

Disability Law in a Pandemic: The Temporal Folds of Medico-legal Violence

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journals.sagepub.com/home/sls**Claire Spivakovsky** *The University of Melbourne, Australia***Linda Roslyn Steele***University of Technology Sydney, Australia*

Abstract

Disabled people are subject to disability laws – such as guardianship, mental health and mental capacity legislation – which only apply to them, and which enable legal violence on the basis of disability (‘disability-specific lawful violence’). While public health laws during the COVID-19 pandemic enabled coercive interventions in the general population, disabled people have additionally been subject to the continued, and at times intensified, operation of disability laws and their lawful violence. In this article we engage with scholarship on law, temporality and disability to explore the amplification of disability-specific lawful violence during the pandemic. We show how this amplification has been made possible through the folding of longstanding assumptions about disabled people – as at risk of police contact; as vulnerable, unhealthy and contaminating – into the immediate crisis of the pandemic; ignoring structural drivers of oppression, and responsibilising disabled people for their circumstances and the violence they experience.

Keywords

COVID-19, disability, emergency, guardianship law, indefinite detention, restrictive practices, temporality, violence

Corresponding author:

Claire Spivakovsky, School of Social and Political Sciences, The University of Melbourne, Victoria, 3010, Australia.

Email: cspivakovsky@unimelb.edu.au

Introduction

This article contributes to debates around the coercive functions of law during the COVID-19 pandemic ('the pandemic'). It shifts focus from public health law to disability law to consider the intersections of these laws during the pandemic, and the consequences thereof for both disabled people and the broader community.

Worldwide, legal responses to the pandemic have restricted people's freedom of movement, liberty, and association, curtailing the ways by which many people participate in their communities. In Australia – the focus of this article – public health laws have been implemented through declared states of emergency and disaster. These laws have limited the reasons a person is lawfully allowed to leave their home, the duration for which they can leave, and the distance for which they can travel. These laws have also limited the number of visitors within a person's home, and with whom that person can associate.

For many people, these public health laws represent their first encounter with the coercive functions of law. For others, contending with law's coercive functions is familiar. For centuries, disabled people – most notably those living with psychosocial disability, intellectual disabilities and other cognitive impairments – have experienced significant restrictions on their freedom of movement, liberty, and association. Disability laws – that is, laws that only apply to disabled people by reason of their disability – have been, and continue to be, central to enabling and legitimating these restrictions over time (Spivakovsky et al., 2020). Contemporary disability laws enable forced mental health medication, electroshock therapy, and the seclusion of disabled people in mental health facilities in the community (Kelly, 2015). These laws also enable 'restrictive practices' that can be used to lock disabled people in a room, sedate them, and/or mechanically or physically restrain them (Spivakovsky, 2017). These practices can be applied in homes, large disability residential centres, aged care facilities, schools and segregated employment. Finally, in the case of some women with disability, contemporary disability laws enable non-consensual sterilisation, abortion and menstrual suppression (Steele, 2014, 2016, 2018a).

These disability-specific applications of the coercive functions of law have historically drawn minimal public or political contestation. Typically, they are framed in therapeutic terminology, and presented as beneficial to disabled people and the broader community. Yet, as we have argued elsewhere (Spivakovsky, 2018; Steele, 2014, 2020), these targeted applications of law's coercive functions are violent, and specifically, they are a form of *legal violence*. They are non-consensual, harmful actions perpetrated against disabled people that are regulated by law, but not prohibited by it, and as such, take on legal character. We refer to this perpetration of legal violence as 'disability-specific lawful violence' (Steele, 2014).

As socio-legal scholars of dis/ablism, we have spent much of our early careers questioning how and why disability-specific lawful violence remains palatable and largely unquestioned (see e.g. Spivakovsky, 2014a, 2014b, 2017, 2018; Spivakovsky and Seear, 2017; Steele, 2014, 2016, 2017a, 2017b, 2020). Our interest has therefore been piqued by the emergence of vehement public and political debates about the limits of, and justifications for, using coercive public health laws during the pandemic.

We have wondered: what implications might this contested, population-wide encounter with law's coercive functions hold for disabled people whose encounters with law's violence are rarely questioned? Answers to this question are hard to come by. If we listen to advocates and activists, they tell us that although many services, supports and opportunities for disabled people were paused or entirely ruled out as options during the pandemic – including because of a lack of access to personal protective equipment (see PWDA, 2020; Wong, 2020) – coercive disability laws continued unabated. What remains unclear, however, is what specifically has been happening to disabled people, who during the pandemic, have been geographically and jurisdictionally part of a population subject to public health laws, while additionally part of a specific population subject to disability law. We attend to this issue in our article. To do so, we focus on one aspect of disability law in Australia: guardianship law. We select guardianship law because the coercive functions enabled under this disability-specific law are strikingly similar to those enabled under Australia's use of public health law during the pandemic. That is to say, pursuant to guardianship law, a guardianship order can be made to enable third parties (guardians) to determine when a disabled person is lawfully allowed to leave their home, the duration for which they can leave, as well as to dictate with whom that person can associate (see, e.g. *Guardianship Act 1987 (NSW)*). To further ground our exploration, we focus on guardianship law in the New South Wales jurisdiction, and we analyse two guardianship decisions made by the New South Wales Civil and Administrative Tribunal ('NCAT'). These decisions – *UZX* [2020] NSWCATGD 3 and *GZK* [2020] NSWCATGD 5¹ – are the leading NCAT decisions on the application of guardianship law's coercive powers during the pandemic, and they were made within days of the NSW *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* taking effect.

