



EAP17/11422

Mr Alan Cameron AO
Chair
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

29 MAR 2018

Dear Mr ^{Alan}Cameron

Review of Guardianship Act 1987

Thank you for your correspondence of 22 November 2017 inviting the Department of Family and Community Services (FACS) to provide comments on the Law Reform Commission's Draft Proposals on the Review of the *Guardianship Act 1987*.

Please find attached our submission on the Commission's draft proposals.

As we have previously submitted to the Commission, FACS' position is premised on the fundamental principle that all adults have the right to make decisions about how they live their own lives, including people with disability.

It is our experience working with clients that most people with disability, including those with conditions that affect the brain, are able to make at least some independent decisions. Some people need more help than others to make important health, accommodation and lifestyle decisions but are able to make them with support and advice from their family and/or friends.

Supported decision making is generally provided by a trusted person, and can involve assistance with communication or providing information in accessible formats. Importantly, the person is being assisted to make their own decisions and therefore retains their autonomy and agency to make decisions for themselves.

If this kind of supported decision making is working well and the person with disability is able to make decisions, with some help, there is no need for the appointment of a guardian or substitute decision-maker. Accordingly, we support the Commission's proposal to retain the substitute decision-making framework as a last resort option.

While FACS supports the proposed new framework for assisted decision making based on contemporary human and disability rights principles, we are concerned about the impact that the Commission's proposal to establish two types of supported decision making may have on current informal supported decision making arrangements.

Supported decision making reflects the current practice for most people in the community where decision making involves engagement with, and advice from, others in everyday life. The extent to which this can and should be formalised in legislation requires careful consideration.

In particular, we are concerned that by legislating for personal support agreements (and less so for Tribunal support orders), more formal supported decision making arrangements may lead to the diminution or failure to recognise informal supported decision making arrangements which is the reality for most people in the community today.

In other words, legislating for a formal support agreement may force people to 'formalise' their current arrangements if issues arise in their daily life where informal arrangements are not recognised.

FACS also supports the creation of a Public Advocate with advocacy and investigative functions.

We draw to the Commission's attention the recommendations of the Legislative Council Inquiry into Elder Abuse, which recommended that the Public Advocate be able to investigate complaints and provide an advocacy function in relation to at-risk adults.

If you would like more information, please contact Jemi Jeng, Senior Project Officer,

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Yours sincerely

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Michael Coutts-Trotter
Secretary

Encl.

Submission to NSW Law Reform Commission Review of the Guardianship Act 1987 (NSW) Draft Proposals

Introduction

1. Publication of FACS submission

- The Department of Family and Community Services (FACS) welcomes the opportunity to respond to the *Review of the Guardianship Act 1987: Draft Proposals* (Draft Proposals) and consents to the publication of this submission.

2. Context of FACS submission

- As with the Draft Proposals advanced by the NSW Law Reform Commission (Commission), this submission is informed by human rights principles established in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), National Quality and Safeguards Framework (NDIS Q&S Framework), as well as the *Disability Inclusion Act 2014* (NSW) (DIA).
- The Draft Proposals have also been considered in the context of the National Disability Insurance Scheme (NDIS), which will be fully implemented in 1 July 2018.

3. Summary of FACS position

- The Draft Proposals set out proposed provisions of a new Act to be called the *Assisted Decision-Making Act*. The proposals have been informed by the numerous submissions that the Commission received in response to six question papers it circulated in 2016-2017, covering a broad range of guardianship issues.
- As with previous FACS submissions to the Review of the Guardianship Act 1987 (Review), we have not responded to every proposal advanced by the Commission in this submission. Instead, this submission focuses on those issues that are most relevant to FACS. The submission also addresses broader legislative and policy reform issues, including those relating to the NDIS.
- FACS broadly supports the proposed assisted decision-making framework advanced by the Commission. An overview of our position on key aspects of the proposed framework is outlined below:
 - Although FACS generally supports the proposed legislative framework, we question the operational feasibility of certain aspects of the framework, particularly if assisted decision-making is intended to operate on a continuum.
 - FACS continues to have concerns about how a formalised supported decision-making regime in NSW is to operate jointly with an informal regime.

