

**PROTECTING OR NEGLECTING?  
THE CASE OF *PUBLIC ADVOCATE V C, B*  
(2019) 133 SASR 353**

I INTRODUCTION

As Australia's population ages, and the prevalence of dementia increases,<sup>1</sup> questions regarding the powers of those who take on legal responsibility for persons recognised as mentally incapacitated will likely become more common.<sup>2</sup> One such question recently came before the Full Court of the Supreme Court of South Australia in *Public Advocate v C, B*.<sup>3</sup> This case concerned an appeal by the Public Advocate against a declaration made by Stanley J in the Supreme Court of South Australia that the respondent, a 95-year-old man named 'BC', was unlawfully detained at a residential aged care facility by reason of the Public Advocate's exercise of guardianship over him under s 29 of the *Guardianship and Administration Act 1993* (SA) ('*Guardianship Act*').

At first glance, the decision by the Full Court to dismiss the appeal appears to be a sweeping judgment, with wide-ranging implications as to how our health system currently treats those with mental incapacities such as dementia. After all, by upholding Stanley J's decision to grant a writ of habeas corpus, the Full Court (Kourakis CJ, Kelly J and Hinton J) effectively dissolved the legal basis that South Australian families and medical practitioners have relied upon when making the difficult decision to remove elderly persons into secure dementia wards or nursing homes, concluding that this constitutes unlawful detention.

However, upon closer examination, the Full Court's decision does not necessarily involve a radical reconceptualisation of the law's treatment of those who lack the mental capacity to make decisions for themselves. Instead, it is a judgment consistent

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<sup>1</sup> Deaths due to dementia have increased by 68.6% in Australia since 2009: Australian Bureau of Statistics, *Causes of Death, Australia, 2018* (Catalogue No 3303.0, 25 September 2019).

<sup>2</sup> See, eg, James D Gallagher and Cara M Kearney, 'Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go' (2003) 16(4) *Georgetown Journal of Legal Ethics* 597.

<sup>3</sup> (2019) 133 SASR 353 ('*Public Advocate v C, B*').

with the principle of legality, international covenants and statute. Although the question of the scope of a guardian's powers in emergency circumstances is left unresolved, the decision ensures additional protections, transparency and oversight for protected persons under the *Guardianship Act*. The decision thus serves as an important reminder of the role our courts play in upholding community values and providing crucial oversight of statutory offices — showing us that where those charged with protecting the vulnerable fail, our courts will be there to protect us and ensure that these failures do not go unnoticed.

## II FACTS

The respondent, referred to by the pseudonym BC, suffered from dementia of 'moderate severity'.<sup>4</sup> Following an application by the respondent's wife and a medical practitioner to the South Australian Civil and Administrative Tribunal ('SACAT') on 27 September 2018, the Public Advocate was appointed as BC's limited guardian for the purposes of his 'accommodation and lifestyle' pursuant to s 29(2) of the *Guardianship Act*.<sup>5</sup> SACAT also appointed the respondent's wife as his limited guardian for the purposes of his health care.<sup>6</sup>

In a purported exercise of these powers, the Public Advocate gave a direction that BC reside in the Memory Support Unit of the Barossa Village Aged Care Facility ('the Memory Unit') on 5 October 2018.<sup>7</sup> Access to and from the Memory Unit was controlled by a set of locked doors which could only be opened with a classified key code, or using an electronic key card held by staff.<sup>8</sup> BC's ability to exit the Memory Unit was restricted to the intermittent occasions when he would be escorted outside by a member of staff or a permitted family member.<sup>9</sup>

Soon after the placement of the respondent in the Memory Unit, the respondent's son lodged an application to SACAT for internal review of the guardianship orders, which later became an application for judicial review and habeas corpus in the Supreme Court of South Australia.

## III DECISION BY STANLEY J

At first instance, Stanley J granted the application, declaring that the respondent was unlawfully detained in the Memory Unit and that a writ of habeas corpus should issue.<sup>10</sup>

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<sup>4</sup> Ibid 354 [1].

<sup>5</sup> Ibid 354 [2].

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 354 [3].

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 368 [63].

<sup>10</sup> Ibid 355 [4].