Our article comprises four main parts. In the first we introduce guardianship law in Australia and bring together socio-legal and critical disability scholarship on law, temporality and emergency to draw out the operation of what we refer to in this article as guardianship law's 'medico-legal time'. Second, we introduce the cases of *UZX* and *GZK*. Here we explain how these decisions demonstrate that guardianship law amplifies pre-existing legal violence during the pandemic, and how this violence is made possible through guardianship law's production and arrangement of medico-legal time. We then turn in our analysis to explain how this violence is necessitated and legitimated by two temporal folds. First, there is a *folding in of time*, such that age-old narratives about disabled people as 'faultless', 'risky', 'vulnerable' and 'leaky' are folded in – like an egg into flour – with the foundations upon which guardianship law's authority and emergency law's time operate. We show how this folding process produces a new legal subjectivity: disabled people *as the emergency* of the pandemic. Second, we draw attention to the *folding up* of time and history – like a paper concertina – such that long-standing insecurities and inequalities in disability supports and services in the community become obscured by the only issue left visible for redress on top: the apparently new 'emergency' of 'risky', 'contagious' disabled people. We conclude by noting the complicity of law in the slow death of disabled people in the 'deinstitutionalised' community, and we encourage socio-legal scholars to engage with disability law

both in its own right, and for its possibilities for enriching understandings of law and temporality, in pandemics and beyond.

Guardianship Law in Australia

Australian guardianship law took shape in the late 1980s as both a legislative figuration of longstanding *parens patriae* laws, and as a response to what is claimed to be Australia's 'deinstitutionalisation' movement. To this end, guardianship law is said to balance the community 'inclusion' ideals of this movement with the assumed 'vulnerability' and 'incapacity' of disabled people. To achieve this balance, guardianship law 'protects' those who are deemed vulnerable due to their apparent lack of decision-making capacity from becoming subject to laws that focus on custodial control, such as mental health and *parens patriae* laws (Victorian Law Reform Commission, 2012: [2.11]–[2.13]; see similarly New South Wales Law Reform Commission, 2018: [2.4]–[2.17]). To enable 'inclusion' in the community, guardianship law authorises third parties, specifically, a guardian – who can be a family member or friend, or, if no one else is available, a state appointed Public Guardian – to make decisions on behalf of an individual whose decision-making capacity is perceived as lacking or 'impaired'. This model of decision-making is referred to as 'substitute' decision-making. It is called so because while the guardian is expected to consider the welfare and interests of the individual, ultimately it is the guardian and not the individual who steps in to make decisions.²

Which decisions a guardian is empowered to make is outlined in a guardianship order. Generally, guardianship orders can be plenary/full (i.e., covering all aspects of an individual's life) or limited/conditional (i.e., covering specific aspects). In the Australian state of New South Wales (NSW) – the focus of this article – these orders provide guardians with different 'functions', with these 'functions' delineating the subject matter of the decisions the guardian can make. While some 'functions' might appear relatively benign – for example, making decisions about accessing medical treatment – other 'functions' allow for guardians to decide where a disabled person will live (i.e. in a private home, in supported accommodation, or in a 'group-home'); whether within that residence the person can be subject to restrictive practices (e.g. physical restraint, mechanical restraint, chemical restraint, and seclusion); and if police and ambulance services can be used to forcibly return the person to that residence if they leave without permission, or do not return at a set time.

Much could and should be questioned about the 'balance' and 'inclusion' guardianship law is claimed to achieve through substitute decision-making and coercive functions (see Chesterman, 2018 for some notable critiques). What is of interest to us in this article, however, are the *temporal dynamics* underpinning these claims of 'balance' and 'inclusion', and the consequences thereof for disabled people. We lay the foundations for considering these dynamics now.

Guardianship Law's Violent, Curative Arrangement of Time

Conventionally, time is understood as linear; it progresses from past to present, and into an infinite future. But in law, time is not pre-existing, unitary, or chronological. Rather, law *produces, specifies and arranges* time, such that 'juridical concepts, legal discourses, and legal authority are underwritten by and draw their meanings from the production, specification, and arrangement of time' (Mawani, 2014: 71). The role of law in declared states of 'emergency' and other 'crises' offers an ideal example of this arrangement.

At face value, an emergency is understood as a sudden and unexpected threat to safety that requires immediate action to protect lives. Pursuant to such an understanding, law can be legitimately suspended by state authorities to enable certain actions and interventions claimed to meet the unfolding, extraordinary circumstances. But this reading of law and emergency masks two important dynamics. First, it obscures the constitutive role of declared emergencies in legitimating the violence of law (Agamben, 2010). As Hussain (2009: 32) argues in the context of colonialism, 'we have always, in a sense, lived in a state of emergency because emergency is not a departure from the rule of law, but rather an inherent part of that rule'. Second, this reading also masks the legal subjectivities and social identity categories made possible through the production, specification and arrangement of law's time. As Anghie (2009: xi) explains – also in the context of colonialism – the legal conception of 'the colonial' has a central, constitutive role in the production of 'modern times', because

[i]t is in the colony that law is confronted with the challenge of producing itself as the "rule of law", transparent, accountable, limited, while also possessing within itself the potential to authorise an endless violence posited as essential to defend against the racial other, the savage, the barbaric.

Thus, this scholarship reminds us that there can be 'tensions and disjuncture between law's time and lived time', which fragment relations between events, spaces or people, and which can render injustices incomprehensible (Greenhouse, 1989; Keenan, 2017; Mawani, 2014: 93). Law is not alone in this regard.

Critical disability studies scholars remind us that disability – as a social category – is both historically and contemporarily bound up in the fragmenting temporal arrangements of a medical model. These scholars argue that under a medical model of disability, disability is temporally positioned as an unchanging, individual deficiency which prevents individuals from developing into fully capable adults (and citizens/legal subjects) (see e.g. Pyne, 2017). This temporally informed medicalised conceptualisation of disability holds significant consequences for disabled people. As Kafer (2013: 2–3) contends, it casts disability *outside of futurity*, such that the model assumes that 'a better life would of necessity require the absence of impairment', or to be clear, a 'better future . . . is one that excludes disability and disabled bodies'. Crucially, this temporally informed medicalised reading of disability also legitimises violence, just like law's time. In the case of disability this legitimacy is gained through the production of a 'curative imaginary' and 'curative time'. That is, 'an understanding of disability that not only

expects and assumes intervention but also cannot imagine or comprehend anything other than intervention' (Kafer, 2013: 27). An understanding that there is no place for 'disability and illness as different ways of living', and that any medical intervention in the lives of disabled people is 'justified in the name of cure' (Kim, 2017: 14). Or, put differently, an understanding that the unrequested and non-consensual medical interventions perpetrated against disabled people could only ever be beneficial; both for disabled people, and for all those others who are (and apparently should be) invested in securing a collective future without disability.

