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Criminal Justice Support Network

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NSW Law Reform Commission
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By e-mail: nsw_lrc@justice.nsw.gov.au

Dear Commissioners

Review of the *Guardianship Act 1987*:

IDRS Response to Question Paper 1: Preconditions for Alternative Decision-making Arrangements

About the Intellectual Disability Rights Service

The Intellectual Disability Rights Service ('IDRS') is a community legal centre and disability advocacy service that provides legal and other advocacy for people with intellectual disability throughout New South Wales. IDRS advocates for policy and law reform and undertakes a range of community education with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports and advocates for people with intellectual disability when they come into contact with the criminal justice system as victims or defendants.

General

IDRS supports a supported decision making model whilst recognising that substituted decision making may be needed as a last resort. IDRS emphasises the need to be aware of the complexity of decision making capacity when drafting policy and legislation. The comments made in this submission must be viewed in light of these statements.

Questions 3.1, 3.2 & 3.3

The *Guardianship Act* should provide further detail to explain what is involved in having, or not having, decision-making capacity. IDRS supports criteria which indicate insufficient decision-making capacity, and not disability, as the precondition to the appointment of alternative decision-makers. The focus of the legislation should be on decision-making capacity, any supports available to a person to maximise capacity, and any absence of capacity.

IDRS agrees that the NSW Attorney General's Capacity Toolkit is a useful and important resource for explaining and providing advice on assessing capacity.

IDRS also believes that it is appropriate to set out criteria for assessing decision-making capacity in the *Guardianship Act*. IDRS supports criteria that are in line with the definition of 'capacity' set out in the *Guardianship and Administration Act 2000* (Qld); namely that a person's decision-making should be considered in light of the person's ability to:

- understand the nature and effect of a decision;
- freely and voluntarily make a decision; and
- communicate the decision in some way.

The court or tribunal should also be required to be satisfied when considering if a person understands the nature and effect of a decision, whether or not the person:

- had access to appropriate supports to make the relevant decision and, if not, why these were not available;
- can retain the information to make the relevant decision; and
- can use the information to weigh up the factors relevant to the decision to be made.

It is unnecessary for there to be a link between disability and incapacity. IDRS does not support alternative decision-making arrangements being based on capacity alone but sees decision-making capacity as one limb of a test that may lead to the appointment of alternative decision-makers. IDRS does not agree with the reasoning of the Victorian Law Reform Commission that a causal link with disability provides extra assurance because widely accepted tests are used. Any assessment of decision-making capacity should be accompanied by a capacity assessment, setting out the process undertaken and supporting the conclusions made.

Question 3.4

IDRS supports the legislation recognising that decision-making capacity can vary over time and depend on the subject matter of the decision. These factors should be considered up front as part of the process on which determinations are made but do not need to complicate the definition of decision-making capacity.

These matters need to be taken into account when deciding the specifics of any order, including length of time of the order, the extent of the order, the review process and whether or not a less restrictive measure will be more appropriate. IDRS supports the approaches recommended by various law reform commissions to include assessment principles that need to be considered before any order is made. Such assessment principles include a consideration of:

- the kinds of decisions which are being considered;
- whether the incapacity is temporary, permanent or fluctuating; and
- whether or not any factors exist which are affecting decision making at the time the assessment takes place.

Question 3.5

Definitions of decision-making capacity within NSW law should be aligned for the different alternative decision-making arrangements. IDRS supports consistency in approach, using decision-making capacity, as defined in the legislation, as the main test. Each of the areas addressed by the legislation must look to a lack of capacity as the trigger for alternative decision-making.

What is important is that the court or tribunal has flexibility to make orders to meet the particular and differing needs of the people who appear before it.

Question 3.6

There should be a statutory presumption of decision-making capacity. The legislation should restate the common law and include the presumption of capacity as one of the guiding principles of the legislation. To do so reflects contemporary thinking and acknowledges the legal starting point in New South Wales.

Question 3.7

There are a number of matters which of themselves should not be considered relevant when determining if a person lacks decision making capacity, including:

- a person's appearance, manner, age or disability;
- that the perceived or likely outcome of a decision proposed by the person is unwise;
- that the person needs support to make or communicate a decision.

