"Succeeding Together"

October 2016
NSW Law Reform Commission
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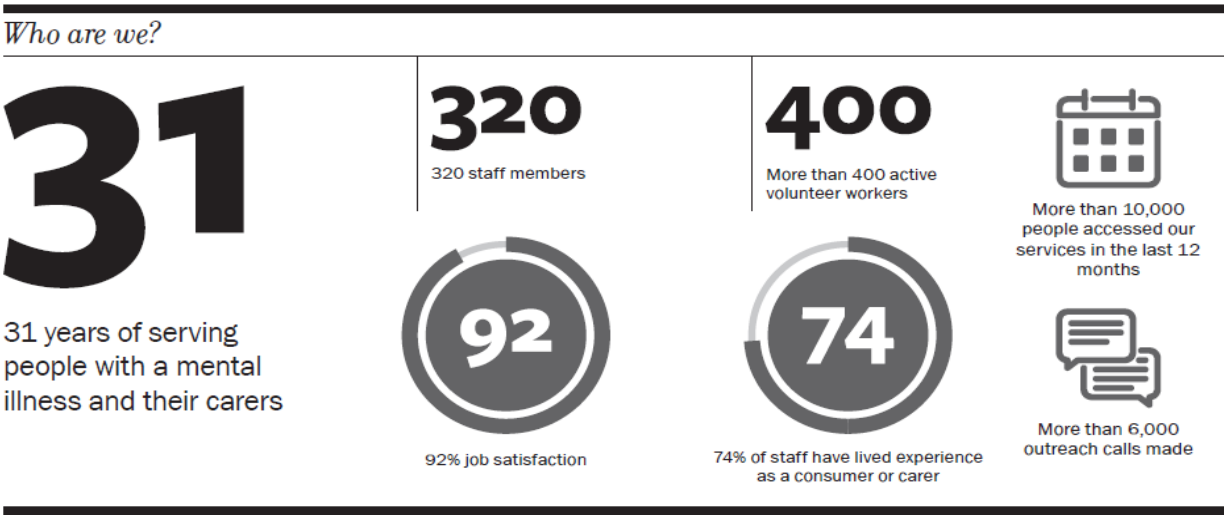
Submission to the NSW Law Reform Commission Submission
Review of the *Guardianship Act 1987 (NSW)*
Question Paper 1

The Schizophrenia Fellowship of NSW Ltd. (SF NSW) appreciates the opportunity to provide comment towards selected questions outlined in Paper 1 of the Review of the *Guardianship Act 1987* (NSW).

Background

SF NSW is a specialist mental health recovery organisation, operating across 33 sites in NSW and ACT. SF NSW is committed to improving the circumstances, welfare, access to clinical and allied health services and advocacy for people with a serious mental illness. SF NSW delivers trauma-informed recovery-oriented psychosocial support programs and services for both carers and consumers including care coordination, housing, employment, social inclusion, clinical and peer supported services.



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General Comments:

The elegance of the *Guardianship Act* ("the Act") is its simplicity. SF NSW recommends the following guiding principles be demonstrated in order for a guardianship order to be made (details of how this could be expressed in the Act follow in the detailed responses to the questions):

1. Current incapacity
2. Current need
3. The will, preference and rights and of an individual

Summary of SF NSW Recommendations

The following requirements should be demonstrated, as expressed in the Act, as pre-conditions for a guardianship order to be made:

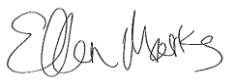
1. **Current incapacity**
   - Develop a single nationally consistent legal definition of capacity and incapacity.
   - Capacity should be presumed, but always assessed.
   - A person's disability should be relevant (only) to the extent that it bears upon their ability to make or implement decisions but not a linked requirement for a finding of impaired capacity.

2. **Current need**
   - A decision-specific approach be adopted

3. **The will, preference, rights and best interests of an individual**
   - Pre-emptive orders, advanced care directives and living wills should be covered by legislation
   - Consideration should be given to pre-emptive orders, or the will, preference and rights of an individual, that that promote personal and social wellbeing.

SF NSW has provided further specific recommendations on the following page. SF NSW would welcome the opportunity to participate in further discussions with the New South Wales Law Reform Commission towards the review of the *Guardianship Act 1987*.

Regards,



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Specific Comments:

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, SF NSW supports the inclusion of capacity assessment principles in the Act. This should be expressed as an explicit, succinct definition of decision-making capacity and lack thereof.