To us, guardianship law can and should be read as a collision of, and collusion between, law and medicine's arrangements of time. This conflux holds significant consequence for disabled people. Through combining objectives for curative futurity with law's capacity to authorise violence, guardianship law produces, arranges and specifies medico-legal time. This time simultaneously legitimises violence against disabled people, while rendering its perpetration incompressible. We make these claims about guardianship law based on four, connected, observations.

First, guardianship law emerged from, and continues to work within, the temporal dynamics of a medicalised, curative imaginary. Not only is the appointment of a substitute decision-maker under guardianship law seen as necessary for producing a better future for the 'lacking' individual – graciously allowing the person to remain in the community by denying them legal recognition of their decisions. But additionally, this promise of a better, more 'inclusive' future in the community through guardianship, is pitted against what Altermark (2017) calls, the 'dark past' of institutionalisation.

Second, the future brought forth by guardianship law is one filled with (more) curative violence. To continue to be 'included' in the community going forward, disabled people deemed lacking decision-making capacity are not only denied legal recognition of their decisions, but they are also expected to receive and accept significant coercive, violent and harmful interventions in their bodies and lives. In the name of 'inclusion', they are expected to welcome having no choice in where they live, with whom they can reside, or indeed, when they can leave their place of residence. They are also expected to welcome having someone else consent to them being physically and/or mechanically restrained, to being chemically rendered docile, and to being secluded in their room or home.

Third, we note that what ultimately makes guardianship law's curative violence permissible is law's capacity to authorise violence. It is through the legal provision of substitute decision-making via guardianship law – or to be explicit, through legally authorised *substitute consent* – that the coercive, violent and harmful interventions in the bodies and lives of disabled people are re-categorised as legally permissible. In this way, guardianship law does not just authorise curative violence to take place, it also perpetrates epistemic violence. It denies disabled people the opportunity to have their own perceptions and views of their experiences and needs recognised by others, and it negates their status as political actors, capable of exercising resistance to legal and medical authority (Beupert, 2018; Roper, 2018). This is the complex and multilayered nature of the lawful, curative violence made possible through guardianship law's provisions.

Finally, the lawful, curative violence guardianship law makes possible, distorts time and fragments relations between events, spaces or people. Here we draw on Steele's (2017b) observation about the doctrine of necessity, which draws on the work of Nixon (2013) on 'slow violence', and Berlant (2007) on 'slow death'. For Nixon (2013: 2) slow violence is violence that: 'occurs gradually and out of sight'; it is 'dispersed across time and space'; and, is 'typically not viewed as violence' because of the conventional understanding of violence as 'an event or action that is immediate in time, explosive and spectacular in space'. For Berlant (2007), violence like this – that is, with prolonged temporality – has subtle physical impacts. Indeed, Berlant (2007: 754) coined the term 'slow death' to describe the 'physical wearing out of a population and the deterioration of people in that population that is very nearly a defining condition of their experience and historical existence'. Bringing these concepts together with the arguments of Steele (2017b), we argue that guardianship law, like the doctrine of necessity, stretches 'the tempo of an intervention to an ongoing, dispersed, institutional relationship and space' (Steele, 2017b: 395), and that this stretching of time contributes to the 'slow violence' and 'slow death' of disabled people. We make this claim based on two connected features of guardianship law. First, guardianship law authorises guardians to make decisions during a specific period – for example, across a 12-month period, or on an ongoing basis, depending on the order – rather than authorising each specific decision to be made. This specification of time disperses the perpetration of lawful violence across time and space, enabling it to become a defining condition for those under guardianship, while at the same time, making it impossible to attribute legal causality for any one specific harm (Steele, 2017b: 396; see also Steele, 2018b). Second, guardianship law also enables guardians to authorise others, including disability service providers, to use coercive and restrictive practices against disabled people under guardianship. This dispersal of authority thus also makes it impossible to identify a specific perpetrator to which legal causality for a specific harm can be attributed (Steele, 2017b: 396).

With these temporal dynamics in mind, we return now to the focal question of this article: what has been happening to disabled people who during the pandemic, have been geographically and jurisdictionally part of a population subject to public health laws, while additionally part of a specific population subject to disability law? Our answer to this question is grounded in two guardianship decisions.

Guardianship Law in a Pandemic: The Cases of UZX and GZK

The two decisions we focus on in this article – *UZX* [2020] NSWCATGD 3, [2] and *GZK* [2020] NSWCATGD 5, [4] – were made by the New South Wales Civil and Administrative Tribunal ('NCAT'). They were made following the NSW Government's declaration of a state of emergency, and the coming into effect of coercive and restrictive powers of the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* ('NSW Public Health Order') pursuant to s 7 of the *Public Health Act 2010* (NSW). We select these two decisions for three reasons. First, these decisions relate to disabled people who were already subject to guardianship orders prior to the pandemic. Second, these decisions detail how during the pandemic, applications were made to NCAT to vary and extend the coercive functions of these people's pre-existing

guardianship orders in order to respond to the introduction of the NSW Public Health Order. Finally, these are the leading NCAT decisions on the application of guardianship law's coercive powers during the pandemic.³ An overview of these leading decisions is provided below.

UZX [2020] NSWCATGD 3

UZX is described as 'a 69-year-old Aboriginal woman living in Housing NSW accommodation in Regional NSW' (*UZX [2020] NSWCATGD 3, [2]*). UZX came under guardianship in August 2019, with the NSW Public Guardian appointed as her guardian for 12 months. Under this order, the NSW Public Guardian was granted both the 'accommodation' and 'services' functions of guardianship. Accordingly, the NSW Public Guardian was empowered to make all decisions about where UZX could stay – either permanently or temporarily – including whether UZX could visit family and friends (NSW Office of Public Guardian, 2009). The NSW Public Guardian was also empowered to make all decisions about the types of services and supports UZX would receive, including which service providers would be engaged (NSW Office of Public Guardian, 2009: 51).