These matters should be included in the principles which guide the operation of the legislation. See response to question 5 below.

Question 3.8

IDRS believes the availability of appropriate support and assistance is relevant to assessing capacity. Assessment of the availability of supports and assistance should be made a mandatory precondition to the imposition of any alternative decision-making arrangements. This assessment needs to be

rigorous. Any court or tribunal must be obliged to enquire about attempts already made to provide support and the effectiveness of those attempts.

Having informed itself as to the support provided prior to its involvement, the court or tribunal should actively consider whether further supported decision-making options are appropriate and reasonably available. The court or tribunal should not conclude a person lacks decision-making capacity unless it is satisfied that all the decision-making supports that could reasonably be put in place will be insufficient for a person to be able to make the decision/s in question at the relevant time.

IDRS considers this issue to be of such importance that it should be made a precondition to an order being made, requiring close enquiry and scrutiny.

IDRS therefore supports the inclusion in the legislation of preconditions to any order being made to the effect that the court or tribunal must be satisfied about:

- the access that the person has, and has had, to information and the form of such access; and
- the supports that have been, and will be, in place for the person and the appropriateness of these supports.

Question 3.9

As the court or tribunal already has a general power to inform itself, which power extends to seeking evidence from professionals, it is not necessary to include a special provision in the legislation.

Question 3.10

IDRS supports changes to the language used in the legislation to reflect concepts of 'supporter', 'supported person', 'representative' and 'represented person'. IDRS believes that these changes will encourage a shift in thinking away from the traditional paternalistic approach towards people with limited decision-making capacity.

Questions 4.1 and 4.2

IDRS supports the inclusion of additional preconditions to the making of an order. IDRS supports an approach which:

- uses decision–making capacity as the primary tool;
- secondly, looks at what supports can be put in place to maximise decision making; and
- thirdly, assesses whether alternative decision-making arrangements will promote the personal and social wellbeing of the person.

IDRS supports the approaches taken by Queensland and the Australian Capital Territory which in effect combine the 'needs' and 'best interests' approaches. IDRS supports the approach, taken under both the *Guardianship and Management of Property Act 1991* (ACT) and the *Guardianship*

and Administration Act 2000 (Qld), which requires the court or tribunal to be satisfied that if nothing is done:

- the person's needs will not be met; and
- the person's interests will be significantly adversely affected (s: 7(1) (c) and s12(1)(c)).

IDRS also supports an approach which requires the court or tribunal to be satisfied that making an order will promote a person's 'health, safety and welfare' or be for the 'personal and social wellbeing' of the person. IDRS favours this positive approach over the more negative approach of looking at 'unreasonable risk'. IDRS believes that this will require the court or tribunal to look at the imposition of alternative decision-making arrangements in a more supportive and less restrictive way.

Question 4.3

IDRS favours the alignment of preconditions to appointment for all areas where alternative decision-making arrangements may be imposed.

Question 5

One of the issues with the *Guardianship Act* is the multiple approaches taken to dealing with the imposition of alternative decision-making arrangements. It is difficult to see why such different approaches should be retained. It is also difficult to see why the principles that should be considered before imposing one particular alternative arrangement do not equally apply to considerations for all alternative arrangements. For these reasons IDRS favours a new set of principles which reflect contemporary thinking and which can be applied across the board.

IDRS proposes the following guiding principles to apply to all persons exercising any function under the Act:

1. The capacity of all adults to make decisions is presumed;
2. The will, preferences and rights of the individual (if known or ascertainable) must be taken into account;
3. A persons' will, preferences and rights can only be overridden:
    a. to protect the person against serious harm; or
    b. if it is for the personal and social wellbeing of the person such that to not do so will seriously adversely affect the person's interests;
4. Measures which are less restrictive of a person's rights and freedoms must be taken into account;
5. The views of family and other relevant support persons may be taken into account;
6. The beliefs, culture and values of the supported person may be taken into account.

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We thank you for the opportunity to make this submission.

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