This decision turned on two separate findings: first, that the conditions in the Memory Unit did in fact restrict the respondent's freedom of movement;<sup>11</sup> and secondly, that the powers of the limited guardianship granted to the appellant did not provide a lawful justification for authorising BC's detention.<sup>12</sup>

#### IV ISSUES BEFORE THE FULL COURT

On appeal to the Full Court, the Supreme Court (composed of Kourakis CJ, Kelly and Hinton JJ) was asked to consider the following two questions:

- i. whether the scope of the general guardianship powers contained in s 31 of the *Guardianship Act* extend to making an order to detain a person ('the statutory construction issue');<sup>13</sup> and
- ii. whether a person is falsely imprisoned when their alleged detention is intermittent and includes occasions of 'conditional liberty' ('the false imprisonment issue').<sup>14</sup>

#### V THE JUDGMENTS

The appeal was dismissed in separate judgments by Kourakis CJ, Kelly J and Hinton J, each finding that Stanley J had been right to issue habeas corpus and declare that BC's detention constituted false imprisonment.<sup>15</sup>

##### A Chief Justice Kourakis

The Chief Justice began his judgment by addressing the issue of statutory construction. Section 31 of the *Guardianship Act* provides that the powers of a guardian appointed under s 29 are

subject to this Act and the terms of the Tribunal's order, all the powers a guardian has at law or in equity.<sup>16</sup>

Defining the scope of the powers granted under s 31 therefore required consideration of two further issues: first, might the powers of a guardian at common law and equity extend to authorising a person's detention? If so, did the *Guardianship Act* limit these powers?

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<sup>11</sup> Ibid 355 [5].

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 356 [11]–[12], 366 [50].

<sup>14</sup> Ibid 370 [67].

<sup>15</sup> Ibid 355 [5].

<sup>16</sup> *Guardianship and Administration Act 1993* (SA) s 31 ('*Guardianship Act*').

## 1 *A Guardian's Powers at General Law*

As a result of extensive legislative reform to the law of mental health and guardianship since the first intervention into the general law by the *Lunacy Regulation Act 1853*, 16 & 17 Vict, c 70,<sup>17</sup> defining the content of the powers of a guardian at common law and equity required consideration of ‘relatively old authorities’.<sup>18</sup> The power to grant guardianship over a person of ‘unsound mind’ was originally derived from the equitable jurisdiction exercised by the Court of Chancery, received in South Australia pursuant to s 17 of the *Supreme Court Act 1935* (SA).<sup>19</sup> This equitable power included the discretion ‘to use force, to detain a protected person, and to authorise others to do the same’.<sup>20</sup>

The scope of this power was considered in relation to the power to detain persons of ‘unsound mind’ in *McLaughlin v Fosbery* (*McLaughlin*).<sup>21</sup> In that case, the High Court was required to determine whether the conduct of the respondent police officers in forcibly removing the appellant to a private hospital could be lawfully justified by an order given by the appellant’s wife within her powers as ‘the committee of his person’ (his guardian with respect to his personal care, but not property).<sup>22</sup> Dismissing the appeal, the High Court found that at general law, the powers held by the appellant’s wife as his guardian did extend to ‘caus[ing] the removal of the lunatic from one place of residence to another if circumstances justify such action’.<sup>23</sup>

Therefore, on the face of it, the general powers of a guardian provided by s 31 of the *Guardianship Act* appear to authorise a power of detention.

## 2 *Construction of the Guardianship Act*

Justice Stanley found that that the powers contained in s 31 of the *Guardianship Act* were limited by s 32.<sup>24</sup> Section 32 sets out additional orders for which a guardian (as an ‘appropriate authority’) may apply:

The Tribunal, on application made by an appropriate authority in respect of a person to whom this section applies—

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<sup>17</sup> Sir Henry Studdy Theobald, *The Law Relating to Lunacy* (Stevens and Sons, 1924) 40.

<sup>18</sup> *Public Advocate v C, B* (n 3) 359 [25].

<sup>19</sup> *Ibid* 356 [11].

<sup>20</sup> *Ibid* 356 [12]; Theobald (n 17) 49.

<sup>21</sup> (1904) 1 CLR 546 (*McLaughlin*).

<sup>22</sup> *Public Advocate v C, B* (n 3) 360 [25]–[27].

<sup>23</sup> *Ibid* 361 [27], quoting *McLaughlin* (n 21) 564 (Griffith CJ).

