life as ordered by SACAT such as accommodation.³² In relation to the power of guardians to make decisions per s 31 of the GAA, that section states that "A person appointed as a guardian under this Part has and may

²⁷ GAA (n 23) s 32.

²⁸ Ibid s 32(1a).

²⁹ Ibid s 29.

³⁰ Ibid s 29; s 3.

³¹ Ibid.

³² Ibid s 31; Kim Chandler, Ben White and Lindy Willmott, 'What Role for Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) Monash University Law Review, 512.

exercise, subject to this Act and the terms of the Tribunal's order, all the powers a guardian has at law or in equity."³³ The Chief Justice in the seminal South Australian case on the powers of guardians in *C, B* provided a clear explanation of s 31, providing that because of s 31, "the Act has not abrogated the general law concerning the powers of a guardian, but rather has provided that persons appointed a guardian under the Act can exercise those powers."³⁴ The general law Kourakis CJ is another term for common law or law created by judges.³⁵ If the Chief Justice's comments are accepted that the powers of guardians are subject to the common law powers of guardians, it is essential to examine what those powers are, their limitations and if they are consistent with human rights.

The Powers of Guardians Under Common Law and Authorising Restrictive Practices

A Breadth of Power

The aforementioned common law powers of guardians is often referred to by academics and scholars as being an implied "breadth of power" due to the purported wide-ranging scope of guardians to make decisions.³⁶ Furthermore, it has been described that this breadth of a guardian's decision-making authority over a PP is limited only by the appointing tribunals and guardianship legislation.³⁷ Kim Chandler, who has written extensively on the powers of guardians, suggests that guardians with full or partial appointments typically have broad, undefined powers, provided they act in line with the decision-making principles set out in the

³³ *GAA* (n 23) s 31.

³⁴ *C, B* (n 5) at [11].

³⁵ Chandler (n 32) 512.

³⁶ *Ibid* 510; Terry R Carney and Peter Singer, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (Report, Australian Human Rights Commission, 1986) 49; *FI v Public Guardian* [2008] NSWADT 263[44].

³⁷ Chandler (n 32) 510 – 514; Victorian Law Reform Commission, *Guardianship: Final Report*, Report No 24 (2012) 320 [15.14].

legislation.³⁸ Both tribunals and courts have embraced this concept. For instance, the New South Wales Administrative Decisions Tribunal—the NSW counterpart to SACAT—stated that the purpose of guardianship should be understood in light of the general law's historical interpretation of a guardian's scope and responsibilities.³⁹ The Tribunal described this as 'to enable the making of decisions that the subject would have been able to make had he or she had legal capacity to do so.'⁴⁰ In essence, the Tribunal's remarks reflect an argument that so long as a protected person can consent to something, so can a guardian. Further, the Office of the Public Advocate in South Australia has taken the position that guardians can consent to at least some RP by appointment, and SACAT has made limited guardianship orders solely for the authorisation of RP.⁴¹

Is a wide breadth of guardians' powers consistent with the CRPD and ICCPR frameworks

There has been considerable discussion regarding the legality of guardians using their broad inherent powers to authorise RP concerning the scope of guardians' authority over such measures.⁴² The Supreme Court of South Australia recently, in the case of *C, B*, examined the inherent breadth of a guardian's powers and discussed the limits of the common law powers of guardians, with specific reference to the common law principle of legality. While the Court in *C, B* specifically discussed the principle of legality concerning the RP of detention, the principles and reasoning applied can be used to discuss all RP.⁴³

³⁸ Chandler (n 32) 512.

³⁹ Ibid; *FI v Public Guardian* [2008] NSWADT 263 (16 September 2008) [44].

⁴⁰ *FI v Public Guardian* [2008] NSWADT 263 (16 September 2008) [44]

⁴¹ Office of the Public Advocate (SA), 'Guardian Consent for Restrictive Practices in Disability Settings' (Policy, 1 July 2014), 9; *C, B* (n 5) [53]; *Katie Walsh and Clare Nolan, 'Protecting or Neglecting? The Case of "Public Advocate v C, B" (2019) 133 SASR 353' (2020) 41(1) Adelaide Law Review 344.*

⁴² Chandler (n 32) 493.

⁴³ *C, B* (n 5) [31] to [56].

Principle of Legality

The principle of legality is a legal doctrine in Australian law that presumes that the Parliament does not intend to limit fundamental rights and freedoms when creating legislation unless it explicitly sets out to do so.⁴⁴ His Honour Justice Stanley in *BC v Public Advocate*,⁴⁵ upheld by the full Court in *C, B*, commented that "More recently the principle of legality has been approached on the more refined basis that Parliament may now be taken to be well aware that Courts will construe legislation based on the principle of legality, and therefore, the courts are well justified in proceeding on that basis, safe in the knowledge that Parliament would have used appropriate language if it did indeed wish and intend to oust fundamental freedoms".⁴⁶ From Stanley J's comments in *BC*, it could be argued that since the GAA is silent on authorising RP, except for detention, and given the general acceptance and increasing recognition of the rights of people with disabilities, as evidenced by Australia ratifying the CRPD, the rights asserted in the CRPD are fundamental freedoms.⁴⁷ If it is accepted that the rights of people with disability are fundamental freedoms, then if Parliament had intended to grant guardians the power to authorise RP, the legislation would have made this explicit. However, given that the GAA was enacted in 1993 when disability advocacy was not as prominent as it is today, and considering the historical acceptance of guardians authorising RP, it could be argued that the principle of legality may not be overly applicable in the circumstances. The confusion surrounding whether guardians in South Australia can authorise RP without violating the common law principle of legality highlights this essay's

