The Royal Australian & New Zealand College of Psychiatrists

# Review of the Guardianship Act 1987: Question Paper 1
# Preconditions for alternative decision-making arrangements

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maximising opportunities for recovery

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# Royal Australian and New Zealand College of Psychiatrists submission

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## About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises government on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand, and as a binational college has strong ties with associations in the Asia-Pacific region.

The RANZCP has more than 5000 members, including around 3700 fully qualified psychiatrists and 1200 members who are training to qualify as psychiatrists. Psychiatrists are clinical leaders in the provision of mental health care in the community and use a range of evidence-based treatments to support a person in their journey to recovery. There are 1500 members in the NSW Branch of the College.

## Introduction

The RANZCP welcomes the opportunity to comment on Question Paper 1 of the New South Wales Law Reform Commission's review of the *Guardianship Act 1987*. We support the purpose of this broad review to determine the desirability of changes to the Guardianship Act. In particular, we strongly support any efforts to align the Guardianship Act with contemporary understandings of disability including developments in human rights law as reflected in the United Nations *Convention on the Rights of Persons with Disabilities*, as well as the shift towards person-centred and recovery-oriented care which is facilitated through supported decision-making.

RANZCP Fellows with specific interest and expertise relevant to this review have been consulted in the development of this submission. Forensic psychiatrists have specific training and work experience in the interface between psychiatry and the law and are therefore well placed to comment on the proposed changes in legislation affecting people with mental illness. Accordingly, the RANZCP would like to comment on a number of questions which relate to the concept of 'capacity', as outlined below.

## Question 3.1: Elaboration of decision-making capacity

The RANZCP supports the current use of the NSW Capacity Toolkit to provide advice on assessing capacity. However, we are concerned that enshrining the toolkit in legislation may result in the legal requirement to utilise its advice in an overly prescriptive manner. Common law already contains useful language regarding capacity and, more importantly, recognises the role of the doctor in capacity assessments. The assessment of decision-making capacity requires clinical sophistication and prescriptive legislation may divest medical professionals of necessary flexibility. The RANZCP also notes that no definition of decision-making capacity would be complete without addressing the issue of fluctuating capacity which will be addressed in response to Question 3.4.

## Question 3.2: Disability and decision-making capacity

The RANZCP has some concerns about the way that disability is currently linked with decision-making capacity. In cases of decision-making capacity for medical treatment, it is possible that capacity may be diminished due to matters other than a disability such as intoxication (which may or may not be viewed as a disability). Therefore, the RANZCP would support the delinking of disability and decision-making

capacity wherever it is not required and suggests disability need only be linked with capacity in relation to guardianship orders.

**Question 3.3: Defining disability**

The RANZCP suggests that provisions (b) and (d) should be removed for all alternative decision-making arrangements. Provision (b) relates to age which does not itself constitute a disability. Though age may be linked with conditions which do constitute a disability, these conditions would be encompassed by provisions (a) and/or (c). Similarly, the RANZCP suggests that provision (d), which relates to individuals who are 'otherwise disabled', casts too wide a net.

Furthermore, if disability and decision-making capacity are to remain linked for medical treatment, disability should be defined so as to include temporary and/or transient disorders such as intoxication.

**Question 3.4: Acknowledging variations in capacity**

The RANZCP acknowledges that the cognitive power required to have decision-making capacity exists along a continuum and therefore suggests that no legislative instrument relating to the assessment of decision-making capacity would be complete without recognition of this fact. We note especially that the unpredictability of mental illness means that a person's cognitive capacity can even experience significant fluctuations in short periods of time and can vary depending on the matter being addressed. The RANZCP therefore supports the Legislative Council Standing Committee on Social Issue's recommendation that the proposed definition of capacity 'acknowledge the fact that a person's decision-making capacity varies from domain to domain and from time to time' (LCSCSI, 2010) but further suggests expanding this statement to include reference to environmental factors.

It is not uncommon for a person with mental illness to experience fluctuations in their capacity resulting from the context in which they present. In an unsettling environment, an individual's presentation may not provide a reliable indicator of their actual cognitive capacity. The ACT Mental Health Act recognises the importance of providing individuals with appropriate environments during decision-making processes in section 8(g):

> a person who moves between having and not having decision-making capacity must, if reasonably practicable, be given the opportunity to consider matters requiring a decision at a time when the person has decision-making capacity.

As such, in addition to the acknowledgement that a person's decision-making capacity can be influenced by time and subject matter, it may also be advantageous to recognise the impact of one's environment and the complex interactions between all of these factors.

The RANZCP therefore suggests that the Guardianship Act acknowledge that capacity may be influenced by a variety of factors including, but not limited to, time, environment and subject domain, and that the assessment of capacity should be made in a suitable environment, and in relation to a defined matter at a specified time. The RANZCP further suggests the importance of vesting such an acknowledgement within the definition of decision-making capacity due to the frequency with which people with mental illness experience fluctuations in their capacity.

While the RANZCP supports the Capacity Toolkit's capacity principles, we would further support the inclusion in these principles of an acknowledgement of the complex variables relating to a person's decision-making capacity. The Victorian Law Reform Commission (VLRC, 2012) provides some useful language in its recognition of these variations:

(a) 'A person's capacity is specific to the decision to be made.

(b) Impaired decision-making capacity may be temporary or permanent and can fluctuate over time...
(f) 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'.

The RANZCP believes statement (f) would be better stated: '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 be optimised'.