<sup>24</sup> *Public Advocate v C, B* (n 3) 366 [50]–[51].

- (a) may, by order, direct that the person **reside**—
  - i. with a specified person or in a specified place; or
  - ii. with such person or in such place as the appropriate authority from time to time thinks fit,...
- (b) may, by order, **authorise the detention** of the person in the place in which he or she will so reside; and
- (c) may, by order, authorise the persons from time to time involved in the care of the person to **use such force as may be reasonably necessary** for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person.<sup>25</sup>

An order under s 32 may only be made in cases where SACAT is satisfied that ‘the health or safety of the person or the safety of others would be seriously at risk’.<sup>26</sup>

### 3 *The Parties’ Submissions*

It was the applicant’s submission that Stanley J had been wrong to find that the *Guardianship Act* abrogated the content of the general law powers of a guardian contained in s 31 by creating an exhaustive and exclusive power for detaining a protected person in s 32.<sup>27</sup> Justice Stanley’s construction was stated to be consistent with the principle of legality, which requires that rights such as ‘personal liberty’ and ‘freedom of movement’ not be infringed except by ‘clear lawful authority’, or express words by Parliament.<sup>28</sup>

In response, the Public Advocate contended that the powers contained within s 32 were instead properly construed as conferring *additional* powers to those held by a guardian under s 31. Whereas the general law authorised a guardian to detain a protected person by restricting their freedom of movement, s 32 further provided lawful justification to enter premises and use reasonable force in order to return a person to a place of detention pursuant to s 32(4)(a) — acts which would be illegal at general law alone.<sup>29</sup>

The Public Advocate further submitted that Stanley J had been wrong to strictly construe the *Guardianship Act* by reference to the principle of legality, given that the

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<sup>25</sup> *Guardianship Act* (n 16) s 32(1) (emphasis added).

<sup>26</sup> *Ibid* s 32(2).

<sup>27</sup> *Public Advocate v C, B* (n 3) 362 [31].

<sup>28</sup> *BC v Public Advocate* [2018] SASC 193, [29] (Stanley J).

<sup>29</sup> *Public Advocate v C, B* (n 3) 366 [53].

general law had ‘always accepted the abrogation of the right to liberty of persons of unsound mind’.<sup>30</sup>

#### 4 *The Chief Justice’s Decision*

The Chief Justice rejected the Public Advocate’s submissions, finding that the *Guardianship Act* had in fact abrogated the general law powers of a guardian contained in s 31 by creating an exclusive power for detention in s 32.<sup>31</sup> His Honour concluded that

the very conferral of the power on the Tribunal to order detention suggests that the power to do so unilaterally has been withdrawn from the guardian.<sup>32</sup>

This construction was supported by reference to the increasingly progressive legislative history relating to the care of persons suffering from mental illness in South Australia,<sup>33</sup> including the replacement of the *Lunatics Act 1864* (SA) by the *Mental Health Act 1977* (SA), and the introduction of a requirement to treat the welfare of the protected person as the ‘paramount consideration’.<sup>34</sup> A similar requirement is now contained in s 5 of the *Guardianship Act*, which emphasises the importance of personal autonomy and deference to the wishes of the protected person in construing the Act. Combined with the shift in community attitudes towards the treatment of the mentally ill since *McLaughlin*, Kourakis CJ considered that any authority suggesting a guardian has the power to detain had since ‘receded even further into legal history’.<sup>35</sup>

The Chief Justice further upheld Stanley J’s decision to construe the *Guardianship Act* alongside the principle of legality, and extended this reasoning by reference to art 9 of the *International Covenant on Civil and Political Rights* (‘ICCPR’),<sup>36</sup> which recognises the right to liberty and security of the person.<sup>37</sup> The Chief Justice found this construction to be consistent with the High Court’s decision in *McLaughlin*, which gave substantial weight to individuals’ rights to personal freedom and autonomy, as

<sup>30</sup> Public Advocate, ‘Appellant’s Submissions’, Submission in *Public Advocate v C, B*, SCCIV 1402 of 2018, 21 February 2019, [14.1].

<sup>31</sup> *Public Advocate v C, B* (n 3) 366 [50]–[51].

<sup>32</sup> *Ibid* 366 [51].