The definition of capacity used is fundamental to the process and purpose of the Act. The current Act does not currently provide elaboration on the concept of capacity, and while the NSW Capacity Toolkit provides guidance, it is important that Toolkit is a reflection of principles outlined in the Act rather than the reverse.

(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?

A nationally consistent approach to defining capacity and incapacity in the Act should be developed and the Act should attempt to align, where possible, with other jurisdictions in Australia.

Doubt about an individual's capacity does not necessarily equate with incapacity. This is particularly relevant for those with psychiatric illness. A psychiatric illness may disrupt coherence of personal preferences in decision-making by altering them. Extrapolating the concepts of capacity, studies have shown that 20-44% of inpatients in psychiatric facilities lack decision-making capacity with regards to treatment[1,2,3]. Critically, these areas of impairment which define incapacity are closely related to the concept of insight, which encompasses awareness of illness, the ability to recognise unusual mental experiences as pathological, and treatment adherence[4].

An example of a definition of capacity that encompasses elements of insight is the *Guardianship and Administration Act 2000 (*Qld), where capacity for a person or matter is defined as:

> *(a) understanding the nature and effect of decisions about the matter; and*
> *(b) freely and voluntarily making decisions about the matter; and*
> *(c) communicating the decisions in some way*[5]

Similarly, incapacity could be defined as:

[1] Raymont V, Bingley W, Buchanan A, *et al* (2004). The prevalence of mental incapacity in medical in-patients and associated risk factors. Lancet; 364, 1421– 1427.
[2] Bellhouse J, Holland AJ, Clare ICH, *et al* (2003). Capacity-based mental health legislation and its impact on clinical practice: treatment in hospital. Journal of Mental Health Law; 24– 28.
[3] Cairns R, Maddock C, Buchanan A, *et al* (2005). Prevalence and predictors of mental incapacity in psychiatric in-patients. Br J Psychiatry;187:379-85.
[4] David AS (1990). Insight and psychosis. Br J Psychiatry;156:798–808.
[5] Guardianship and Administration Act 2000 (Qld) s 4 (Dictionary): definition of 'capacity'

Where supported-decision making has failed, a person with impaired-decision making capacity (incapacity) is unable to carry out any part of this process under the definition of "capacity".

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?

A person's disability should only be linked to the assessment of his or her decision-making capacity, but should not be a requirement for a finding of incapacity- a requirement of disability for a finding of incapacity is discriminatory.

As recommended by the Victorian Law Reform Commission, a person's disability should be relevant (only) to the extent that it bears upon their ability to make or implement decisions[6]. Capacity is a broader issue than disability and any definition of incapacity must include discussion of the range of circumstances that can lead to incapacity.

Focus should be placed on the assessment of capacity, rather than the presence of a specific disability. A number of factors other than disability contribute to impaired decision-making capacity, including risk, social and contextual factors. A focus on the assessment of capacity will promote judgement of decision-making capacity on a decision-to-decision basis.

Expression of exclusions from consideration for incapacity, such as those expressed in the *Guardianship and Management of Property Act 1991* (ACT) should be considered for inclusion (amended):

A person cannot be found to have impaired decision-making capacity only because the person:

(a) is eccentric; or

(b) does or does not express a particular political or religious opinion; or

(c) is of a particular sexual orientation or expresses a particular sexual preference; or

(d) engages or has engaged in illegal or immoral conduct; or

(e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account)[6,7]

(f) has a disability, including physical, mental, psychosocial or intellectual disability.

[6] Victorian Law Reform Commission. Final Report 24 Guardianship 2012.

[7] Guardianship and Management of Property Act 1991 (ACT) s 6A.

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?

As per question 3.2, disability should only be linked to capacity to the extent that it bears upon the ability to make or implement decisions, not as a requirement to be assessed as lacking decision-making 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?

It is important that the law reflects that lack of capacity can fluctuate over time, with context, and is dependent on the subject matter and level of support available. SF NSW rejects the notion of blanket incapacity.

For example, for many people with either a severe chronic or acute/episodic mental illness, decision-making capacity will be present most of the time, subject to fluctuations based on severity of the illness at the time and the nature of the decision making tasks. Similarly, fluctuations in decision-making capacity are also present for those without a psychiatric illness including people experiencing adverse effects of medication or diabetes-associated hypoglycaemia.

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

Decision-making capacity on the part of the person, to take necessary action or make a relevant decision, should be assessed for each specific situation and/or decision. This could be expressed as per the *Guardianship and Administration Act 2000* (Qld)[8]:

the capacity of an adult with impaired capacity to make decisions may differ according to—

(i) the nature and extent of the impairment; and
(ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
(iii) the support available from members of the adult's existing support network.

