The Royal Australian & New Zealand College of Psychiatrists

New South Wales Branch

Royal Australian and New Zealand College of Psychiatrists NSW Branch Submission
Review of the Guardianship Act 1987 (NSW)
Question Paper 2: Decision-making models
Question Paper 3: The role of guardians and financial managers

January 2017

maximising opportunities for recovery

PO Box 280, Rozelle NSW 2039 Australia
T 02 9352 3600 F 02 9810 5073
ranzcp.nsw@ranzcp.org www.ranzcp.org
ABN 68 000 439 047

RANZCP NSW Branch Submission

Review of the Guardianship Act 1987 (NSW)
Question Paper 2: Decision-making models
Question Paper 3: The role of guardians and financial managers

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. The NSW Branch has 1500 members.

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.

Introduction

The RANZCP welcomes the opportunity to comment on Question Papers 2 and 3 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.

Question Paper 2 – Decision-making models

The RANZCP NSW Branch (the Branch) understands that under the current NSW Guardianship Act 1987 (the Act) there are no formal alternatives to guardianship and financial management for people with disabilities who need decision-making support, apart from 'substitute' decision-making'. This model allows a formal decision-maker to be identified or appointed to make personal, financial and medical decisions for someone who cannot make their own decisions.

As part of the review of the Act, the dominant use of 'substitute' decision-making models under NSW guardianship is being considered. This is in response to a movement towards 'supported' decision-making models internationally and in other states which recognise that all people have the right to make decisions for themselves, but acknowledges that some people may need or want support in reaching their decision.

The move towards supported decision-making is also reflected in the UN *Convention on the Rights of Persons with Disabilities* which Australia ratified in 2008. In line with Article 12, the NSW Branch supports a move away from the 'best interest' standard to one in accordance with the 'will and preference' of the individual. This aligns to the concept of person-centred care where consumers are valued, respected and appropriately involved in decision-making processes.

The NSW Branch recognises that the level or nature of the support needed under guardianship arrangements will vary from person to person and wants or needs may change over time and may even depend on the type of decision. Importantly, we acknowledge that there are some situations where no amount of support will assist, such as where a person may have a severe cognitive or psychiatric impairment and is unable to make or communicate a decision.

For people with mental illness, the flexibility to accommodate a range of decision making options is important. The unpredictability of mental illness means that the cognitive capacity required to have decision-making capacity (even with a supporter) exists along a continuum. Cognitive capacity can fluctuate significantly over short periods of time and can vary depending on the matter being addressed. In an unsettling environment, an individual's presentation may not provide a reliable indicator of their actual cognitive capacity. The NSW Branch believes that changes to the Act regarding decision-making models need to allow for these fluctuations.

The NSW Branch notes the circumstances in which stakeholders have suggested that substitute decision-making should be available (p34). These include:

- where the person is incapable of understanding the full nature and consequences of their decisions
- where the person does not have the capacity to articulate their wishes
- where the person would prefer a substitute decision-maker to be appointed
- where there are likely risks or real evidence of serious financial loss, harm, neglect, overprotection or exploitation under a supported decision-making model
- where urgent action is needed because a person's own decisions or the influence of others puts their safety and well-being at imminent risk.

We support the recommendations of the 2010: NSW Legislative Council Standing Committee on Social Issues cited in the paper that substitute decision-making remains as an option, but that changes to the Act be made to:

- state that the legislation supports the principle of supported decision making
- provide that courts and tribunals can make orders for supported decision-making arrangements
- prescribe the criteria that must be met for such orders to be made.

The NSW Branch acknowledges that informal supported decision-making already occurs in NSW when family members and friends support people to make decisions. However we believe that a formal legislative framework is necessary through the Act to ensure that people with impaired decision-making capacity are adequately protected, supporters understand their role and responsibilities and the number of people in substitute decision-making arrangements is kept to a minimum.

Clearly, the right balance has to be struck between informal arrangements that allow for autonomy and flexibility on one hand, and formal arrangements that ensure an appropriate level of oversight and certainty on the other. We note that in the review of international supported decision-making frameworks, a mixture of informal and formal arrangements has been retained, requiring certain conditions to be met before a formal decision-making arrangement is put in place. NSW could adopt similar provisions to ensure informal arrangements are allowed to continue, in situations in which they are functional.

While the NSW Branch supports the reflection of the principle of supported decision making in the review of the Act, we believe that co-decision making as a principle is not as flexible and presents a risk of forcing people to make decisions they may not want to make.

To protect the person's privacy and ensure that the supporter can do their job, the NSW Branch supports the capacity of the legislation to specify the kind of information that a supporter can access, and possible restrictions around the way such information can be used. It may also be necessary to list specific

powers that a supporter cannot exercise, such as entering into significant financial transactions or signing documents that may have legal consequences.

The NSW Branch acknowledges that in some cases, supporters may not have the skill level to help with financial decisions, for example where to invest money. We believe that extra protections are required to make sure an adequate level of expertise/experience is available to ensure that appropriate financial decisions are made.

