NSW Law Reform Commission
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SYDNEY NSW 2001

28 March 2016

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Dear NSW Law Reform Commission

Preliminary Submission
Review of the *Guardianship Act 1987*

We welcome the opportunity to make a preliminary submission to the NSW Law Reform Commission regarding the desirability of changes to the *Guardianship Act 1987 (NSW).*

INTRODUCTORY COMMENTS

There are two duties of government towards vulnerable people: to respect their autonomy and concurrently protect them from abuse.[1] UN Enable reinforces this antinomy when suggesting that States must do what they can to support individuals to exercise their legal capacity while providing safeguards against abuse of that support.

It is a difficult role for government to balance protecting people from harm through statutory intervention, with a corresponding bureaucratic process to oversight the implementation of such a regime, while simultaneously respecting and promoting an individual's freedom and autonomy in making their own decisions and living without undue restriction.

The potential for processes of legal intervention to simultaneously promote and undermine freedom have been well documented. Typically, legal interventions that have engaged with areas of life that are already structured by law – for example in the labour market where reforms provided protections to workers from excessive hours of work, unfair dismissal, and protected the freedom to organise – have tended to unambiguously promote individual autonomy. However, those reforms which depend on legal-bureaucratic interventions in the everyday relations and life experience of citizens – for example where monetary compensation is provided to those who are ill, old, unemployed or poor – have had ambivalent effects. This analysis is salient in the context of legal interventions designed to protect the interests of persons with diminished capacity where such intervention involves judicial or quasi-judicial processes for the appointment of substitute decision makers, and in particular where those appointed as substitute decision makers are part of the executive arm of Government. Although such reforms have no doubt involved an improvement in the historical conditions in which many such persons lived, the nature of the legal intervention has also led to a restructuring of the relationships and life situations of these people. In particular, the individualising effect of a system of intervention based on legal status or entitlements has had negative effects on the autonomy of individuals, including the general

[1] 'Standing Committee on Social Issues, 'Substitute decision-making for people lacking capacity', Report 43, New South Wales Legislative Council. Published 25 February 2010 at p 3.Although the Committee Report suggests these are *competing* duties, it is submitted that this is not necessarily the case. Indeed one of the best arguments in favour of a model of supported or assisted decision making is that it can help overcome this antinomy.

ability of persons to develop the relations-to-self necessary to practically realise their autonomy. These negative effects may also undermine the readiness of communities organised on the basis of a sense of solidarity rather than legal relations – including the family – to provide support or assistance.

Over the last couple of decades, at least in part in response to the perceived autonomy undermining effects of a paternalistic model of state intervention, the balance is swaying more towards respecting an individual's right to self-determination, autonomy, and freedom to make their own decisions (even if the decision is considered by others to be a bad decision). Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* ("UNCRPD") has prompted many governments around the world to undertake reforms in line with this trend.

This in turn is reflected in a dramatic shift in emphasis in the discourse around guardianship laws from: 1) disability to ability, 2) incapacity to capacity, and 3) protection to autonomy.[2] In practice, these changes are significant and require people working in the field to think differently about the way guardianship laws are approached.

Both writers, Bernhard Ripperger and Laura Joseph work in the legal industry and oversee supports for people with diminished capacity involved in litigation. Both writers have also conducted research regarding guardianship laws in New South Wales and other jurisdictions including Victoria, Australia; British Columbia, Canada; and Alberta, Canada.

TERMS OF REFERENCE

1. The relationship between the Guardianship Act and other legislation

In 2010 the Legislative Council Standing Committee on Social Issues, made over 20 significant recommendations to NSW guardianship legislation which we broadly endorse[3] The amount of legislative reform required to bring the NSW legislation in line with these recommendations and current policy requires a complete overhaul of the legislation as opposed to a few piecemeal amendments.

It is not only submitted that the *Guardianship Act 1987 (NSW)* should be redrafted as opposed to amended, it is also recommended that related legislation such as the *NSW Trustee and Guardian Act 2009 (NSW),* the *Powers of Attorney Act 2003 (NSW);* the *Mental Health Act 2007 (NSW);* and other relevant legislation be redrafted so that they have a common philosophy that reflects national and international developments in the field of incapacity planning and substitute decision making.