<sup>33</sup> *Ibid* 363–4 [33]–[40].

<sup>34</sup> *Mental Health Act 1977* (SA) s 27(4)(b), repealed by *Mental Health Act Amendment Act 1986* (SA) item 7(b); *Public Advocate v C, B* (n 3) 364 [40].

<sup>35</sup> *Public Advocate v C, B* (n 3) 361 [29].

<sup>36</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’). Article 9(1) provides that ‘[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.

<sup>37</sup> *Public Advocate v C, B* (n 3) 366 [52].

well as the importance of judicial scrutiny of detention orders and any associated use of force.<sup>38</sup> Even at common law, there was a widespread practice ‘from long ago’ of guardians obtaining judicial sanction before restraining the liberties of a protected person.<sup>39</sup>

Yet perhaps the factor that had the most bearing on Kourakis CJ’s decision was the public interest in ensuring that orders for detention are only made in transparent ways by independent bodies such as courts and legal tribunals.<sup>40</sup> This public interest was described by his Honour as ‘so obvious that it requires no explanation’, and one which must inform the construction of the *Guardianship Act*.<sup>41</sup>

Finally, Kourakis CJ also upheld Stanley J’s finding that BC was, in fact, falsely imprisoned.<sup>42</sup> Even though the respondent was occasionally permitted outside of the Memory Unit, with supervision but without physical restraint, the effect of the appellant’s direction was to restrict his liberty to ‘goe at all times to all places whither he will without baile or main, prise or otherwise’.<sup>43</sup> This restriction, and only conditional liberty, was therefore sufficient to constitute the tort of false imprisonment.

Chief Justice Kourakis therefore found that Stanley J had been right to issue habeas corpus and declare the respondent falsely imprisoned.

#### B *Justices Kelly and Hinton*

Agreeing generally with the reasons of Kourakis CJ,<sup>44</sup> Kelly J and Hinton J also dismissed the appeal. However, their Honours’ agreement was subject to certain reservations set out by Hinton J.<sup>45</sup>

First, Hinton J expressed reservation over whether an exception to the construction of s 32, as an exhaustive source of power to use force to detain a protected person, might arise in ‘emergency situations’.<sup>46</sup> Such situations could arguably lawfully justify the use of force to detain a protected person in circumstances of urgency

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<sup>38</sup> Ibid 362 [32].

<sup>39</sup> Ibid 361 [29].

<sup>40</sup> Ibid 362 [29].

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 371 [72].

<sup>43</sup> Ibid 370 [67], quoting Duke LJ’s reading of John Rastell, *Les Termes De La Ley: or, Certaine Difficult and Obscure Words and Termes of the Common Lawes and Statutes of This Realme Now in Use Expounded and Explained* (Jo Beale and Rich Hearne, 1641) 188 in *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44, 51.

<sup>44</sup> *Public Advocate v C, B* (n 3) 372 [76]–[77].

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 372 [77].

where it is necessary to ensure a protected person's 'safety and wellbeing', but there is insufficient time to obtain the appropriate order under s 32.<sup>47</sup>

Secondly, Hinton J also stated that he would not draw the same conclusions regarding the construction of the *Guardianship Act* in relation to art 9 of the *ICCPR* before hearing submissions on the topic.<sup>48</sup>

## VI COMMENT

### A *The Protection of the Vulnerable*

The Supreme Court's construction of the *Guardianship Act* is consistent with the fundamental value the law places upon personal freedom and liberty, reflected in art 9 of the *ICCPR*.<sup>49</sup> The importance of personal autonomy and deference to the wishes of the protected person in construing the *Guardianship Act* is similarly explicitly protected in s 5, which provides that when granting guardianship orders, the wishes of the protected person must be the 'paramount consideration'.<sup>50</sup> But most importantly, such a reading is also consistent with public expectations and community standards. When vulnerable people are detained, community expectations dictate that an independent body will evaluate whether such detention is necessary. Without such independent oversight, the only means of varying unjustified detention orders is if the protected person (who, it must be remembered, lacks the capacity to make decisions regarding their own wellbeing) or a benevolent intervener applies for a variation or revocation of the guardian's order under s 30 of the *Guardianship Act*. We cannot expect persons so vulnerable that they have been placed into the care of another to fight for their rights and freedoms, nor can we sit idly by and hope that some unrelated and benevolent person will intervene and fight for the vulnerable. This is particularly so in the case of the elderly who often lack social and familial support systems,<sup>51</sup> leaving them with no one to protect and fight for them.