The NSW believes that the legislation should include clear eligibility criteria for people appointed as supporters. We support the eligibility criteria and the specific exemptions described on pp39–40 of Question Paper 2.

The NSW Branch supports the recommendations of the Australian Law Reform Commission allowing a person to have more than one supporter.

If there are no other options, and it is the wish of the person to have a supporter, the NSW Branch supports the use of government agencies as supporters.

Question Paper 3: The role of guardians and financial managers

The NSW Branch understands that some people become incapable of making decisions about important issues in their life and the Act allows an adult to plan for this possibility by appointing an 'enduring guardian'. We also understand that the Act authorises the NSW Civil and Administrative Tribunal (the Tribunal) to appoint a 'guardian' or a 'financial manager' (or both) for someone with impaired decision-making capacity. This paper is seeking comment on the roles of guardians and financial managers under the current Act.

The NSW Branch supports this review as we believe that the Act could better reflect developments in other states and countries, along with the United Nations *Convention on the Rights of Persons with Disabilities* which includes the rights to dignity, autonomy, full and active participation in society and equal recognition before the law.

We also understand that the profile of people in the guardianship system has changed a lot. At first, the largest affected group was people with an intellectual disability. Now cases involving people with dementia are common, along with mental illness and acquired brain injury.

We understand that guardians and financial managers, often known as 'substitute decision makers', make decisions on behalf of people with disabilities. Internationally, there is a growing recognition that governments should be providing people with more flexibility to source the support they need to make their own decisions.

The NSW Branch comments on Question Paper 2 which considered the debates around supported decision-making and potential ways of implementing it in NSW, recommended a 'spectrum' approach, in which substitute decision-making should still exist in NSW along with supported decision-making. This would enable the Tribunal to appoint guardians and financial managers as a last resort, if people are not able to nominate these representatives themselves.

The NSW Branch acknowledges that in some cases, the Tribunal may need to appoint a private guardian, such as where the person may not have a relative or friend willing to take on the role. It is interesting to note that between2014–15, the Tribunal appointed the Public Guardian in 56% of cases, suggesting this is a reasonably common scenario. Feedback from our members regarding delays in these appointments and the negative impacts on disabled people requiring guardianship suggests that the eligibility options for these roles may need to be widened.

The NSW Branch supports the consideration of other options for guardians as part of the review of the Act, such as community volunteers; an approach that has been enacted in Victoria and Western Australia. These programs have been supported by clear regulatory frameworks, including volunteers being at least 18 years of age, background checks and a commitment to at least 2 years of service. They have also included recruitment and training programs.

We understand that in 2010, the NSW Legislative Council Standing Committee on Social Issues considered a proposal by the Public Guardian to establish a similar program in NSW, on the assumption that the Public Guardian would recruit the volunteers, and be responsible for training, matching with people under guardianship and supervision. The NSW Branch supports further consideration of this program.

The NSW Branch acknowledges that the choice of a financial manager to manage a person's property and affairs (or part thereof) is a serious matter, which requires rules around the qualities of a 'suitable person', currently not described in detail in the Act. The suggestions on p15 drawn from other States and Territories may be worth considering to ensure that appropriate financial managers are nominated on the basis of more detailed eligibility criteria.

The NSW Branch believes that the Act should support a 'sensible hierarchy of choices' in potentially appointing the Public Guardian as a guardian, in that this hierarchy gives effect to the principle of last resort. We note that the current Act does not include this approach in relation to the appointment of the NSW Trustee as a financial manager. We support the recommendation of the NSW Legislative Council Standing Committee on Social Issues to clarify that the NSW Trustee is to be considered the financial manager of last resort.

The NSW Branch agrees that there should be strict rules around the choice of a commercial trustee corporation as financial manager, to mitigate the risk of companies having profits in mind, rather than the interests of the person, especially around the charging of fees.

For enduring guardians, the NSW supports the adoption of the Victorian Law Reform Commission recommendations on the scope of personal matters over which the enduring guardian can make decisions. Similarly, the NSW Branch believes that compiling a list of exclusions regarding what guardians are permitted to do on behalf of people would be useful. Examples are given in the paper of similar approaches adopted by other States and Territories (pp28–29). In the same way, the NSW Branch supports a clear description of powers and functions that financial managers cannot exercise, as recommended by the Victorian Law Reform Commission.

The NSW Branch supports the NSW Trustee or the courts being able to determine the range of powers for financial managers. This is a preferable option to all financial managers having the same powers and would be a more efficient approach compared to review and then modification on an individual basis through the Tribunal.

References

NSW Legislative Council Standing Committee on Social Issues (2010) *Substitute Decision-Making for People Lacking Capacity: Report 43*. Sydney: NSW Parliament.

Parliament of Australian Capital Territory. *Mental Health Act 2015.*

Parliament of New South Wales. *Mental Health Act 2007.*

Parliament of Victoria. *Mental Health Act 2014.*

Queensland Law Reform Commission (2010) *A Review of Queensland's Guardianship Laws: Report 67*. Brisbane: QLRC.

Victorian Law Reform Commission (2012) *Guardianship*: *Final Report 24*. Melbourne: VLRC.