In addition, a range of statutory provisions and Court rules and procedures that impact on the ability of persons with capacity issues to participate in litigation need to be addressed. Arguably, these provisions are even more problematic than the substantive legislation mentioned above.[4]

In Victoria, Australia, the changes to the social policy and legal environment were seen to be sufficiently far-reaching to warrant an entire new legislative framework as opposed to

[2] Standing Committee on Social Issues, 'Substitute decision-making for people lacking capacity' Report 43, New South Wales Legislative Council. Published 25 February 2010.

[3] Legislative Council Standing Committee on Social Issues, 'Substitute decision-making for people lacking capacity' Report 43, New South Wales Legislative Council. Published 25 February 2010.

[4] See Chapter 7, Australian Law reform Commission Report 124, 'Equality, Capacity and Disability in Commonwealth Laws', 2014

modification of the existing *Guardianship and Administration Act 1986 (Vic)*.[5] The Guardianship Bill is yet to be enacted but the changes illustrate the significant change in the discourse behind the legislation.

In British Columbia, Canada the 1993 incapacity planning and guardianship legislative framework was designed as a comprehensive and integrated package. The major pieces of legislation[6] have a common philosophy that reflects national and international developments in the field of incapacity planning and substitute decision making. It is crucial that the major pieces of legislation have a common philosophy. Although the package of legislation received royal assent on 29 July 1993, they only partially came into force on 28 February 2000. To date, the parts of the legislation have not been proclaimed. Scholars involved in designing the legislative framework have expressed that the delay affected the energy going into implementation. When interviewed, those involved in the legislative reform in British Columbia advised that from their experience changes are best made as a complete bundle, rather than as piecemeal reforms.

2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.

The principles provided in the UNCRPD are in part drawn from the discourse in Canada in the 1980s. Thus, the philosophies underpinning the law in British Columbia can be jointly discussed with the provisions of the UNCRPD.

The five fundamental policies that are reflected throughout the legislative framework in British Columbia and to some extent the UNCRPD are:

1. All adults have the right to autonomy, choice and self-determination.[7] This principle is also found in Article 3 of the UNCRPD, to respect the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disabilities.[8]
2. All adults are entitled to receive the most effective but least restrictive, least intrusive, and least stigmatising form of assistance, support or protection when they are unable to act independently.[9] This principle relates to Article 12(4) of the UNCRPD: the safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.[10]
3. All adults are entitled to the legal presumption that they are capable of making decisions and, where necessary, to support and assistance in order to understand and make informed decisions on their own behalf.[11] Article 12 of the CRPD, promotes equal recognition before the law. In other words, a person with a disability should be

[5] *Guardianship and Administration Act 1986 (Vic)*

[6] *Representation Agreement Act,* RSBC 1996, Chapter 405; *Adult Guardianship Act,* RSBC 1996, Chapter 6;*Public Guardian and Trustee Act,* RSBC 1996, Chapter 383; *Health Care (Consent) and Care Facility (Admission) Act,* RSBC 1996, Chapter 181.

[7] BC Association of Community Response Networks, 'How Can We Help', September 1992

[8] *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS (entered into force 3 May 2008), Article 3(a).

[9] BC Association of Community Response Networks, 'How Can We Help', September 1992

[10] *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS (entered into force 3 May 2008), Article 12(4).

[11] BC Association of Community Response Networks, 'How Can We Help', September 1992

afforded a legal capacity on an equal basis with others and should not lose their legal capacity to act simply because of a disability.[12]

4. The use of court procedures and court orders appointing decision makers or guardians for adults should only occur as an absolute last resort and only after alternatives such as the provision of supports and assistance have been either attempted or carefully considered.[13] This provision relates, in part, to Article 12, Clause 3 of the UNCRPD which provides that States should take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.[14] This refers to the principle of 'assisted decision making'.
5. All procedures, protocols and other processes associated with the provision of support, assistance, protection should be accessible to all.[15]

In terms of Victoria, the *Guardianship and Administration Bill 2014*[16] has been drafted to encapsulate many of the principles in the UNCRPD, including greater autonomy through supported decision making with the assistance of a supportive person. It is submitted that these principles should guide any new legislation drafted.

