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**NSW Law Reform Commission**
**Submission Questions 3-5: Review Guardianship Act 1987 (NSW)**

The Mental Health Coordinating Council (MHCC) is the peak body representing mental health community managed organisations (CMOs) in NSW. We provided a preliminary submission in March 2016 and thank the NSW Law Reform Commission (NSWLRC) for inviting us to comment on this second review made public on 25 August 2016.

MHCC provide comment against the questions asked as follows:

**Question 3.1: Elaboration of decision-making capacity**

(1) Should the *Guardianship Act* provide further detail to explain what is involved in having, or not having, decision-making capacity?

**Yes. MHCC propose that both having and not having, decision-making capacity should be clearly defined and articulated as specifically meant under the Act.**

(2) If the *Guardianship Act* were to provide further detail to explain what is involved in having, or not having, decision-making capacity, how should this be done?

**We suggest that the example provided under the *Mental Capacity Act 2005* (UK) is appropriate combined with elements suggested by the Queensland Law Reform Commission as follows:**

**Capacity, for a person for a matter, means the person is capable of:**

- **understanding the nature and effect of decisions about the matter; and**
- **freely and voluntarily making decisions about the matter; and**
- **communicating the decisions in some way.[1]**

**A person is regarded as being unable to make their own decision if they cannot:**

- **understand the relevant information (including the consequences of making or**
- **failing to make the decision)**
- **retain the information**
- **use the information or weigh it as part of the decision-making process, or**
- **communicate the decision in some way.[2]**

[1] Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Report 67 (2010) Rec 7-8, 7-9. See also Rec 8-1–8-7; 7.210; Rec 7-16.
[2] *Mental Capacity Act 2005* (UK) s 3.

**MHCC feel that this definition of capacity [3] achieves an appropriate balance between maximising a person's decision-making autonomy and safeguarding them from neglect, abuse and exploitation.**

**Question 3.2: Disability and decision-making capacity**
How, if at all, should a person's disability be linked to the question of his or her decision-making capacity?

**We do not agree that a person's disability should be linked to their decision-making capacity. MHCC believe that it is discriminatory to link disability to capacity, as currently described in the Act. We agree with the statement that "this violates the prohibition on discrimination and the right to equal recognition before the law found within the UN Convention".[4] It is vital that legislation not infer the commonly held belief that a person is incapable by virtue of the fact that they live with disability.[5]**

**However, we propose that by broadening how capacity is viewed, might unintentionally lead to inclusion of people, seen as incapable of managing their personal life for reasons of, for example: use of substances, gambling, lifestyle choice, eccentricity, unconventionality or personality disorders. The State of Victoria's concerns about potential subjectivity are valid. However, we believe that an "objective safeguard" [6] would be possible if the recommendations proposed by the NSW Disability Network Forum[7] are considered. They are that the language of disability should be avoided and a focus on appropriately determining decision-making capacity pursued.**

**Question 3.3: Defining disability**
If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?

**We do not agree that it should be retained. We particularly draw attention to the link that is drawn between disability and capacity (s 3(2)(c))[8] which infers that by being defined as a person who is mentally ill within the meaning of the *Mental Health Act 2007* (NSW) and therefore being defined as having a disability, leads to the conclusion that the person lacks capacity.**

**We agree with the statement in (3.33, p.21) that: "it is now widely recognised that a person's decision-making capacity can fluctuate and can differ depending on the subject matter. For example, the UN Committee on the Rights of Persons with Disabilities has observed:**

[3] Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Report 67 (2010) [7.132].
[4] NSW, Legislative Council Standing Committee on Social Issues, Substitute Decision-Making for People Lacking Capacity, Report 43 (2010) [5.129]–[5.132].
[5] NSW, Legislative Council Standing Committee on Social Issues, Substitute Decision-Making for People Lacking Capacity, Report 43 (2010) [4.52]–[4.57], Rec 1.
[6] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) Rec 22.
[7] NSW Disability Network Forum, Preliminary submission PGA5, 6; NSW Council for Intellectual Disability, Preliminary submission PGA18, 6; Confidential preliminary submission PGA33, 2;
Intellectual Disability Rights Service, Preliminary submission PGA44, 5; NSW Trustee and Guardian, Preliminary submission PGA50, 10; Australian Lawyers Alliance, Preliminary
submission PGA52, 6; BEING, Preliminary submission PGA22, 4; Alzheimer's Australia NSW, Preliminary submission PGA14, 5; Institute of Legal Executives, Preliminary submission PGA35, 4.
[8] Guardianship and Administration Act 1986 (Vic) s 3(2)

> **"Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors". [9]**

**Question 3.4: Acknowledging variations in capacity**

(1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?

