



Aged & Community
Services NSW & ACT

NSW Law Reform Commission
Review of the Guardianship Act 1987
**Question Paper 1: Preconditions for alternative decision-making
arrangements**

Submission

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ABOUT AGED AND COMMUNITY SERVICES NSW & ACT

Aged & Community Services NSW & ACT (ACS) is the leading peak organisation representing not-for-profit, church and charitable providers of services in retirement living, community aged care and residential aged care in NSW and the ACT.

ACS represents around 300 organisations, providing over 2,000 services to more than 100,000 people.

ACS members range in size from large multisite organisations to small rural and regional stand-alone providers.

ACS members are typically registered charities with not-for profit status, in recognition of the services provided to aged and frail people unable to afford fees and charges or unable to access any other form of support due to their levels of disadvantage. Not-for-profit organisations across NSW and the ACT provide around 65% of all aged care beds and around 89% of community packages.

The views expressed in this submission are those of our members, management and staff.

SUBMISSION:

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

- (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?

Any definitions of capacity should commence with a presumption of capacity.

ACS supports an approach similar to that taken in England and Wales ie

- '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'.¹*

ACS members see many situations of elder abuse where older people are subject to undue influence to make decisions which benefit others as opposed to themselves. To counter this, ACS believes it is important to build in some safeguard such as that

¹. *Mental Capacity Act 2005 (UK) s 3.*

in the Queensland legislation where it states that the person must be 'capable of ... 'freely and voluntarily making decisions about the matter' .²

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?

ACS supports the view that disability per se should not be a determinant of capacity. Decision making capacity may fluctuate and vary depending on the decision that needs to be made. Focussing on a person's disability risks a more static and accurate view of their capacity being made.

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?

ACS does not support retaining the link between disability and capacity.

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?
- (2) How should such acknowledgements be made?
- (3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?
- (3) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

ACS supports the Guardianship legislation acknowledging that capacity can vary from time to time and decision to decision. It therefore supports the concept of diminished capacity rather than a view that a person has no capacity.

ACS supports the provision contained in the law in Ireland:

"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".³

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

². Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) Rec 7-16.

³. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(1).

ACS supports the definitions of decision-making capacity being consistent. As ACS does not support a determination re capacity being dependant on a link to disability, removing disability from the definitions is suggested.

Question 3.6: Statutory presumption of capacity

Should there be a statutory presumption of capacity?

Yes.

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

ACS is not of the view that definitions of capacity need to list what should not lead to a finding that a person lacks capacity. If a presumption of capacity is enshrined in the legislation and an approach is taken similar to England and Wales as detailed in our response to question 3.1 (2), then this would be unnecessary.

However, ACS supports the retention of principles in the legislation which guide the work of the Tribunal and anyone operating under the Act. It would be appropriate to include in the principles a requirement that the person's appearance, behaviour and beliefs; the fact that people may think the person's decisions are unwise, and the person's methods of communication⁴ are not to be taken into account in determining capacity.

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

ACS agrees that the availability of appropriate support and assistance is relevant to assessing capacity. Any form of substitute or supported decision making determination by the Tribunal must be as a last resort and if a person were to be able to make a decision with assistance this should be accommodated within the legislation.

⁴ NSW Law Reform Commission Review of Guardianship Act 1987, Question Paper 1: Preconditions for alternative decision-making arrangements

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?
- (2) How should such a provision be framed?

Obtaining the necessary assistance to gather evidence to support a decision about a person's decision-making capacity is a significant issue and can limit a person receiving the support they need in a timely manner.

The Questions paper says 'in NSW, the Tribunal has a general power to inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.'⁵ This would include seeking evidence from professionals who could provide advice about a person's capacity to make the required decisions.⁶ In reality the Tribunal usually relies on evidence provided by the applicant or professionals already involved with the person. It can be difficult for an applicant to arrange for appropriate assessments to be undertaken or for the reports provided by involved professionals to provide sufficient information for the Tribunal to rely on in making a decision. The availability of trained professional assistance to assist with assessing capacity would be supported.

Question 3.10: Any other issues?

Are there any other issues you want to raise about decision-making capacity?

No

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

An order should only ever be made as a last resort. ACS supports the move of other States and Territories to express the consideration of whether there is a 'need' in the more positive way as a 'consideration of 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'.⁷

⁵. *Civil and Administrative Tribunal Act 2013 (NSW) s 38(2). See also Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 98(1)(c).*

⁶ *NSW Law Reform Commission Review of Guardianship Act 1987, Question Paper 1: Preconditions for alternative decision-making arrangements*

⁷. *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).*

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"?
- (2) If such a precondition were required, how should it be expressed?
- (3) What other precondition could be adopted in place of the "best interests" standard?

ACS recognises that a concept of 'best interests' may be considered paternalistic and supports the move to decisions being made in accordance with the person's own "will and preference"⁸ or their previously expressed views wherever possible. However, we caution the complete removal of the concept of 'best interests' from the legislation and suggest a balance between the two be retained within the legislation.

Question 4.3: Should the preconditions be more closely aligned?

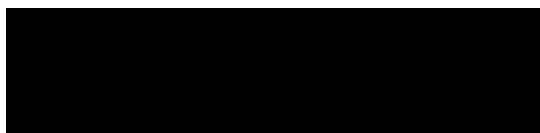
- (1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?
- (2) If so, in relation to what orders or appointments and in what way?

ACS supports the alignment of financial management and guardianship orders. In order for these instruments and appointees to work well together aligning them into a single instrument is supported.

Question 4.4: Any other issues?

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

No.



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⁸. NSW Disability Network Forum, *Preliminary submission PGA5*, 1; Senior Rights Service, *Preliminary submission PGA7*, 7; NSW Ombudsman, *Preliminary submission PGA41*, 4–5.