Developments in law, policy and practice in Victoria, Australia

In Victoria, a significant amount of research has been conducted to reform guardianship laws, with the intention to bring the legislative framework in line with the UNCRPD. As Victoria is in the same federal jurisdiction as NSW, the model is easier to apply in NSW.

The Victorian Law Reform Commission produced a report "Guardianship: Final report" which was tabled in Parliament on 18 April 2012. The report led to the *Guardianship and Administration Bill 2014* which was tabled in parliament on 20 August 2014, however the bill is yet to be enacted.

Important aspects of the Bill include a definition of decision-making capacity, how to assess decision making capacity, clarification that a person is presumed to have capacity to make decisions unless the contrary is proven, and the empowerment of VCAT to appoint a "supportive guardian" to support people to make decisions.

Another significant feature in the Victorian jurisdiction, as well as almost all other jurisdictions in Australia, is the Office of the Public Advocate. The Public Advocate can act as a systemic as well as individual litigation guardian, where there is no suitable family member or friend who can act.

Developments in law, policy and practice in in British Columbia, Canada

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[12] United Nations Enable, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) at <http://www.un.org/disabilities/default.asp?id=212>, Chapter 6.

[13] BC Association of Community Response Networks, 'How Can We Help', September 1992

[14] *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS (entered into force 3 May 2008), Article 12 (3).

[15] BC Association of Community Response Networks, 'How Can We Help', September 1992

[16] *Guardianship and Administration Bill 2014 (Vic)*

Since the 1970's Canada, and especially British Columbia, has lead the way with its progressive social model of disability.[17] The British Columbian legislative framework is encapsulated in the UNCRPD.[18]

With strong community support, legislative reform has occurred over the past 5 decades to allow people to better plan for incapacity as well as assist people with diminished capacity. Most importantly, a group of statutes, which received royal assent on 29 July 1993, partially came into force on 28 February 2000. The main instruments are:

- *Representation Agreement Act,* RSBC 1996, Chapter 405[19]
- *Adult Guardianship Act,* RSBC 1996, Chapter 6[20]
- *Public Guardian and Trustee Act,* RSBC 1996, Chapter 383[21]
- *Health Care (Consent) and Care Facility (Admission) Act,* RSBC 1996, Chapter 181[22]

Jay Chalke, the former Public Guardian and Trustee of British Columbia stated that "a central underlying part of the reform efforts have been that the wishes of individuals must be respected to the extent of their capacity to make decisions".

An examination of the models in British Columbia provides a significant amount of insight into how progressive principles can be codified in a legislative framework, the framework can be applied in practice, capacity can be assessed, and supported decision making used to achieve long term resolutions without compromising individual autonomy.

For example, the British Columbian system embraces the spectrum of capacity, favours supported or assisted decision making, and seeks to maximise autonomy, whether the person has diminished or full incapacity.

The model in British Columbia is based on a different world view, and has therefore taken a different trajectory, to the system in New South Wales. To transpose the British Columbian model would require holistic change in NSW. Alternatively, if that is not practically viable, it is submitted that a viable option would be to graft into the NSW system aspects of the British Columbia model which are complementary with the existing NSW paradigm.

Developments in law, policy and practice in Alberta, Canada

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[17] *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS (entered into force 3 May 2008).

[18] Robert M Gordon, *The 2012 Annotated British Columbia Incapacity Planning Legislation, Adult Guardianship Act and Related Statues, (*Carswell 2012) at p4.

[19] RSBC 1996, Chapter 405

[20] RSBC 1996, Chapter 6

[21] RSBC 1996, Chapter 383

[22] RSBC 1996, Chapter 181

The model in Alberta is useful in two specific areas: 1) its definition and unique assessment of capacity [23] [24] and 2) the incorporation of supported decision making and co-decision making[25] under the *Adult Guardianship and Trustee Act 2008*[26].