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

The RANZCP is concerned that variations in the definitions of decision-making capacity can be confusing for many people and would prefer, where possible, the alignment of such definitions across alternative decision-making arrangements. Such an alignment should not in any way detract from the need to individualise each assessment according to the relevant context. Where differences in the law are deemed to be necessary, they should be accompanied by clear guidelines to ensure that all those potentially affected by the laws are able to understand them.

**Question 3.6: Statutory presumption of capacity**

The RANZCP recognises the importance of a statutory presumption of capacity and would support amendments to the legislation to clearly articulate this.

**Question 3.7: What should not lead to a finding that a person lacks capacity**

The RANZCP supports the incorporation of the Capacity Toolkit's capacity assessment principles into the Guardianship Act, including those that relate to what should not lead to a conclusion that a person lacks capacity, namely:

3. 'Don't assume a person lacks capacity based on appearances
4. Assess the person's decision-making ability – not the decision they make' (Attorney General's Department, 2008).

The RANZCP would support additions to these qualifications as they relate to a person's behaviour, beliefs and methods of communication, including those noted in the NSW Law Reform Commission's Question Paper 1 (p. 26) drawn from relevant laws in the Northern Territory and the Australian Capital Territory. However, these additions must be worded with extreme caution.

The RANZCP notes the importance of ensuring that the behaviour and/or beliefs of an individual do not prejudice any assessment of their capacity. People with mental illness may at times exhibit behaviour and/or beliefs that can be stigmatised or viewed as eccentric and/or irrational but which are not necessarily relevant to their decision-making capacity. For example, a person may express a belief that a proposed medical treatment is related to a conspiracy against them. While their belief in such a conspiracy may be a documented aspect of their mental illness, they may yet maintain the capacity to understand and weigh information related to the procedure, its likely effects and those of alternative treatments, and to communicate their decision based on that understanding. In recognition of the effects which mental illnesses may have on an individual's beliefs and behaviours, the RANZCP therefore

affirms the importance of confirming in law that a person's behaviour and/or beliefs should not lead to a premature conclusion of diminished or lack of capacity.

However, it is important to be cautious with language here as many of these matters may rightly contribute to a conclusion that an individual lacks capacity, although they may not lead to that conclusion in isolation of other facts. For example, an 'unusual' decision in the eyes of a health-care professional may in fact be the thing that prompts a capacity assessment in the first place. As noted in Hunter and New England Area Health Service v A [2009]:

> the lack of any discernible basis for a decision to refuse treatment may be something to take into account in assessing the competence or validity of the decision (McDougall, 2009).

Similarly, certain delusions resulting from some psychiatric disorders may indeed render an individual unable to use and weigh the information relevant to a decision; insofar as this is true, a person's beliefs may in fact lead to a conclusion of diminished capacity.

As such, while the RANZCP supports an expanded list of factors which should not *directly* lead to a finding of diminished capacity, we suggest the use of language which makes it clear that these factors are not necessarily to be excluded from considerations related to a person's capacity. For example, the law may refer to factors which should not *directly* lead to a finding that a person lacks capacity; or factors which should not lead to a *premature conclusion* that a person lacks capacity; or factors which should not *prejudice* findings related to a person's capacity.

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

The RANZCP notes the increasing recognition of the need to provide support and assistance to a person who may be suffering from diminished capacity. The NSW Mental Health Act does so in section 68 (h1) which states that:

> every effort that is reasonably practicable should be made to obtain the consent of people with a mental illness or mental disorder when developing treatment plans and recovery plans for their care, to monitor their capacity to consent and to *support people who lack that capacity* to understand treatment plans and recovery plans [emphasis added].

The RANZCP therefore acknowledges the worth of providing individuals with support and assistance before making assessments of capacity.

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

The RANZCP does not believe that special provision needs to be made in NSW law for psychiatrists to be available for those who must assess a person's decision-making capacity. However, good clinical practice may indeed include referral of difficult cases to suitably qualified psychiatrists. Assessment of capacity is a part of basic medical training and the RANZCP training program includes advanced competencies in capacity assessment. A requirement for participation in an additional accredited course on capacity assessment would risk de-skilling psychiatrists who as treating clinicians are in the best position to make such decisions.

The RANZCP also notes that, due to the often rapidly changing manifestations of mental illness, proper assessments are best undertaken by clinicians with the benefit of extended interactions over a significant period of time with the individual in question. Consumers with mental illness should therefore have the opportunity for their assessment to include input from a clinician who has known them for an

extended period of time, and has a more nuanced understanding of their disability and level of impairment, which cannot be achieved in a snapshot assessment. However, it should be noted that when assessing the validity of a person's purported refusal of medical treatment, the treating clinician cannot also function as an independent expert. With these facts in mind, the RANZCP affirms the varied and important roles which psychiatrists have to play in assessments of the decision-making capacities of persons with mental illness, and states its position that psychiatrists will best fulfil these important roles in accordance with established medical training arrangements.

**Question 3.10: Any other issues?**

The RANZCP does not wish to raise any further issues.

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

The RANZCP does not believe there should be a precondition before an order is made.

**Question 4.2: A best interests precondition**

The RANZCP supports the move away from the 'best interest' standard to one in accordance with the 'will and preference' of the individual. This is line with contemporary understandings of human rights as captured in Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*. It is also congruent with the concept of person-centred care where consumers are valued, respected and appropriately involved in decision-making processes. The RANZCP holds that individuals with diminished capacity not only have the right to have their will and preferences taken into consideration but that the treatment of such individuals is optimised when their will and preferences are empowered.

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

The RANZCP has no specific comments.

**Question 4.4: Any other issues?**

The RANZCP does not wish to raise any further issues.

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

The RANZCP has no specific comments.

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