RACGP

Royal Australian College *of* General Practitioners

Healthy Profession.
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10 January 2018

Erin Gough | Policy Manager
Law Reform and Sentencing Council Secretariat | NSW Department of Justice
Level 3, Henry Deane Building, 20 Lee St, Sydney
GPO Box 31
SYDNEY 2001 NSW

Law Reform Commission
By email: nsw-lrc@justice.nsw.gov.au

Dear Ms Gough

Re: Invitation to make a Submission on the Guardianship Act 1987 Review

The Royal Australian College of General Practitioners NSW&ACT welcomes the opportunity to comment on the Guardianship Act Review.

Our submission addressing the Terms of reference is attached hereto.

It is important that provision is made to educate the health sector in regard to this new legislation. The Guardianship Act was introduced with no provision of education and information to the health sector. So to this day, there is very little knowledge of 'person's responsible' and other aspects of the legislation. If we want this new Act to be effective where people receive health care, then health care providers need to understand this legislation and how it applies to the care they are providing, or hope to provide, to people who have lost some or all their 'decision-making ability'.

If you have any questions regarding this response, please contact Roslyn Irons, State Manager of RACGP NSW&ACT at nswact@racgp.org.au

Yours sincerely

A/Professor Charlotte Hespe
Chair, RACGP NSW&ACT

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Submission

NSW Law Reform Commission

Review of the Guardianship Act 1987

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The RACGP NSW&ACT appreciates the opportunity to make the following submission.

Review of the Guardianship Act 1987

NSW Law Reform Commission - Summary of key draft proposals

Our key draft proposals are:

NSW should have a new Act called the Assisted Decision-Making Act that provides a formal framework for both supported decision-making and (as a last resort) substitute decision-making.

Yes, agree

New general principles should reflect the UN Convention. These should include recognising the right to autonomy and the importance of giving effect to a person's will and preferences wherever possible.

Yes, agree

The term "decision-making ability" should be adopted (instead of "capacity").

Yes, agree

The term "disability" should be removed as a precondition for a Tribunal order and from the legislation altogether.

Yes, agree

The new Act should provide guidance on assessing a person's decision-making ability.

Yes, agree – it will be very important to define this in the Act and provide help as people try to assess this. It can be quite difficult and is open to abuse.

The new Act should provide for two types of formal supported decision-making arrangements: personal support agreements and tribunal support orders.

Yes, agree

The new Act should provide for two types of formal substitute decision-making arrangements as a last resort: enduring representation agreements (to replace the current arrangements for enduring guardians and enduring powers of attorney) and representation orders (to replace the current arrangements for guardians and financial managers).

In principle, this sounds fine but in reality in our experience, people want to give different people different functions. For example, a person may want their daughter to make medical decisions

and a son to make financial decisions or vice versa. It is about using their strengths and knowledge.

The new Act should not allow the Tribunal to make plenary (or unlimited) orders (as it currently can for guardianship). Rather, the new Act should require all agreements and orders to specify the particular personal, healthcare, financial and/or restrictive practices functions for a supporter or representative.

Yes, agree

New decision-making principles should require representatives to give effect to a person's will and preferences wherever possible rather than a person's "best interests".

Yes, agree

The new Act should strengthen the safeguards that apply to enduring representation agreements and representation orders.

Yes, agree

The new Act should introduce review periods for representation orders where the representative has a financial function.

It is not clear how this will work. A bit more detail is required here.

The new Act should introduce new advocacy and investigative functions, to be performed by a Public Advocate.

Yes, agree – good in principle but need more detail here.

The new Act should set out specific considerations relevant to Aboriginal people and Torres Strait Islanders.

Yes, agree. However, the details of this sound very paternalistic. Agencies need to be working with extended families, engaging Elders or cultural advisors from 'their mob' and making sure there are Aboriginal and/or Torres Strait Islanders employed in the organisations to help make the processes culturally appropriate.

The new Act should be internally consistent and be drafted using simple and accessible language and structure.

Yes, agree

The proposals assume the existence of the following key entities: the NSW Trustee (currently titled the NSW Trustee and Guardian), the Public Representative (currently titled the Public Guardian), the Assisted Decision-Making Division (currently titled the Guardianship Division of the NSW Civil and Administrative Tribunal), and the Public Advocate (a proposed new entity).

1. A new framework

1.17 Supreme Court's inherent protective jurisdiction

The new Act should not limit the Supreme Court's inherent jurisdiction, including its parens patriae jurisdiction.

This is not written in simple and accessible language and needs an explanation in plain language.

2. Personal support agreements

Significantly, our proposal permits the appointment of paid care workers, volunteers and others involved in providing medical, accommodation or other daily services, as supporters. Most submissions acknowledged this was appropriate particularly where the person requiring support lacks other community ties.

We do not agree with this and think there are significant conflicts of interest where people are paid. We think volunteers should not be doing this unless they have received significant training and signed a statuary declaration that they have no pecuniary or other type of involvement with the person. This group of people have not known the person before they became unwell and/or frail and may find it very difficult to 'give effect to a person's will and preferences wherever possible'. It needs to be recognised that this allows doctors to be 'supporters'. This means they are potentially seeking consent to treatment and being the advisors and supporters of the people of whom they are asking for consent. This is a total conflict of interest.

4.3 Eligibility for appointment as an enduring representative

The new Act should provide:

(1) A person is not eligible to be appointed as an enduring representative if: (a) they are under 18 years of age (b) they (or their spouse, child, brother or sister) provide, for fee or reward, healthcare, accommodation or other support services to the appointing person (c) they are to be given a financial function and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the enduring representation agreement, or (d) they are the Public Representative or the NSW Trustee.

(2) The appointment does not lapse if an enduring representative (or their spouse, child, brother or sister) is subsequently engaged to provide for fee or reward healthcare, accommodation or other support services to the represented person.

We disagree with point (2) and think this should never happen. This leaves the person very open to abuse and is again a conflict of interest. It is a very sad fact that in our society, elderly people

are being abused by the very people who should be protecting and caring for them. The legislation needs to address this issue and, as far as it is possible, to prevent it from happening.

6. Healthcare decisions

6.19 The person responsible hierarchy

(b) the spouse of the person, if they have decision-making ability for the decision and the relationship is close and continuing –

Does this include defacto-spouse and same sex partners who have not married?

7. Medical research procedures

7.1 Definition of "medical research procedure"

(c) "any non-intrusive examination including:

(i) a visual examination of the mouth, throat, nasal cavity, eyes or ears; or

(ii) the measurement of a person's height, weight or vision;

(d) observing a person's activities

(e) administering a survey

(f) collecting or using information, including:

(i) personal information within the meaning of the Privacy and Personal Information Protection Act 1998 (NSW)

(ii) health information within the meaning of the Health Records and Information Privacy Act 2002 (NSW), and

(g) any other procedure prescribed by the regulations as not being a medical procedure"

We believe that some people might, if they could, object to all of these, eg physical examination, particularly for example: examination of the breast and genitalia which may be argued is no more intrusive than the examples mentioned. Observation of their activities, particularly personal activities such as toileting habits and sexual activities that may be disinhibited in the case of dementia, for example; collecting or using information that may be of a personal nature, or health information that may be of a personal nature (eg history of sexually transmitted infections).

We believe it is dangerous to assume that these exceptions can be made, and that people should be protected from these research activities in the same way as they are for medical research procedures such as administration of medications etc,