**A person's decision making capacity can vary according to the circumstances. We agree with the Standing Committee on Social Issues recommendation that a definition of capacity should acknowledge the fact that "a person's decision-making capacity varies from domain to domain and from time to time".[10] It is also important that decision-making capacity is assessed based on different levels of cognitive ability required for different decision-making needs, and that the law must be flexible enough to accommodate individual circumstances and experiences.[11]**

(2) How should such acknowledgements be made?

**When assessing a person's capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.[12]**

(3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?

**We favour the assessment guidelines proposed by the Australian Law Reform Commission (ALRC) recommending that the following principles must be considered when assessing the decision-making support that a person may need:**

- **(e) A person's decision-making ability will depend on the kind of decisions to be made.**
- **(f) A person's decision-making ability may evolve or fluctuate over time. [13]**

(3) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

**Our preference is for a general approach to assessing capacity, as demonstrated in Irish law:**

> **"A person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time".[14]**

**Question 3.5: Should the definitions of decision-making capacity be consistent?**

(1) Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements?

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[9] United Nations, Committee on the Rights of Persons with Disabilities, Convention on the Rights of Persons with Disabilities, General Comment No 1, CRPD/C/GC/1 (2014) [13].

[10] NSW, Legislative Council Standing Committee on Social Issues, Substitute Decision-Making for People Lacking Capacity, Report 43 (2010) Rec 1.

[11] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) [7.4], [7.6].

[12] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) Rec 27.

[13] Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Report 124 (2014) Rec 3-2(2).

[14] Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 3(1).

**We understand that the different definitions have arisen as a consequence of the separate development of legislation across the various areas where lack of capacity must be determined. Therefore we agree that a consistent set of definitions should apply across the alternative decision-making arrangements.**

(2) If the definitions of decision-making capacity were to be aligned, how could this be achieved?
**See above**

**Question 3.6: Statutory presumption of capacity**
Should there be a statutory presumption of capacity?

**We agree that the starting point for an assessment of decision-making capacity is the presumption of capacity, and "that a person should be presumed to have decision-making capacity unless proved otherwise".[15] However, we also agree with the ALRC that emphasis should be placed on the equal right of people to make decisions, "consistent with the social model of disability which seeks to remove barriers to persons with disabilities participating in society and living independently in the community".[16] We see no reason why the two concepts can't be jointly expressed.**

**Question 3.7: What should not lead to a finding that a person lacks capacity**
(1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?

**Yes. We propose that broad description be made rather than list every conceivable reason that might be considered to indicate that a person lacks capacity. This will always lead to confusion as to what may have been omitted for mention.**

(2) If capacity assessment principles were to include such statements, how should they be expressed?

**We propose and add to the description (in 3.58 p.26) that certain behaviours, conditions and outcomes will not by themselves lead to a conclusion that a person lacks capacity and that these are:**

- **the person's age, appearance, or any aspect of behaviour and beliefs**
- **that the person is known to have a disability, illness or other medical condition (whether physical or mental)**
- **the fact that people may think the person's decisions are unwise, and**
- **the person's methods of communication**

**We also like the VLRC's proposed capacity assessment principle that "a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support". [17]**

[15] Guardianship and Administration Act 1990 (WA) s 4(3); Guardianship and Administration Act 2000 (Qld) sch 1 cl 1; Mental Capacity Act 2005 (UK) s 1(2); Adult Guardianship and Trusteeship Act 2008 (Alberta) s 2(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(2).
[16] NSW, Legislative Council Standing Committee on Social Issues, Substitute Decision-Making for People Lacking Capacity, Report 43 (2010) [5.32], Rec 2.
[17] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) Rec 27(e).

**A provision should also exist that an order is not to be made, or a person is not to be treated as unable to make a decision, solely on the basis that the person makes unwise or imprudent decisions.[18]**

**Question 3.8: The relevance of support and assistance to assessing capacity**

(1) Should the availability of appropriate support and assistance be relevant to assessing capacity?