[8] Guardianship and Administration Act 2000 (Qld) s 5(c).

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

Whether a person has decision making capacity should be assessed, taking reasonable steps to conduct the assessment at a time and in an environment in which the person's decision making capacity can be assessed most accurately[9], with consideration of the nature of the impairment and the context of the decision.

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?

SF NSW supports the development of a nationally consistent approach to defining decision-making capacity, which should be reflected in the Act and consistent with, or reflected in, the *Mental Health Act 2007*.

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

The Australian Law Reform Commission (ALRC) has identified a number of potential regulatory options for achieving a nationally consistent approach to definitions of decision-making capacity[10]:

- *enactment by the Commonwealth of national legislation*
- *the adoption of mirror legislation across jurisdictions, where one jurisdiction enacts capacity legislation which is then enacted in similar terms in the other jurisdictions*
- *a complementary applied law scheme, which would involve one jurisdiction enacting capacity legislation which would then be applied by other jurisdictions—such as the Australian Consumer Law contained in the Competition and Consumer Act 2010 (Cth);*
- *a combined scheme, combining mirror legislation and applied law approaches under which some jurisdictions would enact their own mirror legislation and other jurisdictions apply Commonwealth law as a law of the state—such as the regulation of gene technology;*
- *a principles-based regulatory approach, involving development of a set of principles which could then be applied across a range of areas and contexts as appropriate, favouring reliance on high level principles rather than detailed prescriptive rules; or*

[9] Department of Justice and Regulation . Powers of Attorney Act 2014.
[10] The Australian Law Reform Commission (ALRC) (2013). Equality, Capacity and Disability in Commonwealth Laws IP 44.

- *consideration of the matter by a whole of government or cross-jurisdictional body or forum.*

Question 3.6: Statutory presumption of capacity

Should there be a statutory presumption of capacity?

A presumption of capacity is consistent with common law, Article 12 of the UN Disabilities Convention[11], the NDIS Act[12] and guardianship legislation in several other jurisdictions[13].

While SF NSW supports a presumption of capacity, there should be acknowledgement of the need to assess, or seek an assessment of, a person's capacity for each decision, whenever there is doubt about capacity. As recommended by Darzins *et al*.,

The process of capacity assessment should primarily seek evidence of incapacity, and if this evidence cannot be found, the presumption of capacity should prevail[14].

The onus is on those questioning capacity to prove a lack of capacity rather than the person whose capacity is being questioned to prove they have capacity.

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?

The Act should define what would lead to a finding of impaired capacity.

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

SF NSW believes that a statement reflecting the definition of capacity should be used to define incapacity. Where, capacity for a person or matter is defined as being capable of:

(a) understanding the nature and effect of decisions about the matter; and
(b) freely and voluntarily making decisions about the matter; and
(c) communicating the decisions in some way[15]

Thereby, incapacity can be defined as:

[11] United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law (2014).
[12] National Disability Insurance Scheme Act 2013 (Cth) s 17A(1)
[13] Guardianship and Administration Act 2000 (Qld) sch 1 cl 1, (WA) s 4(3).
[14] Peteris Darzins, D William Molloy and David Strang (2000), Who Can Decide? The Six Step Capacity Assessment Process. Memory Australia Press.
[15] Guardianship and Administration Act 2000 (Qld) s 4 (Dictionary): definition of 'capacity'

Where supported-decision making has failed, a person with impaired-decision making capacity (incapacity) is unable to carry out any part of this process under the definition of "capacity".

As per Question 3.2, SF NSW supports the expression of what should not be considered in an assessment of capacity (*Guardianship and Management of Property Act 1991* (ACT) (amended))

A person cannot be found to have impaired decision-making capacity only because the person:

(a) is eccentric; or

(b) does or does not express a particular political or religious opinion; or

(c) is of a particular sexual orientation or expresses a particular sexual preference; or

(d) engages or has engaged in illegal or immoral conduct; or

(e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account)[16,17]

(f) has a disability, including physical, mental, psychosocial or intellectual disability.

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?

When assessing decision making capacity, consideration of the availability of appropriate support, both formal and informal, should be taken into account. It is also important that the Act recognises that there will be circumstances where impaired decision-making remains regardless of the level of support provided.

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?

Yes, those assessing decision-making capacity should be appropriately trained to do so. The development of training resources for capacity assessors should be so-designed with those who are living with a physical or psychiatric disability and carers.

Question 3.10: Any other issues?

