Mental Health Commission of New South Wales

Review of the *Guardianship Act 1987 (NSW)*

Submission to the NSW Law Reform Commission on Question Paper Six: Remaining Issues by the Mental Health Commission of New South Wales

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Submission to the NSW Law Reform Commission's review of the *Guardianship Act 1987 (NSW) Question Paper Six: Remaining issues*

http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Question-Papers/QP6.pdf

The Mental Health Commission of NSW

The Mental Health Commission of New South Wales (NSW) is an independent statutory agency responsible for monitoring, reviewing and improving the mental health system and the mental health and wellbeing of the people of NSW. The Commission works with government and the community to achieve this goal.

In all its work, the Commission is guided by the lived experience of people with mental illness, and their families and carers. 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.

The Commission has provided submissions on the background paper and question papers one, two, three, four and five. The current submission builds on the arguments put forward in those papers.

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

Mental Health Legislation

The Commission has raised elsewhere in its submissions the need for consistency across the Guardianship Act 1987 (NSW) (the Act), the Mental Health Act 2007 (NSW) and the Mental Health (Forensic Provisions) Act 1990 (NSW) (Forensic Provisions Act).[1] Across all decisions regarding financial management, guardianship and consent to medical and dental treatment the same legislative provisions should apply regardless of which regime the person is under. The Commission submits that the provisions of the Act should be applied in the same way to people who are under the Mental Health Act or the Forensic Provisions Act as it does to people under the Act. However, for people who are under the Mental Health Act or the Forensic Provisions Act, the decisions that need to be referred to a tribunal should be taken before the Mental Health Review Tribunal rather than the Guardianship Tribunal. This would ensure continuity of care, it would simplify the process for the person their carer and family as there would be only one tribunal to deal with and it would cut down duplication of effort. Importantly, this would also enable the MHRT to undertake a holistic review of the person's circumstances rather artificially separating the various aspects of an individual's life.

A further issue that arises, and that has not be canvassed elsewhere in these submissions is the lack of powers by the MHRT to request a priority guardianship decision or to make a guardianship order. One example of difficulties faced by people who fall between Guardianship provisions and the Mental Health Act is where an elderly person is scheduled in a mental health facility under the Mental Health Act and they could be released into an aged care facility, except the facility will not take them without a guardianship order. The MHRT has no power to issue a guardianship order nor to request a fast-track decision by the Guardianship Tribunal.

[1] Mental Health Commission of NSW (2016), *Review of the Guardianship Act 1987 (NSW) Preliminary Submission to the NSW Law Reform Commission*, p 3, available http://nswmentalhealthcommission.com.au/publications/review-of-the-guardianship-act-1987-nsw and Mental Health Commission of NSW (2017), *Submission to the NSW Law Reform Commission on Question Paper Five Medical and dental treatment and restrictive practices*, pp 6-8

Objectives, principles and language

Objectives and principles

The inclusion of objectives in the Act would be a helpful way to convey the intention of Parliament to meet the requirements of the United Nations Convention on the Rights of Persons with Disabilities. The *Disability Inclusion Act 2014 (NSW)* provides a good model. Providing this guidance on the interpretation of the Act would strengthen support in the application of the general principles.

In Question Paper One, the Commission argued for an expanded statement of general principles to better reflect contemporary standards regarding guardianship law.[2] The proposed changes would allow a more flexible approach to decision making and support for decision making.

In Question Paper Six, it is suggested that the general principles found in s 4 of the Act are added to by various other sections, which provide general principles for certain decision making situations. The example given in the paper is s 14 (2) which states:

> *In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to:*
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> *(a) the views (if any) of:*
> *(i) the person, and*
> *(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and*
> *(iii) the person, if any, who has care of the person,*
> *(b) the importance of preserving the person's existing family relationships,*
> *(c) the importance of preserving the person's particular cultural and linguistic environments, and*
> *(d) the practicability of services being provided to the person without the need for the making of such an order.*

It is entirely appropriate for the Act to provide specific guidance in relation to how powers conferred by the Act should be enacted as s 14 (2) does. This serves a different purpose from a statement of general principles. The general principles of an act guide the application of its provisions. Whereas sections such as s14 (2) require active consideration of the relevant matters as part of exercising powers under the act. It operates as an important check and balance when considering whether the take away a person's decision making power. Nonetheless, the principles contained in s 14 (2) can provide a good starting point for stronger general principles.