Within 3 days of the NSW Minister for Health making the NSW Public Health Order, UZX's primary clinician at the Older Persons Mental Health Service ('the applicant') applied to NCAT to vary UZX's guardianship order. The applicant sought to replace the 'accommodation' function of guardianship with the 'coercive accommodation' function. Through the 'coercive accommodation' function, UZX's guardian could go directly against the wishes of UZX,⁴ and place her in emergency respite accommodation. The intention was that UZX could then be 'kept there [in emergency respite accommodation], during the COVID-19 pandemic' (*UZX [2020] NSWCATGD 3[6]*), with recourse to the coercive authority of police and ambulance services to return UZX to this location should she leave.

The applicant provided two reasons for seeking this variation. First, they were concerned UZX would come to police attention because of her claimed 'incapacity to observe social isolation rules' (*UZK [2020] NSWCATGD 3[9]*). Second, UZX's contracted disability service provider had suspended their in-home support of UZX on 30 March 2020 – that is, on the same day the NSW Public Health Order came into effect. UZX's service provider indicated they had suspended their services because: (1) UZX was not practicing the social isolation rules pursuant to NSW's public health law; (2) UZX was perceived to be 'at high risk' of contracting COVID-19; and (3) the provider believed that 'the risk of spread [from UZX] to our caregivers and other frail, elderly clients is too high' (*UZX [2020] NSWCATGD 3[10]*).

NCAT granted the variation to UZX's order. As such, from 3 April 2020 it became legally permissible for UZX's guardian to authorise others – including members of the NSW's police and ambulance services – to: (1) take UZX to respite accommodation against her stated will; (2) to keep her there during the COVID-19 pandemic; and (3) to return her there by force should she leave (*UZX [2020] NSWCATGD 3(6)*).⁵

GZK [2020] NSWCATGD 5

GZK is described as ‘a 76-year-old Aboriginal man who lives with his wife, KBK, in Regional New South Wales’ (GZK [2020] NSWCATGD 5, [4]). Like UZX, GZK was subject to a guardianship order prior to the pandemic – in his case since June 2018 – with the NSW Public Guardian also appointed as his guardian. Also like UZX, GZK’s original order granted the NSW Public Guardian the ‘services’ and ‘accommodation’ functions of guardianship, although in GZK’s case, the ‘accommodation’ function included coercive powers (this was not referred to as the ‘coercive accommodation’ function). GZK’s original order also included the ‘health care’ function. This function empowered GZK’s guardian to make decisions about whether GZK should attend medical, dental or other health care appointments, and to provide substitute consent in such situations.

On 2 April 2020 – 3 days after the NSW Public Health Order came into effect – GZK’s guardian applied to NCAT to request a variation to GZK’s order. GZK’s guardian sought authority to ‘prevent GZK from travelling in his electric wheelchair to a local shopping centre and to otherwise take steps to restrict, as appropriate, GZK to his home during the course of the COVID-19 pandemic’ (GZK [2020] NSWCATGD 5 (7)). The specific function of guardianship through which GZK’s guardian sought to make these actions legally permissible was the ‘restrictive practices’ function. This function would grant GZK’s guardian authority to consent to the use of techniques such as physical, mechanical, or chemical restraint, or restricting a person’s physical environment (NSW Public Guardian, 2009: 55). Crucially, the reason GZK’s guardian was seeking to add the ‘restrictive practices’ function to their guardianship, was in response to the demands of GZK’s in-home support service provider. This service provider was threatening to withdraw their in-home support if steps were not taken to stop GZK from leaving his home. According to the service provider, such steps were necessary because GZK was not only ‘particularly at risk’ of contracting COVID-19, but was also at risk of spreading the virus to others – specifically his wife and service staff – due to his ‘behaviour’ of ‘refusing to stop attending the local shopping centre’ (GZK [2020] NSWCAT 5[26]).

NCAT did not grant GZK’s guardian the ‘restrictive practices’ function. Instead, it elected to develop a novel function of guardianship: the ‘COVID-19 function’. This function is described by NCAT as having the characteristics of ‘a combination of the traditional “coercive accommodation function” and the “restrictive practices functions” but without the requirement for a behaviour support plan’ (GZK [2020] NSWCATGD 5 [42]). NCAT noted in its final decision that this novel function would ‘ensure compliance with a relevant Public Health Order without the need for recourse to a fine or other sanction’ (GZK [2020] NSWCATGD 5, [42]) – that is, it would ‘protect’ GZK from coming to police attention. Below we perform a closer analysis of NCAT’s decisions in relation to GZK and UZK.

Recasting Legal Subjectivities: Making Disabled People the Emergency

As outlined, Australia’s guardianship law emerged as a way to enable the ‘inclusion’ of ‘vulnerable’ disabled people in the community post-deinstitutionalisation. This

'inclusion' is said to be achieved via the mechanism of substitute decision-making. It thus seems necessary to ask: what seemingly problematic decisions were UZX and GZK making that warranted their guardians being granted additional substitute decision-making functions?

At first glance, the answer to this question appears to be: UZX and GZK's decisions to leave their home during the pandemic. Or to be precise, that UZX and GZK's decision to leave their home during the pandemic placed them at odds with the NSW Public Health Order. And yet leaving the home for the purposes of exercise and shopping were not wholly restricted activities under NSW's Public Health Order. Only attending work or gathering with others in various settings (homes and functions) were restricted under this order, and neither UZX nor GZK were engaged in these activities. The apparent problem with UZX and GZK's decision-making must therefore lie elsewhere. Indeed, it seems to lie between the two outcomes presumed to occur should UZX and GZK decide to leave their homes, which are: (1) UZX and GZK will come to the attention of police (who will enforce sanctions), and (2) they will contract and then spread COVID-19. Both of these feared outcomes reflect familiar and longstanding concerns about disabled people, and it is worth considering the implications of their revival in *UZX* and *GZK*.