- FACS agrees with proposals that will require decision-makers to consider or give effect to a person's 'will and preferences' rather than their 'best interests'. The former is consistent with a rights-based approach to decision-making. However, as FACS has submitted previously, there will be exceptional circumstances where it may not be possible to determine a person's will and preference even with best endeavours (for example, where the person has a severe disability and is unable to express or indicate in any way their will or preference and there are no family members to assist). It is therefore important that the proposed Act address how "will and preference" is determined in these situations.
- Decisions that curtail rights, that they do so in the least restrictive way possible.
- FACS supports the removal of the Tribunal's power to make plenary orders under the new Act, but notes that in relation to restrictive practice decisions, the Commission should have regard to how such decisions intersect with policy and regulations under the NDIS, which are currently in development.
- FACS supports the specific considerations set out for Aboriginal and Torres Strait Islander Peoples but encourages the Commission to also incorporate provisions that recognise the unique issues and barriers applicable to women with disability and people from cultural and linguistically diverse (CALD) backgrounds.
- FACS support the recommendation to establish a new Public Advocate and for this role to be vested with advocacy, investigative and other functions. FACS recommends that the Commission consider and clarify whether the Public Advocate's functions and services will apply to people needing assisted decision-making support who come into contact with the criminal justice system, and if so, the scope of these services.
- FACS recommends that further consideration be given to the age thresholds in the new Act. In particular FACS contends that the age threshold for a young person needing decision-making assistance under the new Act should be 16 years of age and the minimum age for any one providing decision-making assistance should be 18 years of age.
- FACS proposes that the responsible person for health care decisions for a young person in statutory out-of-home care be the principal officer of a designated agency responsible for supervising the care responsibility of the young person under the parental responsibility of the Minister of Family and Community Services.
- FACS recommends that the new Act or any supporting regulation clarify the roles, responsibilities and referral powers of the Public Representative, the NSW Trustee and the Public Advocate in relation to information received and action that must be taken when neglect, abuse, exploitation or other criminality is suspected.

Part 1 – The proposed framework

4. Overview

- The Draft Proposals advance a new assisted decision-making framework in NSW that will allow for both supported and substitute decision-making arrangements to

operate under one decision-making regime. The regime will be regulated under a new Act called the *Assisted Decision-Making Act*.

- The first half of the framework deals with supported decision-making arrangements, which are separated into two categories: informal support arrangements and formal support arrangements.
- Informal supported decision-making arrangements reflect current practice in the community. They are informal arrangements between individuals with some decision-making ability and their relatives, friends or other trusted persons who support them to make decisions about matters affecting their lives. Importantly, the decision-maker retains autonomy and agency to make decisions.
- Under the new framework, people needing support will be able to enter into formal support arrangements regulated under the new Act. These arrangements will be similar to existing arrangements and may be entered into by agreement (Personal Support Agreements) or an order issued by the NSW Civil and Administrative Tribunal (Tribunal Support Orders). FACS holds concerns about the desirability of formalising support arrangements in NSW, as explained in further detail below.
- The second half of the framework establishes a substitute decision-making regime which is also separated into two decision-making categories: enduring representation agreements (formerly enduring powers of attorney and enduring guardianships) and representation orders (formerly guardianship and financial management orders). These substitute decision-making arrangements will continue to operate in much the same way as they currently do, with some exceptions.

5. Assessing decision-making ability

- FACS supports the proposed definition of decision-making ability being framed in terms of acknowledging that a person's decision-making ability can vary depending on the circumstances (proposal 1.12). FACS also supports the guidance provided by proposals 1.14-1.16 on assessing decision-making ability and what factors should not result in a finding of a lack of decision-making ability.

6. The principle of least restriction

- According to the Draft Proposals the framework is underpinned by the principle of least restriction which maintains that it should be applied in the least restrictive way possible. Page 12 states that:

The broader framework seeks to provide a range of options and to promote the least restrictive option in every case. The existence of support agreements should provide a less restrictive option for people who, for example, would otherwise be subject to substitute decision-making arrangements.