No person's fundamental freedoms of personal liberty and movement should be subject to removal at whim. Such a construction is not only an affront to the principle of legality and the *ICCPR*, but most importantly, to community values and expectations at large. Both Stanley J and Kourakis CJ (with whom Kelly J and Hinton J agreed) are correct in their construction of the *Guardianship Act* not only because of the law, but also because of its correlation with community values. These values underlie the *Guardianship Act* itself, and thus must be at the forefront of any decision interpreting the Act. After all, the *Guardianship Act* was enacted for the purpose

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid 373 [79].

<sup>49</sup> *ICCPR* (n 36) art 9(1).

<sup>50</sup> *Guardianship Act* (n 16) s 5(a).

<sup>51</sup> For more information, see Aged & Community Services Australia, *Social Isolation and Loneliness Among Older Australians* (Issues Paper No 1, October 2015).



of protecting the vulnerable.<sup>52</sup> Similarly, as its title suggests, the role of the Public Advocate is to advocate for members of the public, in particular the vulnerable. When the office was established, then-Governor Dame Roma Mitchell described the Public Advocate as ‘a watchdog on behalf of mentally incapacitated persons’.<sup>53</sup> In light of this, how can a reading of the *Guardianship Act* that abrogates the rights of the vulnerable, by restricting their personal liberties and freedoms without oversight, be within the spirit of the Act?

Thankfully for the mentally incapacitated and vulnerable, our courts have not forgotten the role of the Public Advocate. Nor have they forgotten the purpose of the *Guardianship Act* to ‘strike a sound balance between an individual’s right to autonomy and freedom and the need for care and protection from neglect, harm and abuse’,<sup>54</sup> with this reflected throughout the Supreme Court’s judgment. Instead, the Supreme Court has read the *Guardianship Act* in a way that is consistent with its purpose and with Australia’s international obligations under the *ICCPR*, reminding us that where our institutions and public offices fail, the courts will be there to protect our rights and liberties.

### B *The Importance of Transparency*

It is important to understand that the Supreme Court has not imposed a blanket prohibition on the detention of those suffering from dementia in the secure wards of nursing homes. The decision in *Public Advocate v C, B* is not a comment on the way our society treats the elderly, nor is it in any way an extension of the *Royal Commission into Aged Care Quality and Safety*. It is, however, a decision that highlights the importance of the judiciary in upholding community values and providing crucial oversight of statutory offices.

Going forward, the Public Advocate can no longer unilaterally order the detention of those in its care. Instead, s 32 of the *Guardianship Act* stipulates that SACAT must oversee any decision to deprive a vulnerable person of their liberty.<sup>55</sup> As Kourakis CJ identified, such a process ensures that the orders which justify any restraint on liberty, and authorise others to take action which would otherwise be unlawful, are a matter of public record rather than private memoranda.<sup>56</sup> Importantly, s 32 also provides a further limitation on the guardian’s power to detain, by requiring that a detention order only be made where SACAT is satisfied that ‘the health or safety of the person or the safety of others would be seriously at risk’ otherwise.<sup>57</sup>

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<sup>52</sup> South Australia, *Parliamentary Debates*, Legislative Council, 6 August 1992, 3 [29] (Dame Roma Mitchell, Governor).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Public Advocate v C, B* (n 3) 366 [54].

<sup>56</sup> *Ibid.*

<sup>57</sup> *Guardianship Act* (n 16) s 32(2).

If such orders could be made by guardians such as the Public Advocate alone, there would be no transparency or accessible review mechanism to challenge these decisions. Without the oversight of SACAT, the vulnerable could be rendered more susceptible to arbitrary detention. Instead, the Supreme Court's decision ensures that decisions that curtail the rights of the vulnerable are made by independent public bodies. This, in turn, ensures that principles such as independence, transparency, consistency and natural justice govern the determination,<sup>58</sup> rather than any other factors that may influence a body such as the Public Advocate. Unlike SACAT, the Public Advocate is under no obligation to provide reasons for its decisions, and its review mechanisms are significantly less accessible,<sup>59</sup> making its processes less transparent and open.