Beginning with the first, fears about the 'faultless' but 'risky' figure of disability who requires protection from police is age-old, and regularly revived in disability-specific law and legal processes. We have called out the appearance of this fear in the development of court diversion processes (see Steele, 2020), specialist court processes (see Spivakovsky and Seear, 2017), and community-based treatment orders (see Spivakovsky, 2014a, 2014b; Spivakovsky, 2017). Each time we do this work, we note how this fear gives birth to a contradictory, paternalistic logic. A logic that claims to 'protect' disabled people from the apparent harms and injustices of criminal justice systems by diverting them to community-based mental health and disability facilities where harms and injustices are perpetrated against disabled people in a more concentrated manner. Each time we show how this contradiction is either overshadowed by the apparent 'rescuing' role of community-based facilities vis-a-vis the prison (Steele, 2020), or how it gets erased through the interpretative denial that posits that detention in community-based facilities cannot be harmful because these facilities are designed to 'protect', not to 'punish' (Spivakovsky, 2014b). Accordingly, it is of little surprise to us that to 'protect' UZX and GZK from coming to police attention through the enforcement of NSW's Public Health Order, what is sought and granted is authority under the *Guardianship Act 1987 (NSW)* to directly involve police in UZX and GZK's lives. But UZX and GZK coming to police attention was only the first of the two feared outcomes. The second was that UZX and GZK would contract and then spread COVID-19. Again, this is a familiar presumption.

Anyone engaged in critical disability scholarship upon hearing this second fear will likely think of Shildrick's (1997, 2009) work on the construction of disabled women as 'leaky bodies' that are both risky and violable. Additionally, anyone engaged in intersectionality or dis/crit scholarship would likely think of Razack's (2015: 38) discussion of settler colonial violence, and her argument that Indigenous and First Nations people – which UZX and GZK are identified as⁶ – 'are not entitled to bodily integrity' and 'can be violated with impunity' (Razack, 2015: 45; see also Bond, 2017). Indeed, of pertinence

here is Razack's point that what enables Indigenous and First Nations people to be violated with impunity is the practice of associating Indigenous and First Nations people with 'decline', including by reference to discourses of disability, disease and addiction.

A parenthesis. We are not suggesting that the actual health risks facing UZK and GZK during the pandemic should be disregarded. Rather, in critiquing the claims that UZK and GZK are apparently more likely to catch and spread COVID-19, we seek to draw attention to what these claims do. These claims obscure structural drivers of poverty, violence and discrimination in the health system which can lead to premature death, including specifically in the context of the pandemic (Hermans, 2020; Heslop et al., 2020). These claims individualise the structural phenomenon of health inequalities of First Nations people, and de-historicise the impacts of structural inaction, settler colonialism, and the justice system on these inequalities (Avery, 2018). Thus, what we are critiquing in the cases of *UZK* and *GZK* are the ways that *UZK* and *GZK* – dislocated from history – are being presented in these cases as inherently vulnerable to catching the virus by reason of their disability, and/or their status as First Nations people, and as potential contamination risks to others by reason of their leaky, disabled bodies. There is one final important observation to be made here.

While claims about disabled people requiring protection from police, being vulnerable to disease, and posing 'contamination' risks to others are age-old, situated in these guardianship decisions, they appear anew. We propose this refresh has been enabled by the merger of the curative authority of guardianship law with the temporal arrangement of public health law in times of emergency. That is to say, the unshakable view that disabled people under guardianship lack capacity to make 'correct' decisions about their own well-being, has been bundled together with the presumption that *UZK* and *GZK* will not be capable of adhering to the unprecedented social distancing measures required under emergency public health law. Accordingly, what *UZK* and *GZK*'s cases ultimately allow us to see is the operation of a temporal fold, as well as its consequences. The cases show how age-old claims about disabled people (as vulnerable, leaky, and contagious) are being *folded in* – like an egg into flour – with the foundations upon which both guardianship law's authority and emergency law's time operate and merge. And the cases show how this temporal fold enables a 'brand new' product to be fabricated: the legal subjectivity of disabled people *as the emergency* of the pandemic. We attend to the implications of this new 'emergency' below.

Framing Relations, Abrogating Responsibility for Redress

As previously established, legal subjectivities and social identity categories made possible through law's time, fragment relations between events, spaces or people, rendering injustices incomprehensible. In the decisions of *UZK* and *GZK*, casting disabled people as the emergency of the pandemic fragments these relations in such a way that any pre-existing notions of responsibility determined through law's authority appear to be abrogated. That is to say, when the 'emergency' shifts from the pandemic to the disabled person, it appears to relieve those empowered under guardianship law's medico-legal authority from having to do their jobs – or at least, it appears to make it acceptable that they are not doing their job. To explain and elaborate this contention we draw attention to

the primary reason applications were made to vary the guardianship orders of UZX and GZK during the pandemic: the suspension or threat of withdrawal of contracted disability services. We find these actions troubling on several fronts; we raise our three main concerns below.

The first concern relates to the shallow expectations that appear to be held for the delivery and quality of disability services in the community. There is no indication in NCAT's decisions that either UZX or GZK's contracted service providers had attempted to work with UZX or GZK to develop accessible, personalised strategies for these individuals to voluntarily comply with the restrictions under the NSW Public Health Order. In fact, there is no time for either service provider to have done this work. UZX's provider suspended their in-home services to UZX on the same day that the NSW Public Health Order came into effect,⁷ and GZK's provider threatened to withdraw their in-home services 2 days later.