Meetings with officers of Human Services in Alberta have revealed that the implementation of co-decision making has been successful. It allows for an adult to make decisions with the support of a family member or friend.

3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.

We support the general approach provided in the report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws, and by the Legislative Council Standing Committee on Social Issues in 2010 to NSW guardianship legislation[27].

4. The UN Convention on the Rights of Persons with Disabilities.

The principles provided in the UNCRPD.[28] should underlie any new legislation and reflect:

1. Self determination and autonomy;
2. Most effective but least intrusive support, assistance or protection;
3. Court as a last resort (the Court should not be asked to appoint, and should not appoint, decision makers or guardians unless alternatives have been carefully considered);
4. The presumption that adults are capable unless the contrary is demonstrated;
5. Recognition that an adults way of communicating is not grounds for them to be determined to be incapable of making decisions.

The UNCRPD questions the ideas that diminished capacity equates to an absolute loss of legal capacity, or, that acting in someone's best interests through substitute decision making will necessarily provide the best outcome for the person with diminished capacity.[29] Despite Australia ratifying the UNCRPD in July 2008 and effectively agreeing to be bound by the convention, domestic laws including the *Guardianship Act 1987 (NSW)* remain inconsistent with the international convention and the practical challenges in the disability field.

5. The demographics of NSW and in particular the increase in the ageing population.

Australia is witnessing disruptive trends including an ageing population, the breakdown of traditional family supports, the de-institutionalisation of people with mental illnesses, a growing awareness of abuse and neglect of incapacitated persons, a desire for greater

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[23] *Adult Guardianship and Trustee Act 2008 (Alberta),* 'capacity' definition.

[24] *Adult Guardianship and Trustee Act 2008 (Alberta),* s102.

[25] *Adult Guardianship and Trustee Act 2008 (Alberta),* supported decision making ss3-10, co-decision making ss 11-23.

[26] *Adult Guardianship and Trustee Act 2008 (Alberta).*

[27] Legislative Council Standing Committee on Social Issues, 'Substitute decision-making for people lacking capacity' Report 43, New South Wales Legislative Council. Published 25 February 2010.

[28] Robert M Gordon, *The 2012 Annotated British Columbia Incapacity Planning Legislation, Adult Guardianship Act and Related Statues, (*Carswell 2012) at p4.

[29] Public Guardian NSW, 'Public Guardian Advocacy Report 2014', Report 2014 (2014)

autonomy by persons with diminished capacity, a growing international rights focus, and an increase in the number of legal incapacity findings by Courts and Tribunals.

As a result, the government has seen an increase of persons requiring assistance to promote and protect their interests. If the trend continues the government may become burdened with caring for these people. Accordingly, there is a need for early interventions and support mechanisms (including supported decision making).

In part, the current challenge for government in responding to the issue of persons with diminished capacity is part of a broader challenge that is presented with a shift in the understanding of the role of law in complex modern societies. Increasingly, the justification for legal intervention is based on contemporary concerns about risk. As modern societies have become more adept at assessing and managing risk, questions of risk management have become both pervasive in modern institutions and a source of anxiety (leading to new sources of social insecurity).[30] In responding to the impact of changing demographics, the government must be careful not to allow a preoccupation with risk (or efforts to systematically manage risk) to lead to an over-intrusion of legal regulation into the everyday life practices of persons with diminished capacity.

There should be a much greater focus on providing different levels of support within the community rather than through government.

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.

It is submitted that the following models should be available for people with diminished capacity:

- Supported Decision Making
- Assisted Decision Making
- Co-Decision Making
- Substitute Decision Making

The most appropriate model depends upon the circumstances of each person' situation, although substitute decision making should only be used as an absolute last resort.

Spectrum of Capacity and Gap

To allow for the use of different decision making models, there needs to be recognition that there is a spectrum of capacity. The NSW system either assumes full legal *capacity* or makes a finding of full legal *incapacity*. There is no in between and no support for persons with diminished capacity eg. a person who has mental capacity, not legal capacity.