- The principle of least restriction is also expressed in several proposals, including proposals 2.5, 3.2(e), 5.2(1), 5.2(2)(b), 5.6(1), 5.7(6)(a), 5.12(2), 6.16(2)(b) and 9.1(3)(g).
- Implicit in the statements above and some of the draft proposals is the idea that the framework will operate on a continuum (or spectrum) with supporters and representatives adjusting the type of assistance they provide based on a person's 'assessed' decision-making ability each time a decision is made.
- If it is intended that the framework will operate on a continuum of supported assisted decision-making, FACS queries the operational feasibility of this

approach. While this is consistent with our position on the variability of decision-making (see FACS Submission to Question Paper 1) it appears to assume that supporters and representatives will be sufficiently skilled, engaged and equipped to assess a person's decision-making ability each time a decision is to be made (e.g. as set out in proposals 1.14-1.15). In addition, it is unclear what processes (if any) they will need to follow if they determine that a person's decision-making ability has changed.

- For these reasons, FACS recommends that procedures and policies be developed to provide guidance on how the proposed framework will operate in practice having regard to the principle of least restriction and the concept of a continuum (if applicable)

Part 2 – Supported decision-making

- As explained in previous submissions, FACS has concerns about formalising supported decision-making in NSW. However, given the Commission's decision to proceed with this approach, we have outlined (below) several issues that are likely to arise with the adoption of a dual system of informal and formal supported decision-making arrangements.

7. Unclear relationship between informal and formal regimes

- Although the Draft Proposals state that formal support arrangements are not intended to replace informal arrangements that are working well, we believe there is a lack of clarity around the circumstances when 'informal' supported decision-making arrangements could come under the jurisdiction of the new Act.
- For example, it is unclear what systems and processes will enable a person to move from an informal support arrangement to a formalised one (or vice versa) or if there may be circumstances where supported persons in informal arrangements may benefit from any protections set out in the new Act – for example, if they are not aware of the option to formalise existing arrangements, lack the resources to do so, and are being abused by their supporter.
- As a result, legislating 'some' supported decision-making arrangements may create some uncertainty or call into question the status of 'informal' supported decision-making arrangements. FACS recommends that these issues should be further clarified in the new Act or any supporting regulations, where appropriate.

8. 'Supported decision-making' terminology may need to be recognised in the new Act

- Given the concerns outlined above (and those raised in previous FACS submissions) FACS questions whether using 'supported decision-making' terminology in the new Act should be reconsidered.
- Adopting a dual system of informal and formal supported decision-making whereby formal support arrangements are defined in statute and vary slightly from accepted practice and definitions will invariably impact upon the informal regime. While this impact could be for the better, there is a risk that the validity of the informal system, including existing definitions and practice, may be called into question. Also, having a formal and informal system has the potential to create confusion within the sector.

- For these reasons, the Commission may wish to reconsider whether using supported decision-making terminology in the new Act is the best approach.

9. Adopting a formalised regime may call into question the validity of the informal regime

- FACS is also concerned that formalising some supported decision-making arrangements in statute may affect how informal arrangements are perceived in the community. In our view, there is a real risk that people in informal support arrangements may be held to standards set out in the new Act, even though these standards are not intended to apply to them. For example, service providers may require supported persons to show proof of their support arrangements before providing certain services.
- Also with the introduction of a formalised regime, supported persons may feel compelled or pressured to formalise their support arrangements even though their current arrangements may be better suited to their needs. In our view, this would be an unfortunate outcome of a dual regime.
- We note that the responsiveness of supporters to the formalised regime is not yet known. While many will likely not oppose the formalised regime and the responsibilities set out in the new Act, some supporters may be deterred by the additional requirements. In these cases, some supported persons may find themselves in unsatisfactory arrangements.

