



**Mental Health Commission**  
of New South Wales

## Review of the *Guardianship Act 1987* (NSW)

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***Submission to the NSW Law Reform Commission on the  
Draft Proposals***

February 2018

## The Mental Health Commission of NSW

The Mental Health Commission of NSW is an independent statutory agency responsible for monitoring, reviewing and improving mental health services and the mental health and wellbeing of the people of NSW. It works with government agencies and the community to secure better mental health and wellbeing for everyone, to prevent mental illness, and to ensure the availability of appropriate support in or close to home when people are unwell or at risk of becoming unwell.

The Commission promotes policies and practices that recognise the autonomy of people who experience mental illness and support their recovery, emphasising their personal and social needs and preferences as well as broader health concerns.

The Commission is guided in all of its work by the lived experience of people with a mental illness.

Throughout this submission the term ‘disability’ is used broadly to encompass people who experience psychosocial disability.

Elements of the Law Reform Commission’s draft proposals are of particular interest to the Mental Health Commission of NSW. With reference to the draft proposals, and reiterating some comments made in its previous submissions, the Mental Health Commission of NSW submits as below.

### A new framework

The Mental Health Commission of NSW supports the proposal that the *Guardianship Act*<sup>1</sup> be replaced by the *Assisted Decision-Making Act*, which will provide for supported decision-making and substitute decision-making, and which is referred to throughout the proposals and this submission as ‘the new Act’.

The focus of the current *Guardianship Act* is on the medical model of disability, rather than the contemporary understanding of disability – the social model, which recognises that disability stems from interaction with the environment and so places the onus on society to adapt the environment to accommodate disability. This cultural shift is represented in the *Convention on the Rights of Persons with Disabilities* (UNCRPD),<sup>2</sup> the purpose of which is to

“...promote, protect and ensure the full and equal enjoyment of all human rights and freedoms by all persons with disabilities, and promote respect for their inherent dignity.”<sup>3</sup>

The new Act’s proposed terminology and general principles means that the emphasis is on acknowledging that everyone should be able to live a thriving and contributing life, and have the autonomy to make their own decisions.

The proposal for the formalisation of supported decision-making arrangements gives statutory recognition to the role of a supporter, and means that people will be able to utilise their enhanced capacity to make their own decisions.

The requirement for anyone exercising functions under the new Act to give effect to the person’s will and preferences wherever possible reflects the shift to recognition of the inherent dignity and worth of people with disability.

Advance care directives have traditionally been used in end of life treatment decisions, and are increasingly being used by people who experience episodic mental illness. The utilisation of advance care

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<sup>1</sup> *Guardianship Act 1987* (NSW).

<sup>2</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Article 1.

directives when determining a person's will and preferences gives recognition to the individual as the expert in their own life and recovery, and is particularly advantageous for those whom experience episodic mental illness.

People with disability regularly face stigma and discrimination, including the assumption that they lack the capacity to make decisions for themselves. The proposed legislative shift from the use of the terms 'disability' and 'capacity' to 'decision-making ability' assists in reducing the stigma, potential for discrimination and misconceived assumptions.

## Personal support agreements

The proposed personal support agreement provisions evidence a recognition of the cultural shift for those working with, and caring for, people with disability, as well as the individuals. For some people, expressing their wish can be daunting, and they benefit from support to do so. A personal support agreement will be an important aspect of the proposed flexible model, and recognises that a one-size-fits-all model is no longer considered appropriate. The proposal strikes a balance between traditional informal and formal arrangements, while giving a supporter the formal status necessary to for example, obtain confidential information or communicate a person's decisions.

The introduction and use of personal support agreements reflects the general principles of the UNCRPD, and recognise that each person has the right to autonomy, and to the giving of effect to their will and preferences.

## Tribunal support orders

Similar to personal support agreements, the proposed option of tribunal support orders will establish, in legislation, the notion of a person being assisted to make a decision. This is a welcome move away from the current *Guardianship Act*, which is a tool for appointing a substitute decision-maker only. The proposal makes available a full range of options, and will be in accordance with the approach of continuum of support if used in conjunction with, for example, advance care directives.

With the implementation of the proposed personal support agreements and tribunal support orders, there will be a requirement for training to be provided to individuals in need of support, supporters and organisations that provide services and support people with disability. This is part of a required cultural shift to recognise and respect supported decision making in practice. This cultural shift encourages society to be more responsive to the needs of people with disability, and is consistent with the work already underway through the *Disability Inclusion Act 2014* (NSW) and Tier Two of the National Disability Insurance Scheme (NDIS).

