



Seniors Rights Service

Review of the Guardianship Act 1987

Terms of Reference

Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the Guardianship Act 1987 (NSW) having regard to:

1. The relationship between the Guardianship Act 1987 (NSW) and
 - The NSW Trustee and Guardian Act 2009 (NSW)
 - The Powers of Attorney Act 2003 (NSW)
 - The Mental Health Act 2007 (NSW)
 - Other relevant legislation
2. Recent developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability and Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model and costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the Federal level, especially the National Disability Insurance

Your rights. Your voice. Supported Decision Making Act 2013, the Aged Care Act 1997 and related legislation.

5. Whether the language of disability is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with decision making incapacity.
7. In light of the requirement of the UNCRPD that there be regular reviews of any instrument that has effect of removing or restricting autonomy, should the Guardianship Act 1987 provide for regular review of financial management orders.
8. The provisions of Division 4A of Part 5 of the Guardianship Act 1987 relating to clinical trials.
9. Any other matter the NSW Law Reform Commission considers relevant to the terms of reference.

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.

We submit that there is an argument for both a supported decision making model and a substitute decision making model for older persons with disabilities in Australia and therefore in NSW.

In NSW there is a current regime for older persons to plan ahead and make their own appointments under enduring power of attorney appointments and under enduring guardianship appointments. This empowers the older person to elect who will support and make decisions on their behalf should the time come and they no longer have capacity to make decisions for themselves.

In order to place our submission in the current context we briefly set out below the current law in NSW as it applies to these appointments.

Operation of Enduring Power of Attorney in NSW

In NSW an attorney under an enduring power of attorney must follow the directions of the older person whilst they have capacity, if the enduring power of attorney is specified to have commenced. It is only when the person lacks capacity that the attorney may act in the older person's best interests and override the directions of the principal, where the principal gives directions to the attorney after a loss of capacity. This does not apply to directions articulated in writing in the enduring power of attorney document when the principal had capacity.

The attorney is bound by fiduciary obligations in equity to act in the best interests of the older person at all times. Previously there were criminal offences in NSW for theft or fraud by the attorney but these are no longer in place. Where a person concerned with the welfare of an older person suspects abuse by the attorney the person concerned can apply to the Guardianship Division of NCAT to have the appointment reviewed and the attorney removed. Should the older person lack capacity a financial management order may be made appointing a suitable person as private manager or the NSW Trustee and Guardian.

Operation of Enduring Guardianship in NSW

In NSW an enduring power of attorney appointment covers financial and legal decision making only and does not cover health, dental, accommodation and lifestyle decision making.

In NSW a guardianship appointment may cover medical, dental, accommodation and lifestyle decision making and does not commence until the older person "*is a person in need of a guardian*" as defined under section 3 of the *Guardianship Act*. This requires that the Tribunal determines that the person either lacks mental capacity to make their own decisions

or they lack physical capacity to undertake normal activities of life or both. The appointment does not commence until this requisite loss of capacity is reached based on medical evidence.

A review can be made of an enduring guardianship appointment. The *Guardianship Act 1987* provides for a review of the appointment by the Tribunal of its own motion or by a person concerned with the welfare of an older person.

A review can be made of an enduring guardianship appointment. The *Guardianship Act 1987* provides for a review of the appointment by the Tribunal of its own motion or by a person concerned with the welfare of an older person.

Upon review the Tribunal can revoke the appointment or confirm the appointment. If the appointment is to be revoked, the enduring guardian must have requested the revocation and the Tribunal must be satisfied it is in the best interests of the older person that the appointment be revoked.

Guardianship Orders and Financial Management Orders

These orders provide for the appointment of substitute decision makers to make decisions on behalf of the older person where the person lacks capacity to make decisions (for guardianship the person lacks capacity in relation to accommodation and lifestyle decisions and for financial management in relation to the management of their financial affairs).