The principle of the Act must reflect recognition and respect for the cultural and spiritual beliefs and practices by the individual who identifies themselves as Aboriginal or Torres Strait Islander. To ensure this is adequately captured the NSW Aboriginal community should be closely consulted about the wording.

[2] Mental Health Commission of NSW (2016), *Submission to the NSW Law Reform Commission on Question Paper One Preconditions for alternative decision making arrangements,* p 5, available http://nswmentalhealthcommission.com.au/sites/default/files/uploads/Submission%20-%20Review%20of%20Guardianship%20Act%20Paper%20One%20-%20Oct%202016.pdf

The general principles should require consultation with significant people in the person's life and, if possible, an Aboriginal or Torres Strait Islander Tribunal member should be made available to hear the application. In this respect, the Commission notes the recent amendments to the Western Australian Mental Health Act, which requires that assessment or examination of a person of Aboriginal or Torres Strait Islander descent is conducted in collaboration with Aboriginal or Torres Strait Islander mental health workers and significant members of the person's community.[3]

The Commission notes the comments in the Question Paper that guardianship and related concepts may be incompatible with Aboriginal practices and customs.[4] Where a person does not have decision making capacity, then they are entitled to a guardian, or supporter, to ensure that they can exercise the full range of their rights. The assessment of this need should be done in a culturally appropriate manner and the exercise of the functions of guardian should respect the person's cultural and spiritual needs, but concern for cultural sensitivity should not deny the person access to a guardian or supporter if there is an assessed need.

Language

The language of disability is no longer the appropriate conceptual language for the guardianship and financial management system.

As the Commission said in its submission on Question Paper One:

> "*People who experience mental illness regularly face stigma and discrimination. It is not uncommon for people in the community, including medical professionals, to assume that a person lacks the capacity to make decisions for themselves simply because of their diagnosis. Similarly, many people who experience mental illness report that their views are often dismissed as symptoms of their illness. This has had a significant impact on the way in which policy and legislation is drafted. However, the framing of legislation and policy can be a powerful tool to correct these misperceptions.*"

The understanding of disability within society has moved away from the paternalistic medical-model that dominated when the Act was drafted towards a social model that recognises disability stems from interaction with the environment. The social model puts responsibility on society to adapt the environment to accommodate disability. The language used to describe disability and disability support therefore has important connotations for the way in which people with disabilities are seen and for the way in which services and systems interact with disability.

The Commission is supportive of the approach taken by the Australian Law Reform Commission (ALRC) and set out in Question Paper Six, specifically:

"the ALRC seeks to frame concepts and choose terms in ways that reflect the framing principles – in particular that of 'dignity'…words and terms should not be used that tend to lower the dignity of people with disabilities. Even where terms have an established usage, the ALRC considers that the development of a new lexicon serves to signal the paradigm shift reflected in the CRPD [Convention on the Rights of Persons with Disabilities] – the purpose of which is to 'promote protect

[3] Ss 50 and 81 *Mental Health Act 2014 (WA)*

[4] NSW Law Reform Commission (2017) *Review of the Guardianship Act 1987 (NSW) Question Paper 6 Remaining Issues,* p 9 [2.25] available http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Question-Papers/QP6.pdf

and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'[5]

By using language that reflects the social model of disability the focus shifts to the support required rather than the individual's impairment.

Ultimately, the best way to ensure that the language used in the Act is appropriate is to ask the people to who the Act applies. The NSW Law Reform Commission has taken steps to encourage people who are subject to the guardianship regime to participate in the review process and any review of the language should be guided by the outcome of that process.