[16] Victorian Law Reform Commission. Final Report 24 Guardianship 2012.
[17] Guardianship and Management of Property Act 1991 (ACT) s 6A.

Although every attempt should be made to uphold an individual's right to legal capacity, care should be taken with regards to defining incapacity. This is particularly important for those psychiatric disorders which lead to significant risk of loss of decision-making capacity and distortion of values. Under such circumstances, decision-making may appear to be unimpeded, however, insight, understanding, appreciation and reasoning ability may be impaired.

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?

Yes, that the Tribunal is satisfied that the person is "in need" of an order should be a requirement.

SF NSW recommends the following requirements are met for a guardianship order:

1. Current incapacity (with consideration of the nature of any disability present)
2. **Current need**
3. The will, preference and rights of an individual

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

SF NSW recommends the following requirements are met for a guardianship order:

1. Current incapacity (with consideration of the nature of any disability present)
2. Current need
3. **The will, preference and rights of an individual**

In order to be consistent with both the ARLC[18] and Article 12(4) of the CRPD[19], which recommend recognition of the importance of will, preferences and rights of a person:

> *"the will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives"*[20]

[18] The Australian Law Reform Commission (ALRC) (2013). Equality, Capacity and Disability in Commonwealth Laws IP 44.

[19] United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law (2014).

SF NSW supports the recognition of the precondition of:

> consideration of any pre-emptive order, or the will, preference and rights of an individual[21], that that promote personal and social wellbeing[21].

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?

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Question 4.4: Any other issues?

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

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5. Other factors that should be taken into account

Question 5.1: What factors should be taken into account?

(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?
(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?

- The Guardianship Act considers only current disability, current incapacity and current need. In relation to patients who experience episodes of psychosis or psychiatric illness, but who recover in between- the ability to discuss with preferences with those who have already experienced episodes of illness, should a relapse occur, should be taken advantage of.

[20] The Australian Law Reform Commission (ALRC) (2013). Equality, Capacity and Disability in Commonwealth Laws IP 44.
[21] Victorian Law Reform Commission. Final Report 24 Guardianship 2012.

This could be achieved by incorporation of living wills and advanced care directives in alternative decision-making. This also acts to empower consumers in the development of treatment plans promoting opportunities for consistency in management.

- There is an appetite, particularly amongst those suffering from episodic or cyclic psychiatric illness such as bi-polar or depression, for the inclusion of pre-emptive orders in legislation. This would cover those who do not have a current need or disability, however, a pre-emptive order would allow a guardian to act if they were to become ill.

  Currently, a person is able to appoint an enduring guardian without the involvement of the Tribunal. However, the individual is able to revoke this if they become unwell, which is of particular importance for those who are enduring guardians of those with a psychiatric illness who may lose insight into the consequences of revoking an enduring guardian.

- There is a need for greater consistency between financial management orders (FMO) established via Guardianship Division of NCAT (GD NCAT) under the *Guardianship Act 1987* and FMO established via the NSW Supreme Court or the Mental Health Review Tribunal under the *NSW Trustee and Guardian* Act 2009.
- A number of inconsistencies exist in:

  Who an application can be made for:

  - GD NCAT: any person with a decision making impairment including a patient of a mental health facility.
  - Supreme Court or Mental Health Review Tribunal: a 'patient' under the *Mental Health Act 2007* (NSW) who is currently being treated (voluntarily or involuntarily) in a mental health facility. An FMO continues when that person is discharged.

  Who can make an application for the appointment of a Financial Manager (FM):

  - GD NCAT: anyone with genuine concern to the GD NCAT
  - The NSW Supreme Court or Mental Health Review Tribunal: a person with "sufficient interest" in the financial affairs of an individual
  - The Supreme Court can also appoint a FM without an external applicant.

  Who can be appointed as a Financial Manager:

  - GD NCAT: A private Financial Manager (eg. A family member or friend of the person over the age of 18 years) or the NSW Trustee and Guardian (a public official)
  - Supreme Court or Mental Health Review Tribunal: only the NSW Trustee and Guardian.

FMO review process:

- GD NCAT: can require that the FMO be subject to review at some time, but it does not have to do so.
- Supreme Court or Mental Health Review Tribunal: FMO not time limited or subject to review, the FMO must be revoked.

Interim FMO (a specified length of time up to six months while a capacity assessment is made):

- GD NCAT: an FMO can be made at any point.
- Supreme Court or Mental Health Review Tribunal: when the patient is discharged from the mental health facility, the Interim Order lapses at the end of the period specified and no FMO can be made following discharge.

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