A second, connected concern relates to the accountability of disability service provision in the community. There is no indication within NCAT's decision that there has been, or will be, any consequences for UZX or GZK's service providers suspending or threatening to withdraw their contracted services. This is despite NCAT noting that ongoing provision of these services is what allows both UZX and GZK to remain within their current accommodation, and enjoy their current levels of freedom under guardianship. Indeed, in the case of UZX, NCAT explicitly indicates that 'without a considerable degree of personal care support on a daily basis [as had been delivered by the provider who has now suspended their contracted services], UZX's general health, hygiene and well-being will deteriorate further' (*UZX* [2020] NSWCATGD 3[38]). Similarly, in the case of GZK, NCAT presents GZK's in-home service provision as being 'vital if he is to continue living safely in his own home which is very clearly his strong wish' (*GZK* [2020] NSWCAT 5[2]).

Finally, the responses of UZX and GZK's guardians to the suspension or threat of withdrawal of contracted disability services raise another set of troubling questions. Why was it that neither UZX nor GZK's guardians could locate and engage alternative service providers for UZX or GZK through their pre-existing 'services functions' of guardianship? Surely at a time when all disability service providers across Australia were in the process of having to actively change their practices to support disabled people to comply with public health orders, there would have been a service provider able to determine strategies for UZX and GZK to voluntarily adhere to the restrictions of the NSW Public Health Order? And yet, once again, NCAT does not query whether the guardians of UZX and GZK could have done more to advocate for the individuals for which they are responsible. Nor for that matter does NCAT query whether the seemingly automatic shift of these guardians to seeking restrictive and coercive practices renders their guardianship inappropriate.

A point of clarification is required here. Our concerns about contracted disability services and guardianship are not limited to pandemic times. Disability service provision driven by economic efficiency and risk management is a longstanding issue for the disability community, and it is indicative of the structural injustices disabled people have been expected to tolerate for decades (PWDA, 2020). And yet neither these immediate nor longstanding concerns about the dismal and unjust situation of disabled people

in the community find resonance in *UZX* or *GZK*. This is because, we argue, these decisions are subject to a second temporal fold which is working in concert with the first. That is to say, these decisions are subject to a *folding up* of history and time like a paper concertina, such that the only issue left visible for response is the issue left sitting at the end of the structure: disabled people as the true emergency of the pandemic.

But perhaps we are being unfair. Perhaps the reason we find no questions being asked about the delivery, accountability, quality and availability of community-based disability services in *UZX* and *GZK*, is because these questions fall outside the scope of NCAT's deliberations. If this is true, then it behoves us to consider: what was within the scope of NCAT's deliberations? How did NCAT come to these decisions to increase the coercive and restrictive functions of *UZX* and *GZK*'s guardians during the pandemic?

Enabling Preventative, Indefinite Detention Within the 'Deinstitutionalised' Community

It appears that one of the primary issues of consideration for NCAT when making its decisions about *UZX* and *GZK*'s guardianship orders was ensuring *UZX* and *GZK* would comply with NSW's Public Health Order. Perhaps this is unsurprising given all we have written already about the fabrication of disabled people as the apparent true emergency in this pandemic. And yet it is worth pausing to consider here how NCAT goes about doing this work of facilitating *UZX* and *GZK*'s compliance with NSW's Public Health Order. It does this by bypassing the limits and safeguards of public health law. To explain, public health laws infringe on usual freedoms of movement and assembly enjoyed by citizens who are not currently subject to any immigration or criminal law restrictions. There are, however, clear limits on these restrictions. The Public Health Order relating to social distancing in NSW, for example, never prevented individuals in NSW from *ever* being able to leave their homes. Rather, the negative limitations on movement and association brought forth by this order were balanced by positive aspects, such as enabling individuals to leave the house for shopping, certain work situations, and exercise. This is not the case for *UZX* and *GZK*. Indeed, their revised guardianship orders are specifically designed to prevent these individuals leaving their residences of their own volition. As we are explicitly told in the case of *GZX*, he needs to have his wheelchair disabled 'to ensure that *GZK* complies with such Public Health Order' (*GZK* [2020] NSWCATGD 5 [3]).

Bypassing the limits and safeguards of public health law via guardianship law is troubling on at least two fronts. First, this bypass occurs even though neither *UZX* nor *GZK* at the time of their NCAT hearings have in fact been detected by law enforcement agencies as having breached any laws. Thus, in their cases, guardianship law is being applied prospectively. Second this prospective application of guardianship law is occurring even though the provisions of public health law operate *retrospectively* and *provisionally*. Under public health law, the individual must first breach the order before they can be charged, and then, even if they are charged, they might be subject to fines or more serious penalties (or not), with these penalties also subject to the usual rights of departmental and judicial review. Thus, there is a temporal distinction and inequality occurring

between disabled people who are subject to unequivocal, preventative guardianship law, and others who are subject to retrospective, provisional public health law.

This is a familiar distinction and inequality. Many disability-specific laws and legal processes operate preventatively. This includes the preventative detentions made possible via forensic mental health law (Steele, 2018b), or mental health courts and court diversion (Spivakovsky et al., 2018; Steele, 2020), as well as the forced sterilisation of girls with disability (Steele, 2017b, 2018a). Yet what is of interest about this specific iteration of pre-emptive, preventative, disability-specific law being applied to disabled people at this time, is what it enables, which is: indefinite detention. In claiming to ensure the enforcement of public health law through the preventative, pre-emptive application of guardianship law during the pandemic, it becomes unclear when the amendments to UZX and GZK's guardianship orders will cease. Indeed, in a subsequent hearing (*UZX (No 2) [2020] NSWCATGD 33* (14 October 2020)), UZX's guardianship order was further confirmed at a time when public health laws in NSW were being relaxed.⁸ Put plainly, the temporal ambiguity surrounding these orders – that is, with the orders seemingly to be kept in effect until such time as the pandemic 'ends' – allows for indefinite preventive detention to occur within the community. In these ways, the decisions of *UZX* and *GZK* also demonstrate how guardianship orders can and have been used during the pandemic to effectively transform personal homes and other community-based institutions into closed facilities.