Part 3 – Formal substitute decision-making

10. The making of representative orders

- FACS supports streamlining the current arrangements for guardianship and financial management under the *Guardianship Act*, by replacing them with a single regime of representative orders. In framing the type of decision a representative order will cover, FACS supports the proposal to replace plenary orders with the requirement that the Tribunal specify the type of decisions, including any conditions or limitations, that a supporter or a representative can make.
- FACS supports conferring on the Tribunal the power to require the NSW Trustee to supervise a representative with a financial function and giving power to the Supreme Court to review a representative order (proposals 5.13, and 5.22). We also agree with the proposal that there should be scrutiny by the Public Representative and/or NSW Trustee of representative orders where the Tribunal appoints a person other than the NSW Trustee or Public Representative (proposal 5.8).
- FACS recommends that the new Act or supporting regulations clarify the roles, responsibilities and referral powers of the Public Representative, the NSW Trustee and the Public Advocate in relation to information received and action that must be taken when neglect, abuse, exploitation or other criminality is suspected.

Part 4 – Regulation of restrictive practices

11. Restrictive practice decisions

- FACS supports the proposal 1.7(b) to adopt the definition of restrictive practices used in the National Disability Insurance Scheme legislation. FACS notes that the Commonwealth is developing a national policy on restrictive practices (or behaviour supports), which is expected to be finalised by the end of 2018
- FACS queries whether regulating restrictive practice decisions under the new Act and separating them from healthcare decisions may result in some unintended conflicts between the NDIS legislation and the proposed new Act.
- For example, under the current Guardianship legislation, the use of chemical restraints (i.e. medications affecting the nervous system) to manage a person's behaviour are considered a major medical treatment and as such, fall within the medical decision-making category (see clause 10(1)(e)(iii) of the Regulation and sections 33(1) of the Act). However, the NDIS Quality and Safeguards Framework uses the definition of restrictive practices as outlined in the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Services Sector (2014)* including, but not limited to the use of chemical restraints (see QAS Framework, page 67).
- FACS suggests that consideration be given to how chemical restraints are categorised under the new assisted decision-making regime. We are concerned that any potential inconsistency between state and commonwealth regulatory regimes for restrictive practises will result in confusion for those exercising decisions under the new Act or reporting to the Senior Practitioner under NDIS legislation.

Part 5 – Additional comments

12. Age thresholds

- FACS has concerns with some of the age thresholds proposed for the various decision-making arrangements under the new Act. In our view, the Draft Proposals do not provide a clear explanation as to why the age thresholds differ for each decision-making arrangement.
- For example, under the proposed regulatory framework:
 - 16 years is the threshold age a person can be subject to the healthcare decision-making provisions (proposals 6.2 and 6.18) and the age a young person can be a supporter
 - 18 years or above is the age threshold for representatives and enduring representatives (see proposals 5.4(2)(a) and 4.3)
 - persons will need to be at least 17 years old to be appointed a representative under a representation order (proposal 5.2(1)(a))
 - the threshold for entering a formal support arrangement or an enduring representation agreement will be 18 years or above (proposals 2.1, 3.2, and 4.1).

- FACS is concerned that the different age thresholds proposed for the various decision-making arrangements and to be a person in need of support are likely to create confusion.
- FACS recommends that the age threshold for persons needing decision-making assistance under the new Act be set at 16 years (FACS Submission to Question Papers 4-6, pages 29-30). In our view, this minimum threshold age should apply to all decision-making arrangements, as it will ensure that the new Act is internally consistent and accessible (in line with proposal 1.2). Setting the minimum age at 16 years would also ensure consistency across regulatory frameworks that deal with age-based capacity.
- FACS notes that 18 years is currently the minimum age to be a guardian in all Australian jurisdictions.
- FACS recommends that the age threshold for anyone who provides decision-making assistance under the new Act be set to at least 18 years of age. This reflects the gravity of the decision-making arrangements and the potential implications for represented persons where assistance is unsatisfactory.