In other words, the NSW model does not recognise the spectrum of capacity. As a result, there is currently only substituted decision making support for those with full legal incapacity and no support (eg. No assisted or supported decision making) for those with mere diminished capacity. A person who may lack legal capacity may be competent in

[30] See for example David Garland, 'The Rise of Risk'. *Risk and Morality*. Ed. Richard V. Ericson and Aaron Doyle. University of Toronto Press, 2003. 48–86.

other aspects of their lives and do not fall under the management of the NSW Trustee & Guardian ("TaG") or the Public Guardian.

Defining Capacity and Capacity Assessments

The way in which capacity is defined and assessed impacts the decision making models that can be employed and applied.

In New South Wales there is no single definition of capacity as the legal rules have developed in an ad hoc manner and without harmonisation. It is argued that a clear and single definition would facilitate a more consistent application of the law.[31] The difficulty is that the common law tests of capacity impact many areas of law such as: when a person whose capacity is in doubt enters into a contract, makes an inter vivos gift; retains legal counsel, gets married, makes a beneficiary designation or makes a will. [32]

Consequently, the legal definition of capacity depends upon the type of decision that is being made in each case.[33] In *Gibbons v Wright*[34], the High court stated in relation to the decision-specific test that "the law does not prescribe any fixed standard of sanity as the requisite for the validity of transactions".

In terms of guardianship laws, neither section 3 of *Guardianship Act 1987*[35] nor s41(1) of *NSW Trustee and Guardian Act 2009*[36] provides extensive assistance in the form of a definition of capacity. For those making orders on capacity in NSW, one must turn to the judgment of Justice Powell in *PY vs RJS*[37] as authority for determining whether a person is capable of managing their affairs and defining the threshold for incapacity in terms of a person's ability to deal with everyday affairs and the risk that exists for the person in the absence of the ability.

Also the methods for capacity assessment often result in an inconsistent application. Courts are often mistaken in applying a mental capacity test instead of a test that is issue-specific to the decisions that need to be made. That is, capacity must be considered in relation to specific decisions and their nature and complexity.

2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.

The UN Committee on the Rights of Persons with Disabilities has recommended that Australia take immediate steps to replace substitute decision making with supported decision making.[38] Substitute decision making should only be used as an absolute last resort. As long as the subject person can express and communicate their wishes and interests, in any form, then other models of decision making should be considered.

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[31] Legislative Council Standing Committee on Social Issues, 'Substitute decision-making for people lacking capacity' Report 43 New South Wales Legislative Council. Published 25 February 2010.

[32] British Columbia Law Institute, *Report on Common Law Tests of Capacity*, BCLI Report no. 73 (2013) at p. xvi

[33] The Law Society of New South Wales, *A Practical Guide for Solicitors: When a client's capacity is in doubt*, (2009)

[34] *Gibbons v Wright (1954) 91 CLR 423* at 437 per Dixon CJ, Kitto and Taylor JJ.

[35] *Guardianship Act 1987* (NSW), s3 – the act defines a person in need of a guardian as 'a person who, because of a disability, is totally or partially incapable of managing his or her person.

[36] *NSW Public Trustee and Guardian Act 2009 (*NSW), s41(s).

[37] *PY v RJS* [1982] 2NSWLR 700

[38] Public Guardian NSW, 'Public Guardian Advocacy Report 2014', Report 2014 (2014)

The underlying philosophical basis for the justification of a substituted decision making model is a one dimensional, even pathological, concept of autonomy. This model misinterprets autonomy as equivalent to the more abstract concept of what might be described as a legal personality, understood in terms of the negative sphere of liberty in which individuals are free to act on the basis of their own aims and intentions. The legal personality however is limited by the fact that in order to successfully determine our own aims, we require a form of social interaction that legal freedom cannot provide. [39] This paradoxical aspect of law means that the decision to appoint a substitute decision maker following an assessment of capacity based on an abstract concept of autonomy will have the effect of undermining the complex social relationships that are in fact a necessary precondition for the development of the capacities necessary for the exercise of autonomy itself.