Through its construction of the *Guardianship Act*, the Supreme Court has ensured that principles of transparency, openness and natural justice remain at the heart of determinations affecting protected persons' freedom of movement. Through holding that such determinations can only be made by SACAT, a quasi-judicial body with transparency and natural justice at its core,<sup>60</sup> the Supreme Court has ensured that our right to freedom can only be abrogated by a public body in a decision of public record.

### C Powers in Emergency Situations

Chief Justice Kourakis acknowledged the difficulties that his construction of the *Guardianship Act* would impose on guardians wishing to act to protect a person's safety under emergency circumstances.<sup>61</sup> By construing s 32 as the exclusive and exhaustive source of power to detain a protected person, any legal justification which a guardian might have previously been seen to have under s 31 is now removed, without replacement. This clearly leaves guardians in an unenviable position when faced with the need to make urgent decisions as to a protected person's safe residence and accommodation, as doing so may now expose them to the risk of liability without lawful justification.

Such a scenario is hardly unlikely or unforeseeable in the circumstances of ensuring the safety of mentally incapacitated persons — guardians may in fact frequently be faced with scenarios where they must make urgent decisions as to the best course of action for the protected person. The continuing spread of COVID-19 may yet lead to such issues, with aged care facilities across Australia enacting increasingly strict lockdown measures, such as limiting residents' use of communal living areas and

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<sup>58</sup> See the objectives of SACAT in dealing with matters: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8 ('SACAT Act').

<sup>59</sup> While the Public Advocate's decision in this case was reviewed through the courts, this was a lengthy and costly process, whereas the *SACAT Act* provides for both internal review and appeals: *ibid* ss 70–1.

<sup>60</sup> *Ibid* s 8.

<sup>61</sup> *The Public Advocate v C, B* (n 3) 372 [73].

visitation rights, to minimise the risk of residents contracting the virus.<sup>62</sup> Is it possible that such actions could now be characterised as restricting residents' freedom of movement, exposing hundreds of facilities across Australia to liability for unlawfully detaining residents?

Ultimately, the Full Court could not provide an answer as to what the lawful justification for actions taken by guardians in emergency situations might be. However, such an answer may already be found in s 31 of the *Guardianship Act*. At general law, *McLaughlin* established that guardians are authorised to make directions as to the accommodation of a person of 'unsound mind', and to use reasonable force 'if circumstances justify such action' and were sanctioned by judicial authority.<sup>63</sup> The general law powers contained in s 31 therefore arguably already contain a justification for the use of force in emergency situations. It remains to be seen whether the Supreme Court would accommodate such an interpretation alongside their decision in *Public Advocate v C, B* once the issue inevitably arises.

## VII CONCLUSION

The decision in *Public Advocate v C, B* is not only a 'win' for the respondent, BC, but more broadly, a 'win' for the principles of natural justice, transparency and judicial oversight — principles fundamental to the operation of a democratic society like Australia. In standing up for some of the most vulnerable members of our society and ensuring that decisions that encroach upon some of our most fundamental liberties such as freedom of movement are subject to statutory protections, oversight and scrutiny, the Supreme Court has reminded us all of its place in upholding community values and protecting the vulnerable.

Importantly, the Supreme Court's decision should not be interpreted as imposing a blanket prohibition on the placement of mentally incapacitated persons in secure residential facilities. Instead, the decision has switched the burden of proving the lawfulness of a detention order from the more vulnerable protected person to the guardian. Doing so ensures greater protection, transparency and oversight for decisions made under the *Guardianship Act* — themes which are particularly pertinent in light of the *Royal Commission into Aged Care Quality and Safety* — and highlights the importance of the judiciary in upholding community values and providing crucial oversight of statutory offices.

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<sup>62</sup> Claire Moodie, 'Aged Care Operators Defend Coronavirus Lockdown as Premier, Prime Minister Urge Facilities to Relax Visit Bans' *ABC News* (online, 23 April 2020) <<https://www.abc.net.au/news/2020-04-23/aged-care-providers-defend-coronavirus-lockdown-amid-criticism/12177096>>.

<sup>63</sup> *The Public Advocate v C, B* (n 3) 361 [27], quoting *McLaughlin* (n 21) 564 (Griffith CJ).