13. Public Advocate

- FACS supports in-principle the proposals equipping the new Public Advocate (and the Public Representative) to support the assisted decision-making sector by providing advocacy, investigative, education and other services. The new entity will provide important services and protections to people with disability, including those who are ineligible for the NDIS (for example the elderly) or who are unable to complain to the NDIS Commissioner.
- FACS draws to the attention of the Commission, the recommendations of the Legislative Council Inquiry into Elder Abuse, which recommended that the Public Advocate be able to investigate complaints and provide an advocacy function in relation to at-risk adults. FACS recommends that the Commission consider this recommendation by including provision for the Public Advocate to investigate elder abuse.
- We note the scope of functions that will be vested in the Public Advocate and we suggest that further consideration may need to be given to whether proposals 9.1(3)(a) and (b)(iii) may overlap with services provided by the Tribunal and the NDIS Senior Practitioner, respectively.
- We also note that the meaning of decision-making assistance under proposal 9.1(3)(c) may need to be clarified to ensure that it is not understood to confer supporter functions on the Public Advocate.
- FACS considers that enabling the Public Advocate to access child protection databases will serve as an important safeguard against abuse and neglect for supported and represented persons. However, this must be balanced against privacy and confidentiality considerations.
- We note that proposals 9.1(3)(g) to enable the Public Advocate to commence an investigation, on its own motion, when there is an application before the Court for a support or representative order, may be contentious. In circumstances where the Court or Tribunal needs further information to assist its decision-making functions, it may be preferable if the Tribunal or Court was conferred the power to refer the matter to the Public Advocate for investigation or invited the Advocate to make a submission as a 'friend of the court'.

- It is unclear if the Advocate's functions extend to people who come into contact with the criminal justice system as witnesses, victims or alleged offenders and require decision-making assistance. FACS recommends that the Commission consider and clarify whether the Public Advocate's functions and services will apply to people who come into contact with the criminal justice system and, if so, the scope of these services.

14. Penalties and compensation

- FACS support civil and criminal penalties being imposed for misuse or abuse of power by a representative or supporter.
- FACS is of the view that a strong enforcement and penalty regime is needed because persons in need of assisted decision-making are acutely vulnerable to abuse and exploitation.
- In addition to the Tribunal being able to require parties to use resolution processes or direct that mediation be conducted or arranged by the Public Advocate (proposal 9.1 and 10.6), we recommend that the new Act include civil and criminal penalty provisions to protect persons from supporters or representatives who misuse their position of trust and authority.
- FACS considers NCAT is an appropriate jurisdiction in which to take action against an appointed decision maker.

15. Access to assisted decision-making: recognition of diversity and equity

- FACS strongly supports the new Act including additional principles and culturally relevant considerations for Aboriginal and Torres Strait Islander people in need of decision-making assistance (proposal 1.10). The unique history and culture of Aboriginal and Torres Strait Islander peoples, their particular needs, as well as the intersectional disadvantage they suffer, warrants special consideration.
- FACS reaffirms its position that the new Act should include provisions that recognise the needs and systemic disadvantage that may be experienced by people from culturally and linguistically diverse (CALD) backgrounds. In addition, we recommend that further consideration be given to incorporating provisions in the new Act that recognise the specific needs and issues affecting women with disability to ensure the full and equal enjoyment of their fundamental rights. Women with disability often face multiple disadvantage and are potentially more vulnerable to risk of abuse or exploitation

16. Health care decisions

- FACS broadly supports proposals concerning healthcare decisions, particularly those that seek to align definitions and assessments used in healthcare contexts with the rest of the Act. Similarly, we support a broadened definition of registered health practitioner in the new Act, as this will help to minimise confusion for those who interact with the healthcare system and enhance protections for persons in receipt of such care.
- However, FACS considers proposal 6.16(4) to be confusing and potentially incongruous. As a result, we suggest that the Commission reconsider the wording and aim of this provision.
- FACS does not support the proposed definition of person responsible for health care decisions for a young person under the parental responsibility of the Minister for Family and Community Services or care responsibility of the Secretary of

FACS, as set out in proposals 6.18(1)(b),(c) and 6.18(2). To be consistent with the approach taken under *Children and Young Peoples (Care and Protection) Act 1998* it is recommended that the principal officer of the designated agency or their delegate who supervises the out-of-home care placement for the young person be the person responsible for the young person's healthcare decisions.

17. Search and removal powers

- FACS supports proposals concerning search and removal powers, in principle, noting that they are broader than existing provisions in the current Act, and should therefore provide greater protections for people with disability under the new Act.