The Commission is also supportive of the approach taken by the ALRC in replacing the language of guardianship with terms such as 'supporter' and 'representative'. Question Paper Six neatly sums up the ALRC position: the language of guardianship is too tied up with substitute decision making and new terms are required to reflect contemporary expectations of supported decision making.[6]

In response to the question regarding how relationships could be defined in the Act to take into account Aboriginal and Torres Strait Islander concepts of family, the Commission notes that kinship can be quite difficult to understand and the relationships are not always clear. These difficulties associated with proving kinship can leave the door open for exploitation. The Act already defines 'close friend or relative' broadly as a person who maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare.[7] The definition also contains some protections, excluding someone from being deemed a close friend or relative if they have a relevant financial interest.[8]

Relationship with Commonwealth laws

The interaction between state and Commonwealth laws must be as easy as possible to navigate for people who come under the relevant regimes, their carers and family.

Whatever systems are put in place between the state and Commonwealth at the core they must ensure that people do not slip through the cracks between jurisdictions. There needs to be a robust system of monitoring and complaint handling including effective information exchange between the relevant agencies regardless of jurisdiction to ensure continuity of service provision and to provide adequate protection to an already vulnerable population. In this respect, please see out comments regarding monitoring, assistance and advocacy in Question Paper Four.

As noted in Question Paper Six, the ALRC recommends that Commonwealth laws give greater recognition to state arrangements.[9] The Commission is supportive of this approach as the appointment of a guardian (or future supporter/ representative) by states involves a rigorous process of inquiry, including the views of the person. The Commonwealth provisions which vest

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[5] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws,* Report No 124 (2014), 41 [2.23]

[6] NSW Law Reform Commission (2017), *Review of the Guardianship Act 1987 Question Paper 6 Remaining Issues,* p 13 [2.44], available http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Question-Papers/QP6.pdf

[7] S 3E (1) *Guardianship Act 1987 (NSW)*

[8] Ibid

[9] NSW Law Reform Commission (2017), *Review of the Guardianship Act 1987 Question Paper 6 Remaining Issues,* p 13 [3.23 -3.27], available http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Question-Papers/QP6.pdf

power in the Secretary or CEO to elect a nominee are not so stringent. As noted in the Question Paper, this flexibility in the Commonwealth provisions can be material in a state tribunal's decision not to appoint a guardian. However, where a guardian has been appointed, this should be recognised in order to simplify (and minimise) the number of people involved in decision making on a person's behalf. The recognition of state arrangements will become even more important if the Act is amended to include supported decision making, advance care directives and other mechanisms designed to give individuals more autonomy within the guardianship regime. It would be disappointing to have this approach at a state level overridden by inconsistencies with Commonwealth legislation.

A significant development in the interaction of state and Commonwealth legislation is the roll out of the National Disability Insurance Scheme (NDIS.) The NDIS represents a significant generational reform of disability services, which promotes the autonomy of individuals to choose and control the services and supports they require. How the NDIS interacts with state based Guardianship regimes is still a work in progress as policies and practices of the NDIA continue to be developed as the scheme builds towards full implementation. There will need to be close monitoring and engagement in relation to this reform to ensure appropriate arrangements and recognition of guardians and supporters are in place.

Young people as guardians

Young carers form a significant minority of the carer population and they face unique challenges. As noted in the Question Paper, service providers and medical professionals often do not recognise young carers. The Commission is supportive of increased recognition for young carers and believes both the options for reform[10], proposed in the Question Paper, would help to achieve this.

Parents as guardians

The Commission has been told, anecdotally, of the challenges faced by parents of profoundly disabled children when their children reach 18. It is important to ensure that this group still have a way to exercise their rights. As canvassed by the Question Paper, there is a gap between the Tribunal's reluctance to issue an order where appropriate informal arrangements exist and organisational policies that require the legal authority that comes with guardianship.[11] Arguably, in such cases informal arrangements are not adequate as they are not recognised by the necessary agencies leaving the person without a way to exercise their rights. While generally supportive of a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18, the Commission is not supportive of a review on the papers only. Given the extreme vulnerability of this population, a robust system of review is important.

[10] NSW Law Reform Commission (2017) *Review of the Guardianship Act 1987 (NSW) Question Paper 6 Remaining issues, p 28 [5.29 – 5.30]*
[11] Ibid, p 30 [5.38]