



Mental Health Commission
of New South Wales

Review of the *Guardianship Act 1987 (NSW)*

***Submission to the NSW Law Reform Commission on
Question Paper Two: Decision Making Models 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 Two: Decision-making models

http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Have-your-say-Decision-making-models.aspx

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 Paper One. 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.

Introduction

Legislative amendment to allow for supported decision making has been recommended by successive reviews of guardianship laws throughout Australia¹. The normative impact of supported decision making models is well explained in these reviews and the research literature². It is commonly agreed that supported decision making models

- promote autonomy and choice
- reflect the social model of disability
- comply with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

The Commission submits that supported decision making should be included in the *Guardianship Act 1987 (NSW)* (the Act). This would represent a positive and significant shift in the concept of 'disability' signalling to the community the inherent dignity and worth of people with disability in line with the UNCRPD³. Further, there are many circumstances in which a person may need formalised recognition of their support needs, but does not need to have a substitute decision maker. There is no provision for this in the current Act.

One concern for consumers is the concept of learnt dependency. That is, when a person's decision making power is taken away from them they quickly lose the capacity to make their own decisions. This was born out in the Department of Family and Community Services and the NSW Trustee and

¹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014); NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010); Victorian Law Reform Commission, *Guardianship Final Report*, 24 (2012); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010), ACT Law Reform Advisory Council, *Guardianship Report* (2016)

² See for example, Office of the Public Advocate Systems Advocacy (2014), *A journey towards autonomy? Supported decision-making in theory and practice*, Queensland Government

³ United Nations Convention on the Rights of Persons with a Disability, Preamble

Guardian's joint trial of supported decision making⁴. By recognising supported decision making in the Act it enshrines the importance of building individual decision making capacity, rather than automatically disenfranchising people who could, with support, retain or regain the ability to exercise their will and preferences.

The current process under the Act for formally appointing an enduring guardian, a guardian, financial manager or for giving consent to medical and dental treatment in certain circumstances, works well. The issue is the range of options open to the NSW Civil and Administrative Tribunal (the Tribunal) where it has determined that someone is a person in need of a guardian and the range of options open to someone carrying out functions under a guardianship order⁵. Currently the only option is substitute decision making. This is a blunt instrument that does not adequately reflect the complexity of decision making. To effectively assist people with decision making impairments the Tribunal and guardians should have a continuum of supports to draw on ranging from autonomous decision making through to substitute decision making, with a range of options for assisted or supported decision making in between. These different supports might all be required at different times, depending on the decision to be made. The same considerations and safeguards that currently apply in appointing an enduring guardian, guardian or financial manager could still apply with minor modification to include supported decision making.

A formal supported decision making framework for NSW

There needs to be a framework that recognises the complexity of, and fluctuation in, decision making capacity. There is no one-size-fits-all model that can be applied. Rather there needs to be a framework that allows the greatest flexibility to cater for the myriad of individual circumstances on a decision by decision basis. The framework should involve as little formality as possible and shouldn't displace informal practices where these are working well.

The National Decision Making Principles set out by the Australian Law Reform Commission (ALRC)⁶ represent a helpful starting point:

- 1) everyone has an equal right to make decisions and to have their decisions respected
- 2) persons who need support should be given access to the support they need in decision making
- 3) a person's will and preferences must direct decisions that affect their lives
- 4) there must be appropriate and effective safeguards in relation to interventions for persons who may require decision making support.

⁴NSW Family and Community Services, *Supported Decision Making Pilot – background and learnings*, accessed via http://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making/sdm-background-learnings

⁵ For ease of reference people exercising functions under an order of the Tribunal are referred to as 'guardians' throughout this submission, this should be taken to include enduring guardians, guardians and financial managers as well as decision making supporters, where relevant.

⁶ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014), Rec 3-1

Formal v informal arrangements

As part of this flexible model it is important that there is formal or statutory recognition of the role of a supporter. This provides the necessary authority to third parties to include the supporter in decision making processes, for example through provision of confidential information or by communicating the person's decision. Formal status may also be necessary in those cases where a person does not have an informal network willing or able to take on the role of supporter.

The current Act already strikes a balance between informal and formal arrangements. When making guardianship orders the Act requires the Tribunal to have regard to, among other things, "the practicability of services being provided to the person without the need for the making of such an order"⁷. If a similar consideration is applied in respect of supported decision making then it would render Tribunal involvement unnecessary where informal arrangements are working well.

Continuum of support

The Act, as currently written, is a tool for appointing a substitute decision maker⁸. When deciding what orders to make and how to enact those orders, there should be a full range of options available so that the orders reflect the unique circumstances of the individual, rather than attempting to provide a one-size-fits-all model. For some people this might mean different models are applied for different types of decisions or at different times depending on fluctuating need. This approach should be underpinned by the ALRC's National Decision Making Principles.