The more that the supported decision making model is understood and practised, the less need for substitute decision making as they are almost contradictory in their approach. The supported decision making model requires a completely new way of thinking.

3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.

Supported decision making "should be seen as a redistribution of existing resources, not an additional expense" This means that whilst there may be costs front-loaded into supported decision making there are also less costs at the back end of the process because there is less need for government intervention. [40]

What is supported decision making

It is often argued that supported decision making recognises the way in which most adults function in their daily lives, drawing on the advice, opinions and skills of family, friends and other people to inform individual decision making when needed.[41] People with disability similarly depend upon social networks to assist them to make decisions at different times to varying degrees. Therefore, a determination of a person being mentally incompetent or incapable is often a function of the size and commitment of that person's network of human support and resources[42]

Jay Chalke, the former Public Guardian and Trustee of British Columbia stated that "a central underlying part of the reform efforts have been that the wishes of individuals must be respected to the extent of their capacity to make decisions".

It is submitted that in New South Wales, there should be reform to provide a legislative basis for supported decision making.

Parameters for Supported Decision Making

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[39] See Axel Honneth, *Freedoms Right* Columbia University Press 2014

[40] United Nations Enable, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) at <http://www.un.org/disabilities/default.asp?id=212>, Chapter 6.

[41] Terry Carney, 'Participation, Rights, Family Decision Making and Service Access: A Role for Law?' (Legal Studies Research Paper No 12, Sydney University Law School, 2012) 18.

[42] Robert M Gordon, *The 2012 Annotated British Columbia Incapacity Planning Legislation, Adult Guardianship Act and Related Statues, (*Carswell 2012).

Relevant parameters for supported decision making from a subject person's perspective include:

- *whether the subject person can demonstrate choices and preferences and can express feelings of approval or disapproval;*
- *whether the subject person has a relationship with the support person that is characterised by trust.*
- *whether the subject person understands that the support person may make, or stop making, decisions or choices that affect them;*
- *whether the subject person communicates a desire to have someone make, help make, or stop making decisions for them.*

Further parameters of supported decision making:
Supported decision making is also in line with the normalisation principle which provides that "you act right when making available to all persons with intellectual or other impairments or disabilities patterns of life and conditions of everyday living that are as close as possible to or indeed the same as regular circumstances and ways of life of their communities".[43]

To this extent, supported decision making also requires that:

It an organic process, there should be minimal rules and regulations around the process.

It draws on the advice, opinions and skills of family, friends and other people to inform individual decision making when needed. Historically, there have been excessive safeguards in place to prevent family members or peers from influencing a person with an impairment or disability. In reality, many people with full legal capacity draw on the advice, opinions and skills and are influenced by members in their inner circle, culture and society.

the support person must have an in depth understanding of the subject person's wishes and behaviours. Research in Canada suggests that the model was never intended for government bodies to assume the role of a supported decision maker. Rather government should provide assistance to family and peers so that they can fulfil the role of a support person, where possible.

Making a bad decision is not antithetical to autonomy. People with full capacity often make bad or poor decisions in their everyday living, for example a poor relationship choice, unhealthy eating or living habits. This same benchmark should also be afforded to people with disabilities or impairments rather than having no tolerance for bad decisions.

It is submitted that the two ways in which supported decision making has been implemented into the legislative framework in British Columbia should be considered when redrafting the Guardianship Act 1987. The legislative framework in British Columbia provides for Representation Agreements under the Representation Agreement Act.[44] A representation agreement allows a person to appoint a representative or groups of representatives to engage in the routine management of financial affairs[45], as well as personal and health care[46]. A

[43] Nirje (1992).
[44] RSBC 1996, Chapter 405, ss 7 and 9.
[45] RSBC 1996, Chapter 405
[46] RSBC 1996, Chapter 405

person can enter into the agreement without needing to prove the usual criteria for legal capacity, as long as they are able to express their wish in some way. There is a focus on 'process' rather than 'form'.