⁴⁴ Chief Justice JJ Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775; *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁴⁵ *BC v The Public Advocate & Ors* [2018] SAS 193 ("*BC*").

⁴⁶ *Ibid* [31].

⁴⁷ Degener, Theresia, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 1, 1–24; Anna Arstein-Kerslake and Eilionóir Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law' (2016) 20(4) *The International Journal of Human Rights* 471; Therese Sands, 'The Convention on the Rights of Persons with Disabilities: Building a Disability Inclusive Australia' (2018) 23(3) *Australian Journal of Human Rights* 326.

core issue: that rights should guide the authorisation of RP. Guardianship, in its current form in South Australia, raises serious concerns due to the ambiguity around guardians' authority to permit RP. This uncertainty suggests that guardianship may not be a suitable framework for authorising these practices. Consequently, it is essential to examine whether the GAA principles that can limit guardians' decision-making align with human rights standards. If they do not, this further questions the appropriateness of guardianship in authorising RP.

Principles of the GAA

The first relevant principle that should be considered is what the PP's wishes would be if they did not have a mental incapacity on which there is reasonably ascertainable evidence to base such an opinion.⁴⁸ Secondly, a person's current wishes should be sought, which must be considered where reasonably practicable.⁴⁹ Finally, decisions made on behalf of a protected person should aim to be the least restrictive of their rights and personal autonomy, in line with their care and protection needs.⁵⁰ When looking at the above principles and if they are consistent with human rights, they are likely not, especially concerning articles 14-16 of the CRPD. These articles emphasise the right to liberty and security for persons with disabilities, clarifying that any deprivation of liberty must not be based on disability.⁵¹ Furthermore, they mandate protection from torture or cruel, inhuman, or degrading treatment and call for measures to safeguard individuals from exploitation, violence, and abuse.⁵² While the

⁴⁸ GAA (n 23) s 5(a).

⁴⁹ Ibid 5(b)

⁵⁰ Ibid 5(b) –(d).

⁵¹ Office of the High Commissioner for Human Rights, 'Statement on Article 14 of the Convention on the Rights of Persons with Disabilities' (Report, October 2014) <<https://www.ohchr.org/en/2014/10/statement-article-14-convention-rights-persons-disabilities>>; Australian Government Department of Social Services, *National Framework for Reducing the Use of Restrictive Practices* (Report, April 2014) <https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf>.

⁵² Penelope Weller, 'The Convention on the Rights of Persons with Disabilities and the Social Model of Health: New Perspectives' (2011) 33(1) *Journal of Law and Medicine* 116, 78 - 80.

principles of the GAA strive to respect the individual's wishes and limit restrictions on their autonomy, they permit decisions to be made on behalf of individuals in a potentially arbitrary manner, lacking a robust review process.⁵³ Additionally, the principles of the GAA do not guarantee that a person will not be deprived of their liberty solely because of a disability that impacts their decision-making capacity, which is a clear violation of Art 14 of the CRPD.⁵⁴ As discussed, the limits on a guardian's power to authorise RP are likely constrained only by the principles of the Act and the specific type of guardianship appointment. This framework arguably fails to provide sufficient protections to ensure that a rights-based approach adequately guides the authorisation of RP under guardianship, as this essay contends it should be.

Further Challenges in Rights-Based Authorisation of Restrictive Practices Under Guardianship in South Australia

The lack of rights-based protections and limits on guardians' powers to RP in South Australia raises a fundamental question of whether guardianship is compatible with a rights-based approach. Guardians, unless appointed jointly, make decisions independently, without a formal review process over the decisions they make.⁵⁵ It can be argued that the lack of oversight and unilateral decision-making in guardianship conflicts with Article 12 of the CRPD, which recognises people with disabilities as legal persons entitled to support for exercising legal capacity.⁵⁶ Furthermore, it can be argued that when guardians consent to RP, they impose "coercive and non-consensual" measures on behalf of another person.⁵⁷ Articles

⁵³ Mark Giancaspro, Lukas Price, Esther Richards and Sylvia Villios, 'Better Together: Microboards and Supported Decision-Making in South Australia' (2022) 43(1) *Adelaide Law Review* 131-135; CRPD (n 4) art 16.

⁵⁴ CRPD (n 4) art 14.

⁵⁵ Ibid.

