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Submission to the NSW Law Reform Commission Guardianship Review – Draft Proposals



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Executive Summary

This submission commends the Australian Law Reform Commission (The Commission) for proposing a new Act, changing many key terms to adopt more appropriate language and for introducing the role of supporters.

This submission draws upon the seminal views presented by Michael Bach and Lana Kerzner in 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Law Commission of Ontario, October 2010).

This submission makes three key recommendations;

1. The Commission reconsider the requirement that a person must understand and accept the appointment of a supporter, to allow for people with limited decision-making ability to enjoy the supported decision-making model
2. The Commission reconsider the phrasing of the statutory presumption of decision-making ability by removing its 'rebuttable' status
3. The Commission reconsider the role of representatives and the implications of creating a separate path that relegates people with more severe cognitive impairments to the substitute-decision making model, rather than including them in the supported decision-making model.

About Family Advocacy

Family Advocacy is a state and federally funded disability advocacy organisation in NSW, founded by families of people with developmental disability. Our goal is to advance and protect the rights of people with disability to live ordinary lives and to have access to the same opportunities and choices that the majority of Australians have.

We have been assisting families to build meaningful lives for people with disability for 25 years and are dedicated to continuing this work today. We strive to build the capacity of family members and communities to be able to assist their family member with disability to engage with valued roles in society.

Recommendation 1

Proposal 2.1 Eligibility to Appoint a Supporter

(b) has decision-making ability to enter the agreement

Family Advocacy recommend The Commission reconsider the requirement that a person must understand and accept the process of having a supporter appointed.

If a person has limited or no capacity, an agreement could be formed on the basis of fundamental need or in reference to the person's best interests. People with significant support needs for decision-making rely on others to assist them with this on a daily basis. If they were to have the opportunity to

enter into a decision-making support agreement, this would form a secure arrangement for trusted persons to support them with decisions. It is of course important that if a person has the skills and ability to communicate their agreement or lack thereof to this arrangement, that should be taken into account. However, requiring consent as an element of the eligibility criteria excludes people with certain levels of cognitive impairment from accessing supported decision-making assistance.

Instead, it could be proposed that a supporter can be appointed with, or without the consent of the person, depending on their skills and ability to consent, their best interests and if necessary, at the discretion of the Tribunal.

Recommendation 2

Proposal 1.13 Presumption of Decision-making Ability

Family Advocacy recommend The Commission consider proposing that this statutory ground is not a rebuttable presumption.

This would mean that it is never necessary to decide that a person does not possess decision-making authority. Whilst this initially appears to be a radical shift, it would simply mean that a person always possesses the power to make decisions, however some people may require support or representation **to give effect** to their decision-making power.

This concept eliminates the process of removing a person's decision-making power and placing it with a substitute authority. Thus, not denying people with disability the opportunity to have as much control as possible, with the right support, over their own lives.

This would also give effect to the guiding principle of the *Convention on the Rights of Persons with Disability (CRPD)*, that all people with disability are entitled to autonomy, independence and the freedom to make their own choices.

Recommendation 2

Proposals 5.1-5.24 Representation Orders

Family Advocacy recommend The Commission considers that representation orders be made to assist a person to merely 'articulate' or 'represent' their decision made with the support of their supporter(s).

This process would create a fully supportive decision-making model and completely eradicate substitute decision-making processes from the NSW legislative framework.

Many academics believe that the risk of exploitation and abuse that people with disability face can be attributed to the minimal value that we as a society

place on their roles in our communities.¹ The most fundamental role that some people with disability are prevented from playing, through the substitute decision-making model, is that of decision-maker in their own lives.

By shifting the role of a representative to 'representing' a person's decision(s) rather than 'making' their decision(s), the person with disability can be presumed as **maintaining possession of their decision-making power**.

Discussion

With the supported decision-making model, the two roles of supporter and representative could work in tandem. A person who does not have the skills to make a decision unassisted could enlist, or be appointed with, a supporter or supporters to assist them to make a decision. If the person also does not have the skills to communicate this decision, a representative could represent their decision on their behalf.

This would remove the concept of substitute decision-making all together, whilst simultaneously achieving the same end goal. Therefore, there would only be a level of support required to assist a person with limited decision-making ability to make and articulate a decision. There would be no need to create categories where some people are eligible for supported decision-making, and others must have their decision-making power removed from them and placed with a substitute authority.

¹ Raymond Lemay 'Social Role Valorization Theory and the Principle of Normalization' *Encyclopaedia of Disability and Rehabilitation* (pp. 515-521). Ed. A. E. Dell Orto and R. P. Marinelli. New York 1995; Wolf Wolfensberger 'The Origin and Nature of our Institutional Models' *Changing Patterns in Residential Services for the Mentally Retarded*. Ed. R. Kugel and Wolf Wolfensberger. Washington D.C. 1969.

The concept that people should be allowed different rights or freedoms according to the effect their disability has on their decision-making ability is possibly in contravention with the principles of the *CRPD* and the *Disability Discrimination Act (DDA)*.

The *CRPD* requires that **all** people with disability are entitled to individual autonomy. There should not be a scale where the right to exercise autonomy and freedom to make decisions is partially more available to one person than it is to another person. There should only be a level of support that may need to be increased or decreased to appropriately give effect to a person's decision-making power.

The *DDA* prohibits discrimination on the basis of disability. Allowing some people to exercise their decision-making power with the support of a supporter, and requiring others to have their decisions made by a representative instead, could be viewed as discriminatory under the *DDA*.

Concerns about safeguarding from abuse with sole use of the supported decision-making model

Other submissions have raised the concern that it would be impractical to safeguard people from abuse and exploitation without substitute decision-making being required for people deemed to have little or no decision-making capacity.

There is a great body of evidence from around the world that concludes that vulnerable people are safest when they have a strong network of supporters. Particularly when their supporters know them well and are able to assist them to develop their capacity to make decisions through having intimate knowledge of them as a person. This informal support should be strongly encouraged as it is people, not systems and services, that can succeed in upholding best interests of the person in the long-term.

It is no secret that abuse and exploitation is often aimed toward vulnerable people who possess little power to prevent such doings. Providing people with disability with the means to maintain their decision-making power would be the greatest safeguarding measure from abuse and exploitation.

Family Advocacy welcome a meeting should the Commission wish to discuss this submission in greater detail.