**We agree with the principle that a person should not be considered unable to make a decision unless "all practicable steps" have been taken to help him or her to make that decision, but without success.[19] However, this assumes that such support is readily available. Despite the absence of widespread access to independent decision-making support, it is important to reach for best-practice principles from a human rights perspective.**

(2) If the availability of such support and assistance were to be relevant, how should this be reflected in the law?

**Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence. We propose that the National Decision-Making Principles[20] should be embedded in the legislation to ensure that:**

- **supported decision-making is encouraged;**
- **representative decision-makers are appointed only as a last resort; and**
- **the will, preferences and rights of person's direct decisions that affect their lives.**

**The National Decision-Making Principles as defined by the ALRC, should be defined in the Act as follows:**

- **Principle 1: The equal right to make decisions**
  **All adults have an equal right to make decisions that affect their lives and to have those decisions respected.**
- **Principle 2: Support**
  **Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.**
- **Principle 3: Will, preferences and rights**
  **The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.**
- **Principle 4: Safeguards**
  **Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.**

**Question 3.9: Professional assistance in assessing capacity**

(1) Should special provision be made in NSW law for professional assistance to be available for those who must assess a person's decision-making capacity?

[18] Adult Guardianship and Trusteeship Act 2008 (Alberta) s 46(6)(a); Mental Capacity Act 2005 (UK) s 1(4); Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(4).

[19] Mental Capacity Act 2005 (UK) s 1(3); Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(3).

[20] ALRC National Decision-Making Principles. Available: https://www.alrc.gov.au/publications/national-decision-making-principles

**Availability of trained and certified practitioners to undertake capacity assessment would be desirable as is available in several Canadian jurisdictions.[21] In the absence of this, it is reasonable that the Tribunal have access to a variety of professionals who can provide a range of neuropsych, cognitive and other assessments relevant to the level and type of capacity to be assessed for a particular decision.**

(2) How should such a provision be framed?

**We believe the general provision as it exists is appropriate. The Tribunal (Guardianship Division NCAT) in NSW already has general powers, to inform itself on any matter in such manner as it thinks fit, subject to the rules of 'natural justice'. This includes seeking evidence from professionals who could provide advice about a person's capacity to make the required decisions.**

**Question 3.10: Any other issues?**

**Whilst we agree that there needs to be a consistent approach to the assessment of capacity in the context of representative decision-making (promoting individual autonomy as circumstances require) the process should not become too proscriptive and therefore run the risk of leading to for example, harm or neglect. At the end of the day the legislation must have an underpinning approach that provides the key framework and principles of best practice.[22] In the circumstances where assessment is of a person living with a mental health condition, the approach must be recovery oriented and trauma-informed.**

**4. Other preconditions that must be satisfied**

**Question 4.1: The need for an order**

(1) Should there be a precondition before an order is made that the Tribunal be satisfied that the person is "in need" of an order?

**We propose that both considerations outlined (in 4.4 and 4.6, p.32) could be amalgamated to provide both satisfaction of precondition that there is a need for an order, as well as consideration as to whether needs might be met by less restrictive means.**

(2) If such a precondition were required, how should it be expressed?

**The Tribunal must be satisfied that the person "is in need of a guardian" before it can make a guardianship order.[23] And that before it can make a financial management order, the Tribunal must be satisfied that "there is a need for another person to manage those affairs on the person's behalf".[24] In both areas, consideration must be given as to whether the person's needs could be met by other means that are less restrictive of the person's freedom of decision and action, or their rights and personal autonomy.[25]**

**Question 4.2: A 'best interests precondition'**

(1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person's "best interests"?

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[21] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012) Rec 29.

[22] Information, Mental Health Capacity Act 2005, United Kingdom, Available: http://www.mentalhealth.org.uk/help-information/mental-health-a-z/M/mental-capacity-act-2005/

[23] Guardianship Act 1987 (NSW) s 14(1).

[24] Guardianship Act 1987 (NSW) s 25G (b).

[25] Guardianship and Administration Act 1986 (Vic) s 4(2)(a), s 22(2)(a), s 46(2)(a); Guardianship and Administration Act 1995 (Tas) s 6(a), s 20(2); Guardianship and Administration Act 1990 (WA) s 4(4); Guardianship and Administration Act 1993 (SA) s 5(d). See also Mental Capacity Act 2005 (UK) s 1(6); Guardianship and Administration Bill 2014 (Vic) cl 7(a)(i).