Clearly the indefinite detention of UZX and GZK in the community works entirely against the 'community inclusion' foundations of guardianship law. This situation is rendered even more perverse when considering that the only reason applications were made to NCAT in relation to UZX and GZK guardianship during the pandemic, was because the disability service providers who were crucial to UZX and GZK enjoying freedoms in the community, had suspended or were threatening to withdraw their contracted services. There is seemingly an entire disability service system in NSW that should be capable of supporting UZX and GZK to both follow the restrictions outlined in the NSW Public Health Order, and to continue enjoying the limited freedoms under their pre-existing guardianship orders, and yet, the most logical and legal solution their guardians and NCAT appear to see is to lock them up, indefinitely, when this system fails. With this in mind, we turn now to consider one final question: how was it even possible for NCAT to authorise this deeply problematic 'solution' when this solution appears to work against the intentions of 'inclusion' and 'balance' inherent to guardianship law? An answer to this question is most apparent in *GZK*.

(Re)authorising Guardianship Law's Violent, Curative Arrangement of Time

As previously outlined, prior to the pandemic, GZK's guardian had been provided with the 'accommodation', 'healthcare', and 'services' functions of guardianship. Once both NSW's Public Health Order came into effect, and GZK's service provider threatened to withdraw their services, GZK's guardian requested authority from NCAT to add the 'restrictive practices' function to their guardianship. They wanted this additional function so they could consent to GZK's service provider using environmental restraint

against GZK, specifically, disabling GZK's electric wheelchair to prevent him from leaving his home. As previously outlined, NCAT did not provide GZK's guardian with the 'restrictive practices' function. Instead, it elected to develop a novel function of guardianship: the 'COVID-19 function'. According to NCAT, this function would 'provide the decision making authority requested' by GZK's guardian via combining 'the traditional 'coercive accommodation function' and the 'restrictive practices functions' but without the requirement for a behaviour support plan' (GZK [2020] NSWCATGD 5 [42]).

The creation of the 'COVID-19 function' is troubling on (at least) five connected fronts. First, prior to the pandemic, the use of any form of restrictive practices on GZK was not deemed necessary. Second, the only reason restrictive practices were now claimed to be of necessity was because GZK's contracted disability services were threatening to withdraw their in-home support unless they were in place. Third, while GZK's guardian sought to subject GZK to environmental restraint, NCAT authorised a much broader suite of lawfully violent practices. The 'COVID-19 function' enables GZK's guardian to both make decisions as to GZK's accommodation, freedom of movement, and access to the community, and to enforce these decisions by authorising others, including the NSW Police and the Ambulance Service of NSW, or their delegates to take GZK – if necessary, against his will – to a place approved by the guardian. The 'COVID-19 function' further authorises others to keep GZK in his accommodation through the use of physical restraint, environmental restraint or seclusion if required, and if necessary, to forcibly return GZK to that place should GZK choose to leave it. The fourth reason we find the creation of the 'COVID-19 function' concerning is because it appears to bypass the primary safeguard associated with the use of restrictive practices in guardianship, that is: a behaviour support plan. The implications of this development require some elaboration.

To the best of our knowledge, a behaviour support plan is a requirement in Australian law and policy concerning the use of restrictive practices in disability support services (including the laws and policy governing NCAT). These plans are a requirement because they are seen as safeguards for disabled people who are subjected to this form of lawful violence. This is because, behaviour support plans must include an outline of the *positive* and *proactive* range of behaviour supports – such as improved environments, greater skill development, and increased opportunities to participate in the community – that will be provided to the disabled person in order to reduce the likelihood of 'behaviours of concern', and thus negate or minimise the apparent need to invoke the 'last resort' of restrictive practices (see Spivakovsky, 2017). Accordingly, by bypassing the required safeguard of including a behaviour support plan through the creation of the novel 'COVID-19 function', NCAT has effectively made restrictive practices the first and only response to GZK's 'behaviour'. This brings us to the fifth and final issue with NCAT's decision.

We note that the reason NCAT moved to bypass the safeguard of the behaviour support plan is because GZK *did not have any behaviours of concern*. As NCAT states:

In GZK's case, there is no suggestion that he is engaging in "behaviours of concern" that would normally be in the purview of a behaviour support specialist. Rather, he is engaging

in behaviour which is causing concern solely as a result of the COVID-19 pandemic. But for the pandemic and the resultant Public Health Orders, there would be nothing to suggest that GZK's behaviour in wanting to access his local community was concerning or something to be restricted. Further, there was no suggestion that a behaviour support plan could urgently be developed for GZK or that he would have an entitlement to such services due to the proposed restrictions related to the COVID-19 pandemic. (*GZK* [2020] NSWCATGD 5 [411])

In other words, as NCAT makes clear, GZK is not exhibiting the 'old', pre-pandemic version of 'behaviours of concern' for which a range of safeguards have been built into Australian law and policy to mitigate the use of restrictive practices. Rather, GZK is exhibiting a newly imagined version of 'behaviours of concern', where the 'challenging behaviour' requiring response is a person who threatens to spread the virus through their sheer existence: that is, a disabled person who is, apparently, the true emergency of the pandemic. It is on this point that we offer some final concluding thoughts.

Conclusion: Slow, Curative, Violence Within and Beyond an Emergency

Legal responses to the COVID-19 pandemic have curtailed the ways by which many people participate in their communities and have been met with significant public and political debate. In this article we considered some of the implications this contested, population-wide encounter with law's coercive functions might hold for disabled people whose encounters with law's violence are longstanding and rarely questioned. We performed a close analysis of the two leading guardianship decisions made by NCAT applying guardianship law's coercive powers in the context of the pandemic.