The other way the legislative framework provides for supported decision making through a Microboard. A microboard is a non-profit society of family and friends, committed to knowing a person, supporting that person, and having a volunteer (unpaid), reciprocal relationship with that person. Paid services and supports can be provided through microboard. Involvement, caring, and standing by the person are valued over technical expertise.

The proposed relationship and boundary between supported and substitute decision making is simple. Supported decision making should be the primary decision making mechanism. It should be used as long as someone is capable of expressing their wishes. If not, substitute decision making can be used as a last resort.

4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the National Disability Insurance Scheme Act 2013, the Aged Care Act 1997 and related legislation.

No comment.

5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.

In both Victoria and British Columbia there has been an overhaul of the language and principles relating generally to guardianship laws and consequently the way in which people under legal incapacity are considered in the legal system.

It is submitted that the language utilised in legislation and policy should reflect this and be empowering. For example, a person should be referred to as having “diminished capacity” instead of having “no capacity”. Diminished capacity acknowledges that in many circumstances, people can make some decisions, even if they cannot make others.

It is recommended that the ideologies concerning disability services should be more rights focused (even if NSW does not have a Charter of Human Rights), autonomy should be favoured instead of protectionism and the language should reflect the new paradigms.

6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.

The use of restrictive practices must be the subject of an explicit statutory regime that limits the circumstances and the nature of such practices and provides for regular oversight by a judicial (or quasi judicial) body.

The liberty of the subject is a fundamental freedom.

> Putting to one side the exceptional cases…the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[47]

Although restrictive practices will usually fall short of 'involuntary detention', as the line of cases in the High Court following *Lim* have made clear, there should be a clear grant of statutory power and regular judicial oversight of any exercise of power that interferes in the liberty of the subject (even falling short of 'detention' – see *Thomas v Mowbray* [2007] HCA 33). The comments of Justice Gageler in *Plaintiff M68/2016 v Minister for Immigration & Border Protection* [2016] HCA 1, also provide good reasons to argue that precision, care and scrutiny should be a precondition of any grant of power that enables a person to make decisions that restrict fundamental freedoms such as movement of another person.

It is recognised that there are circumstances in which such measures are necessary. There are such measures provided for explicitly in mental health legislation (which is also one of the 'exceptional cases' referred to in Lim).

In light of a supported decision making model, restrictive practices should only be used as an absolute last resort.

7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the Guardianship Act 1987 provide for the regular review of financial management orders.

The control of a person's estate provides significant barriers to the practical exercise of autonomy in other areas of life. A Financial Manager can in effect impose limitations on decision making functions which the person is considered otherwise capable of exercising.

8. The provisions of Division 4A of Part 5 of the Guardianship Act 1987 relating to clinical trials.

No comment.

9. Any other matters the NSW Law Reform Commission considers relevant

Legislative Powers required to Establish a Public Advocate

There are no specific powers for the Public Guardian or NSW Trustee and Guardian to take on an advocacy role. The NSW Trustee and Guardian can only bring and defend actions, suits and other proceedings relating to the property and other matters of a person under financial management. For all matters that fall outside of this scope, the NSW Trustee and Guardian does not have the power to act in an advocacy role.

In terms of the Public Guardian, the current legislative framework prevents the Public Guardian providing assistance to people with decision making impairment unless they are

[47] Per the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27

under a guardianship order. This is inconsistent with the UNCDPR, as a guardianship order should only be made as a last resort. Hence, people who fall short of requiring a guardianship order, yet have decision making impairment, are not accounted for and fall through the gaps.

In line with the 2010 NSW Legislative Council Standing Committee on Social Issues Report, we submit that it is necessary that an Office of the Public Advocate be established in NSW. A Public Advocacy function that does not require a guardianship order first would be more closely in line with the intentions of the UNCRPD.

The benefit of a Public Advocate is that he/she could act on the concerns of people with disability where gaps exist. It would also be more efficient and less restrictive to have a Public Advocate in NSW to assist people, without compromising a persons autonomy by requiring a guardianship appointment.

Ideally, a Public Advocate would have greater powers than the Public Guardian to assist people prior to a guardianship order. There are also substantial other benefits as the role allows for the investigation of any abuse of incapacitated persons.