In formally recognising supported decision making, there is a need for additional provisions relating to the powers, functions and duties and responsibilities of supporters. The Commission endorses the framework of the Australian Law Reform Commission (ALRC),<sup>4</sup> which while not replicated, are reflected in the proposed responsibilities of representatives and responsibilities of supporters.

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<sup>4</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, report 124 (2014), rec 4-4 and 4-5.

## Enduring representation agreements

The proposal for a single regime of enduring representation agreements is reasonable. Importantly, it will work well as long as it maintains the overarching principle that representatives must, where possible, give effect to the represented person's will and preferences.

Any use of an enduring representation agreement must also retain the approach that decision-making ability can vary depending on the circumstances.

## Representation orders

Similar to enduring representation agreements, the proposal for a single regime of representation orders is reasonable. It is the Commission's firm view that representation orders are used as a last resort, and that this be legislated, as proposed. As with enduring representation agreements, representatives appointed under a representation order must act to give effect to the person's will and preferences, where possible. When making a decision under a representation order, the utilisation of an advance care directive would again be beneficial.

Any use of an enduring representation agreement or a representation order should first presume decision-making ability, and should recognise that decision-making ability sits along a continuum and can vary from time to time, or from decision to decision. This is particularly the case for people with psychosocial disability.

The making and use of representation orders must demonstrate an understanding that decision-making ability can be different at different times. Any supported decision-making or substitute decision-making should be recovery oriented.

## Healthcare decisions

The Commission supports the proposal of an explicit recognition of advance care directives. These are of particular aid where a person experiences fluctuating decision-making ability, and can be used not only for medical decisions but also for other decisions where a person requires support or a decision to be made by a substitute decision maker. Importantly, the proposal notes that a valid advance health care directive cannot be overridden. This helps to abate the Commission's concerns that people are often not heard when it comes to end of life decisions, as it is assumed that the expression of their decision is a result of their mental illness which has, in the past, assumed reduced decision-making capacity. This stigma and discrimination can be overcome by an advance care directive, and legislative recognition of their significance and meaning.

## Restrictive practices

The draft proposals indicate that the new Act will provide for assisted decision-making arrangements that can include decision-making about the use of restrictive practices. The Commission welcomes the assertion that when making a decision about restrictive practices, a decision-maker must give consideration to a person's will and preferences. However, the practicalities of this are unclear, as it seems unlikely that a person would willingly consent to being subjected to restrictive practices. This is particularly so when considering the use of practices such as seclusion or restraint, which the Commission maintains are outdated and harmful.

The Commission welcomes the proposal that the NSW Government monitor the implementation of the NDIS restrictive practices regulatory scheme with a view to applying comparable regulation in NSW, and that there should be an overall aim for the reduction of restrictive practices.

As with all of the proposals, any restrictive practices proposal must recognise that a person's decision-making ability can be fluid, particularly for people with psychosocial disability. At times, they may need some extra support to assist them to recover and continue to live in society. This extra support should always be implemented before any intervention in the form of restrictive practices. At the core of any support must remain the recognition of the person's inherent dignity and worth.

### **Advocacy and investigative functions**

The Commission welcomes the proposed establishment of a new entity, the Public Advocate. Systemic advocacy will ensure that the assisted decision-making regime changes alongside societal shifts in relation to disability. Systemic advocacy will also allow change to be brought about on a holistic level, rather than a case-by-case basis. A Public Advocate should also have relevant powers, such as the draft proposal for the power to monitor and investigate, and the provision of search and entry powers, where necessary.

### **Interaction with mental health legislation**

The proposals seek to clarify the relationship between the new Act, the *Mental Health Act 2007* (NSW) and the *Mental Health (Forensic Provisions) Act 1990* (NSW). The Commission calls for the enabling of further consistency across the Acts. For example, the *Mental Health (Forensic Provisions) Act* uses the term 'disability', and the *Mental Health Act* uses the terms 'disability' and 'capacity'. Consistent language and definitions across the regimes, such as the proposed 'decision-making ability', will assist in bringing clarity and removing uncertainty. Also, consideration should be given to ensuring that the Mental Health Review Tribunal can concern itself with all decisions that need to be referred to a tribunal. This will ensure continuity of care, and simplify the process for the person, their carer and family.



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