cid Council for Intellectual Disability

Review of the Guardianship Act 1987

Response to draft proposals of the NSW Law Reform Commission

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We broadly support the regime proposed by the Commission. However, we also raise the following important issues:

1.11(d) - We would prefer that the circumstances in which the will and preferences of a person can be overridden should be defined as, "if giving effect to a person's will and preferences creates an unacceptable risk to the person's personal and social well-being (including the risk of criminal or civil liability)". As explained in our submission on question paper 2, we see the underlined words as important to avoid the potential for unduly narrow interpretation of risk.

1.17 etc - We continue to be strongly opposed to the Supreme Court having a parallel jurisdiction to the Tribunal especially if the Court is to continue to operate under the outmoded parens patriae jurisdiction rather than the general principles proposed at 1.9.

2 and 3 – We are somewhat wary about the formalisation of supported decision-making that the Commission is proposing. We feel that supported decision-making should generally be a natural extension of relationships rather than put into a detailed legal structure.

2.3 - Should paid service providers be eligible for appointment in a personal support agreement? This is a challenging issue and we feel that it requires a more nuanced response than there being no restriction on such eligibility. Perhaps, there should be scope for the Tribunal and Public Representative to develop and review limits.

3.1 - We suggest that standing for Tribunal applications should require a "genuine concern for the personal or social well-being of the person" rather than a "genuine interest". Interest could be construed unduly narrowly.

3.13 – 3.14 - We suggest that the Tribunal should have jurisdiction to review a termination or suspension of a support order as well as the order itself. For example, there could be issues about whether a person had decision-making ability to terminate an order or about whether a supporter has lost relevant decision-making ability.

5.2(3) - In a non adversarial jurisdiction where parties are usually unrepresented, it is inappropriate to require that the applicant has onus to show that a person does not have decision-making ability. The question should be whether the Tribunal is satisfied that the person does not have decision-making ability.

5.6(2) - The proposal that a representation order has affect "only where the represented person does not have decision-making ability for that decision" – We see this proposal as currently framed as being difficult to apply in practice. Who makes the determination whether or not the person has decision making ability? Perhaps, it should be the representative but with a power to seek review by the Tribunal.

5.13(1)(c) - We do not agree that there should be a blanket rule that a professional person acting as financial representative should be supervised by the NSW Trustee.

5.14(1) is expressed a little narrowly. There may be cases where someone like a family solicitor is willing and suitable to be appointed as financial representative and they are only doing this role on a one-off basis, rather than carrying on a business doing so.

5.16(2)(a) - We suggest that this should be worded "the person will be exposed to unacceptable risk of harm…."

6.7(a) - We suggest that this be reworded to specifically include tubal occlusions and vasectomies. Due to these procedures being often reversible, they are currently specifically mentioned in the regulations.

6.12 - We are concerned about contraception and HIV tests being classified as minor healthcare so that they can proceed without consent if there is no person responsible. There is a danger that HIV testing occurs in the interests of protection of other people and that contraception is unnecessarily used due to the unreasonable apprehensions of support workers.

7 - We are uncomfortable about removing the role of the Tribunal in giving general approval of clinical trials or other medical research procedures. The history of using people with disabilities for experimentation and continued common devaluing of people with disability makes us wary of removing this safeguard.

8 - In our view, specific provision does need to be made in NSW legislation for when and how to obtain authority for restrictive practices. While the NDIS legislation does cover this issue in some respects, it specifically says that State and Territory legislation will continue to cover the issue of authorisation as opposed to standard-setting, review and monitoring etc.

9 - We generally support the proposal that a public authority have functions along the lines of those proposed in 9.1. We support those functions being generally focused on decision-making issues and investigation of abuse and neglect rather than the more wide ranging individual advocacy undertaken by community advocacy bodies.

Perhaps, it would be best for the Ombudsman to have the investigation of abuse and neglect functions and the public representative to have the decision-making functions.

We make two other suggestions:

- 9.1(3)(c)(i) should be omitted. These roles are better performed by community advocacy bodies.
- 9.1(3)(g) should be omitted. This role is better performed by the Tribunal staff; this is a vital adjunct to the Tribunal's inquisitorial role. Also, the public representative would have a conflict of interest in investigating the need for a support or representation order. Resource limitations of the representative could deter the representative from recommending an order where it would be appropriate

Further, whether or not its functions are extended, it is vital that the public representative have full statutory and administrative independence including security of tenure, annual report to Parliament and employing its own staff. It would be very inappropriate for it to continue to be administratively

attached to the NSW Trustee. See Guardianship and Administration Act 1986 Vic, Schedule 3, and Guardianship and Administration Act 1993 SA sections 20 and 24.

11.5(1) - We agree in principle that the person subject of a Tribunal application should not need leave to be legally represented. However, experience in the current Tribunal shows that the Tribunal needs scope to ensure that the lawyer is genuinely representing the person rather than for example a family member.

11.6 - We do not agree that the Tribunal should be required to administer an oath or affirmation to witnesses where there are factual matters in dispute. This would add undue formality to Tribunal proceedings. The existing system is adequate where the Tribunal has the power to administer an oath but alternatively can remind hearing participants that it is an offence to give false information to the Tribunal.