⁵⁶ Ibid art 12; A Pathway to Elimination (n 6) 220; Millar, Dorothy Squatrito, 'Guardianship Alternatives: Their Use Affirms Self-Determination of Individuals with Intellectual Disabilities' (2013) 48(3) *Education and Training in Autism and Developmental Disabilities* 291, 291–305.

⁵⁷ A Pathway to Elimination (n 6) 37.

12 and 13 of the CRPD require that the rule of law applies consistently to people with disabilities, ensuring decisions are free from conflicts of interest, proportionate, and regularly reviewed by an independent authority.⁵⁸ Since guardians are often family members or friends, conflicts of interest in authorising RP are likely. This issue reveals that the current approach in guardianship often disregards the rights and autonomy of individuals, despite its aim to act in the person's best interests when authorising RP.⁵⁹ A fundamental flaw in guardianship is its inherent inconsistency with a rights-based system, reinforcing that the authorisation of RP should not fall within the scope of guardianship.

Detention

Another critical aspect of RP in South Australia is the unique way detention is handled compared to other states. In South Australia, detention is not classified as just another RP but is subject to specific requirements and authorisation under s 32 of the GAA.⁶⁰ This authorisation under s 32 requires a specific order from SACAT to authorise a person's detention.⁶¹ For SACAT to issue a s 32 order, an application must be submitted, typically by a guardian or someone seeking an appointment as a guardian for a PP.⁶² The interpretation of section 32 has long been a source of confusion in South Australia. In *C, B*, the Full Court of the Supreme Court of South Australia clarified that the assumption that guardians could authorise detention under their broader powers in section 31 of the GAA was incorrect.⁶³ The Court reasoned that s 32, in essence, extinguished any common law authority of a guardian to

⁵⁸ Ibid 220.

⁵⁹ GAA (n 23) s 5(b) (5)(d).

⁶⁰ Ibid s 32; DIA (n 25) Div 4; Office of the Public Advocate (SA), 'Special Powers (or Section 32 Powers)' (Fact Sheet, 2024) <<https://www.opa.sa.gov.au/documents/fact-sheets/Fact-Sheet-S32-POWERS.pdf>>.

⁶¹ GAA (n 23) s 32; ; Office of the Public Advocate (SA), 'Special Powers (or Section 32 Powers)' (Fact Sheet, 2024) <<https://www.opa.sa.gov.au/documents/fact-sheets/Fact-Sheet-S32-POWERS.pdf>>.

⁶² Ibid.

⁶³ *C, B* (n 5) [56].

detain a person under the previously discussed breadth of power principle.⁶⁴ So, while it is now clear that guardians while guardians do not directly authorise the RP of detention, they initiate the application process with SACAT for such authorisation, which is still problematic in relation to human rights, as will be discussed.

Does S 32 of the GAA Do Enough to Protect Rights

While s 32 of the GAA does remove the authorisation of detention away from a guardian, guardianship legislation still provides the framework for SACAT to authorise detention, which has human rights concerns. Chief Justice Kourakis, in *C, B*, observed that section 32 and its authorisation process would be consistent with Article 9 of the ICCPR as it guards against arbitrary detention.⁶⁵ While likely consistent with Art 9, a guardian must still bring the application or be appointed alongside a 32 order.⁶⁶ Article 15 of the CRPD mandates that States Parties implement effective legislative, administrative, judicial, or other measures to prevent persons with disabilities from being subjected to torture or cruel, inhuman, or degrading treatment on an equal basis with others.⁶⁷ It is argued that authorising detention under guardianship legislation, based solely on the principles of the GAA, fails to meet the required rights-based standard posited by this essay. The legislature must have a rights-based and guided RP authorisation scheme for RP and must, therefore, establish clear, rights-based guidelines to ensure that detention decisions prioritise the individual's rights and safety, aligning with international human rights frameworks.

⁶⁴ Ibid [64]; *Walsh* (n 41) 347.

⁶⁵ *C, B* (n 5) [52].

⁶⁶ *GAA* (n 23) s 32(1)(a).

⁶⁷ *CRPD* art 15.

Conclusion

The current legal framework for authorising RP and detention for people with disabilities in South Australia under the GAA presents significant challenges when evaluated against human rights standards. While the GAA aims to protect individuals, its principles do not sufficiently align with the rights outlined in international instruments such as the CRPD and ICCPR. This misalignment is highlighted by the extensive powers granted to guardians, which can lead to unchecked use of RP that may infringe on the dignity and autonomy of individuals. Although section 32 of the GAA requires SACAT oversight for authorising detention, the fundamental issues within the guardianship system remain unresolved. The lack of clear, rights-focused legislative guidelines means that authorisation of detention and other RP continues within a framework that falls short of international human rights commitments. Judicial perspectives underscore that the principle of legality requires explicit legislative intention for any restriction of rights, which the GAA inadequately provides. A reform that moves the authorisation regime away from guardianship towards a rights-based, person-centred framework is crucial. This framework should incorporate strong safeguards and mandatory review mechanisms, prioritise the individual's will and preferences, and ensure that RP respects autonomy and liberty. Such changes would allow South Australia to align with its international obligations and better safeguard the rights and well-being of people with disabilities.

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