**Go to (3)**

(2) If such a precondition were required, how should it be expressed?

**Go to (3)**

(3)What other precondition could be adopted in place of the "best interests" standard?

**We understand the practical difficulties arising from that the concept of 'will and preference'. Nevertheless, we support the shift which the ALRC took to consider "how maximising individual autonomy and independence" can be modelled in Commonwealth laws and legal frameworks. The emphasis on the 'will and preferences' of a person who may require support in making decisions is at the heart of the paradigm shift away from 'best interests' standards. We agree with this as a general principle as it reflects the framing principles of dignity, equality, autonomy, inclusion and participation.[26]**

**Article 12(4) of the CRPD uses the formulation 'rights, will and preferences'. The ALRC formulation follows the spectrum of decision-making based on the will and preferences of a person; through to a human rights focus in circumstances where the will and preferences of a person cannot be determined. The inclusion of 'rights' is the crucial safeguard. In cases where it is not possible to determine the will and preferences of the person, the default position must be to consider the human rights relevant to the situation as the guide for the decision to be made.**

**Question 4.3: Should the preconditions be more closely aligned?**

(1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?

**Requirements differ for guardianship and financial management orders in NSW. We understand that these requirements should be tailored to suit the particular types of orders and arrangements, since the nature of these orders and arrangements do differ in some respects. On the other hand, the similarities between certain types of orders and arrangements suggest a case for aligning their preconditions more closely.**

(2) If so, in relation to what orders or appointments and in what way?

**We propose that the Tribunal should be able to make a single order that covers personal matters as well as financial matters. In NSW, separate orders must be made even if the same person is appointed as both a guardian and a financial manager. We agree that aligning the preconditions for guardianship and financial orders (where one person is responsible for both) in NSW law could potentially make it easier for similar "single orders" to be made. [27]**

**Question 4.4: Any other issues?**

Are there any other issues you want to raise about the preconditions for alternative decision-making arrangements?

**We propose that consideration be paid to advance directives with particular reference to medical treatment in the legislation. Advance Directives are important directions to inform guardians' decisions based on 'will and preference'.**

***5. Other factors that should be taken into account***

**Question 5.1: What factors should be taken into account?**

[26] Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124), National Decision-Making Principles (3). Available https://www.alrc.gov.au/publications/will-preferences-and-rights

[27] Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 38(2)(b).

(1) What considerations should the Tribunal take into account when making a decision in relation to: (a) a guardianship order and (b) a financial management order?

**In both a) & b) above the person's present and/or past views, wishes, and/or beliefs and values (where available and ascertainable)[28] should be included. Likewise the wishes of the person's family members in addition to [29] the views of a spouse should be taken into account [30]**
**And the adequacy of existing informal arrangements (and the desirability of not disturbing them).[31]**

(2) Should they be the same for all orders?

(3) Are there any other issues you want to raise about the factors to be taken into account when making an order?

**MHCC made a number of suggestions in our earlier submission and have nothing else to add at this point in time.**

**MHCC thank the NSWLRC for undertaking this review and we express our willingness to be consulted further regarding any matters raised in this submission.**

**Please feel free to contact [redacted] to discuss the contents of this paper or the review in general.**

**Yours sincerely,**

**Jenna Bateman**
**Chief Executive Officer**
[redacted]

[28] Guardianship and Administration Act 1986 (Vic) s 4(2)(c), s 22(2)(ab); Guardianship and Administration Act 1995 (Tas) s 6(c); Guardianship and Administration Act 1993 (SA) s 5(b); Guardianship and Administration Act 1990 (WA) s 4(7); Guardianship of Adults Act (NT) s 4(3)(a); Guardianship and Management of Property Act 1991 (ACT) s 4(2)(a)–(c); Mental Capacity Act 2005 (UK) s 4(6); Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(7)(b) and (c). See also Guardianship and Administration Bill 2014 (Vic) cl 29(a).
[29] Guardianship and Administration Act 1986 (Vic) s 22(2)(b).
[30] Guardianship Act 1987 (NSW) s 14(2).
[31] Guardianship and Administration Act 1993 (SA) s 5(c). See also Guardianship and Administration Bill 2014 (Vic) cl 29(d).