Our analysis of these cases foregrounded the production, specification and rearrangement of time, history, authority and responsibility taking place through guardianship law during the pandemic, and the consequence thereof: the refabrication of an age-old figure of disability as the emergency of the pandemic. What we have found disturbing about this refabrication is what it facilitates. It appears to individualise and de-historicise the slow violence and slow death of disabled people across time in the 'deinstitutionalised' community. It appears to negate the accountability of disability services and governments for their failure to provide meaningful support and resources for disabled people in the community. Indeed, it appears to abrogate any current responsibility for legal redress for this failure, or for the lawful violence perpetrated in the wake of, and in explicit response to, this failure. It appears to 'justify' a new, amplified level of lawful violence to be perpetrated against disabled people in the community, turning homes within the community into closed facilities. And finally, it appears to effectively expand the grounds for disability-specific lawful violence to occur – decoupling the 'restrictive practices' function of guardianship from the *requisite presence* of both 'behaviours of concern', and the safeguard of a behaviour support plan. We need to be mindful of how these multiple and interlocking injustices occur and challenge them.

Long-term structural issues such as health inequalities, poor service provision, discriminatory policing and state irresponsibility must be addressed as a priority so they

cannot be pulled out as the reason to position people as vulnerable and in need of protection through lawful violence. We need to shift beyond apathy, take action to address social injustices, and hold disability services and governments to account. Focusing this point on the contexts of the two cases, questions can be raised about how law facilitates irresponsibility of disability services and guardians, and how law can transform personal homes in the community into closed environments. On this point, we are pleased to see the Australian Human Rights Commission recently published a document *Implementing OPCAT in Australia* which indicates that the Commonwealth Ombudsman has approached the concept of ‘primary places of detention’ to include ‘closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24 hours), such as a Disability Forensic Assessment and Treatment Service’ (Farthing et al., 2020: 43), and stakeholders have further emphasised the need to prioritise ‘places of residential care for disabled people’ (i.e. group homes) (Farthing et al., 2020: 46). Yet, these visions of ‘places of detention’ do not appear to include the personal home of a disabled person who is receiving a service within the community. There are no clear investigative oversight safeguards made available for personal homes within the community that have been transformed into closed facilities through guardianship law.

In thinking of alternative ways, we must look beyond law and to ways that undo structural interlocking oppression and contribute to collective flourishing and well-being. Of course, part of this is abolishing laws, such as guardianship laws. But beyond this it is about fostering grassroots movements and communities already working for transformative change that highlight the radical possibilities of decentering the state in justice and equality. We can turn to examples during the pandemic of advocating and organising by the Disability Justice movement, including care community networks and mutual aid (see e.g. Loner & Rosenau, 2020), disability activists calling out discrimination and violence such as in op-ed pieces (see e.g. Wong, 2020), and activism against eugenics (see e.g. Nobody is disposable, 2020). We can also support self-determination of First Nations communities led by First Nations people, and their campaigns against colonial state violence through criminal justice, welfare and child welfare systems (Bond, 2017). These concerns matter during the pandemic, but they also matter for the collective futures we forge beyond the pandemic and in addressing the everyday slow violence and slow death of disabled people.

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ORCID iD

Claire Spivakovsky  <https://orcid.org/0000-0002-0848-9467>

Notes

1. We are indebted to Kate Finch for alerting us to these decisions.
2. See similar laws in other Australian states and territories: *Guardianship Act 1987* (NSW); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Guardianship and Administration Act 2000* (Qld); *Guardianship of Adults Act 2016* (NT). There are also similar laws in place in other jurisdictions such as in state jurisdictions in the United States of America (American Bar Association, 2021) and provincial jurisdictions in Canada (see, e.g. Law Commission of Ontario, 2017).
3. NCAT guardianship decisions are not automatically published. A challenge in researching this topic is similar to the limitations on the principle of ‘open justice’ in relation to *parens patriae* court matters (Scott v Scott [1913] AC 417 at 437 per Viscount Haldane LC). We would argue that this secrecy and lack of public transparency around NCAT guardianship decision-making contributes to the conditions for the disability-specific lawful violence to flourish (see Steele, 2021). At the time of writing this article, only four relevant NCAT decisions were published. These four decisions include the leading cases of *UZX* and *GZK*. Of the two other published decisions not engaged with in this article, one decision (*UZX* (No 2) [2020] NSWCATGD 33 (14 October 2020)) relates to the end-of-term review of *UZX*’s guardianship order. The second decision (*JZK* [2020] NSWCATGD 42 (24 April 2020)) relates to a man born in ‘Iran to Afghan parents and migrated to Australia in 2010’ who is ‘reported to have cognitive impairment associated with an acquired brain injury, childhood trauma and mental illness’. In *JZK*, NCAT made a limited guardianship order which included the ‘COVID-19 function’ introduced in relation *GZK*.
4. Under the (non-coercive) ‘accommodation’ function, guardians must rely on the disabled person subject to guardianship being agreeable with the accommodation decisions made (i.e. being willing to go and stay where they are told they must go and stay).
5. At a subsequent end-of-term review of *UZX*’s order in October 2020, NCAT ordered a limited guardianship order with three functions: the previous ‘accommodation’ and ‘coercive accommodation’ functions, and an additional ‘access’ function (‘To decide what access *UZX* has to others and the conditions of access’) (*UZX* (No 2) [2020] NSWCATGD 33 (14 October 2020)).
6. It is interesting to note that the third individual in the four NCAT decisions – *JZK* – was also racialised.

7. Interestingly, in a subsequent decision it was noted that: ‘Her service provider ceased providing services to her at the beginning of October 2020 due to concerns about the [drug-use related] behaviour of other people who were either staying in UZX’s unit or who frequented the unit’ (UZX (No 2)): [13]), this also being a reason for the addition of the ‘access’ function.
8. Notably, the age of UZX could enable a further dynamic of indefinite detention that will likely last for the remainder of her life – that is, well beyond the end of the pandemic or the expiry of any guardianship order. We say this because in UZX’s case, NCAT approves the decision for her to be relocated to an emergency respite mental health unit for older people, with this decision likely resulting in her subsequent permanent transfer to a residential aged care facility. We note that segregation and confinement are endemic in residential aged care facilities, and that these practices exist outside of guardianship law; are built into the design of the facilities (Steele et al., 2020a, 2020b); and were exacerbated during the pandemic (Dehm et al., 2021).

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