As part of this continuum approach the Commission acknowledges that there will be some circumstances where substitute decision making is required. This would apply where a person is completely unable to express their will and preference. This, however, should be an option of last resort. In respect of consent for medical or dental treatment the current hierarchy of decision makers set out in the Act could continue to apply⁹.

Advance care directives could greatly enhance a continuum approach. This would allow people who experience fluctuating capacity or those who may lose their capacity to have their will and preferences recorded as the basis of future decision making support.

Whilst submitting that it should be possible to draw from the full range of supported decision making models to decide what is appropriate on a case by case basis, the use of co-decision makers should be done cautiously. There is a risk that co-decision making could be used in place of supported decision making if it is seen as quicker, easier or where a person is seen to be making an unwise decision.

Other issues

Any shift to supported decision making will need to be widely supported with training and cultural change initiatives. This will be required for individuals in need of support, individual supporters and organisations that provide services and support to people with disabilities, older people and people who experience mental illness. However, beyond this there will need to be training for everyone

⁷ *Guardianship Act 1987 (NSW)* s 14 (d)

⁸ Keneally, Kristina, Second Reading Speech – Guardianship Amendment Bill 2007, extract from NSW Legislative Assembly Hansard, 30 May 2007

⁹ *Guardianship Act 1987 (NSW)* s 36

who will be expected to recognise and respect supported decision making in practice, for example the health sector and anyone entering into legal agreements with someone who receives decision making support. This is not a reason to avoid supported decision making and in fact, legislative change is an essential element in driving the necessary reforms. While it might seem like a big undertaking to drive such widespread cultural change, this is entirely consistent with work already underway through the *Disability Inclusion Act 2014 (NSW)* and Tier Two of the National Disability Insurance Scheme. In both cases there are requirements to make society more reflexive and responsive to the needs of people with disabilities.

The question paper raises a concern about the evidence base for supported decision making models¹⁰. This is an important consideration. However, until the right circumstances exist it will not be possible to build the evidence base. Legislative reform is, again, an important part of this process. Throughout its submissions on this review, the Commission has advocated for a legislative framework that is flexible and allows room for developments in science and technology as well as changing community expectations. Such a framing will also allow the Tribunal to accommodate developments in the evidence base. Finally, incorporation of supported decision making principles in the Act goes much further than application of a model, it reflects a significant change in respecting and interacting with people with a disability.

Making these changes to the Act will likely have a knock on effect for other key pieces of legislation. While it is important to consider the interaction between laws, this is not a reason to avoid making the necessary changes. It is assumed this issue will be addressed further in Question Paper Six.

Supporters

In introducing formal supported decision making, much of the existing machinery of the Tribunal can continue to apply. The Act currently sets out provisions in relation to when to appoint an enduring guardian¹¹, guardian¹² or financial manager¹³ as well as provisions relating to eligibility for appointment and the types of decisions that can be made.

In formally recognising supported decision making there will, of course, need to be additional provisions relating to the powers, functions and duties and responsibilities of supporters. The ALRC has laid out a useful framework¹⁴ which the Commission endorses.

¹⁰ NSW Law Reform Commission, *Review of the Guardianship Act 1987 Question Paper 2: Decision-making models* (2016), 5.6 – 5.7

¹¹ *Guardianship Act 1987 (NSW)* Part 2

¹² *Ibid*, Part 3

¹³ *Ibid*, Part 3A

¹⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014), Rec 4-4 and 4-5

ALRC Recommendation 4–4

A supporter assists a person who requires support to make decisions and may:

- a. obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;
- b. provide advice to the person about the decisions they might make;
- c. assist the person to communicate the decisions; and
- d. endeavour to ensure the decisions of the person are given effect.

ALRC Recommendation 4–5

Relevant Commonwealth laws and legal frameworks should provide that supporters of persons who require decision-making support must:

- a. support the person to make decisions;
- b. support the person to express their will and preferences in making decisions;
- c. act in a manner promoting the personal, social, financial, and cultural wellbeing of the person;
- d. act honestly, diligently and in good faith;
- e. support the person to consult, as they wish, with existing appointees, family members, carers and other significant people in their life in making decisions; and
- f. assist the person to develop their own decision-making ability.

In considering whether public agencies, paid workers or organisations or volunteers can be supporters, the Commission considers that there should be an independent option open to people who do not have family or friends willing or able to step into the role of supporter. Issues to be considered when appointing an ‘independent’ supporter are:

- Real or perceived conflict of interest
- Willingness/ capacity to develop an ongoing relationship of trust
- Adequate training or experience

To avoid doubt, the legislation should stipulate that the relationship between a supporter and the person is one which imposes fiduciary duties on the supporter. This would be an explicit instruction to anyone taking on the role of supporter regarding the extent of their duties to the person.