Supported Decision Making

The Difference Between Supported and Substitute Decision Making

Supported decision making is where a person could be assisted to make their own decision. Such persons would have the capacity, once assisted, to make their own decisions. The definition of capacity is the ability to understand the nature of decision, the choices involved, the consequences of those choices, and to communicate the decision. The person could be supported by the supported decision maker:

- Obtaining information for them to help them with their decision;
- Explaining information to them in format they understand;
- Obtaining their response to the decision to be made;
- Assisting them to implement the decision.

Substitute Decision Making is where a person's legal capacity to make a decision has been removed. Whilst capacity is a fluid concept, there may be a situation where a person is unable to understand the nature of the decision to be made due to a cognitive or psychological

impairment. In these circumstances, even with support, the person may not be able to exercise legal capacity to make the decision. In this instance a substitute decision maker may be appointed to make a decision based on what is believed to be in the objective interests of the person concerned, rather than based on the person's own will and preferences.

There is no formal provision in Commonwealth or NSW for supported decision making. We refer in point 3 below to the focus which has been drawn to the need for new supported decision making models based on recent developments including:

- The United Nations Convention on the Rights of Persons with Disabilities – Article 12;
- The Australian Law Reform Commission Report August 2014 on Equality, Capacity and Disability (“ALRC”); and
- Victorian Law Reform Commission Report and the Introduction of *Power of Attorney Act 2014* with amendments for a Supported Decision Making Power of Attorney.

We recognize that there is a need for formal recognition of family members engaged in supported decision making roles for people with disabilities where they assist the person to make their own decision based on the principal's own will and preferences and discuss below the advantages and disadvantages of some of the models proposed. A will and preference is the ability of a person with capacity to make a decision on the option which suits them, based on a range of choices. This is the main focus of our submission.

United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD” or “Convention”)

The purpose of the Convention is to “*promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all person with disabilities, and to promote respect for their inherent dignity*”. (Article 1 of the UNCRPD).

The principles of the Convention are to promote respect for inherent dignity and individual autonomy including: “*the freedom to make one's own choices, and independence of persons. [The Principles also promote] Non-discrimination; Full and effective participation and inclusion in society; Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; Equality of opportunity; Accessibility; and Equality between men and women*”. (Article 3 of the UNCRPD).

We refer to article 12: Equal recognition before the law

“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

Other articles of importance for older persons with disabilities are set out below.

- Article 5: Non-discrimination – All people are entitled, without discrimination, to the equal protection and equal benefit of the law.
- Article 13: Access to Justice - All people are entitled to access to justice including persons with disabilities.
- Article 14: Liberty and Security of the Person - People with disabilities are entitled to enjoy the right to liberty and security of person, and should not be deprived of these unlawfully or arbitrarily.
- Article 15: Freedom from torture or cruel, inhumane or degrading treatment or punishment - effective legislative, administrative and judicial measures are to be taken to prevent people with disabilities being subject to torture or cruel, inhuman or degrading treatment or punishment
- Article 17: Physical and mental integrity - every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.
- Article 18: Liberty of movement and nationality - persons with disabilities are entitled to liberty of movement and nationality.
- Article 19: Living independently - persons with disabilities are entitled to live independently, where and with whom they chose, with access to a range of support services and to full inclusion and participation in the community
- Article 21: Freedom of Expression - persons with disabilities are entitled to exercise the right to freedom of expression and opinion and access to information
- Article 22: Respect for Privacy - no person with a disability is to be subjected to arbitrary or unlawful interference with their privacy and their honour and reputation to be protected.

Interpretation of Convention on Rights of Persons with Disabilities

Article 12 raises the importance in clause 3 of providing persons with disabilities with “all the support they may require in exercising their legal capacity”. This is supportive of a new approach to guardianship laws where a role of supported decision making structures is seen as a priority where possible to implement the will and preferences of the older person with a disability rather than a best interests approach.

In terms of the application of Article 12 in its General Comment No 1 on Article 12 of the Convention – Equal Recognition Before the Law the UNCRPD said that “Support” is a broad term “that encompasses both informal and formal support arrangements, of varying types and intensity”.

The ALRC, referenced the UNCRPD General Comment to explain the difference between supported and substitute decision making.

A supported [decision-making] model comprises ‘various support options which give primacy to a person’s will and preferences and respect human rights norms’ and while supported decision making regimes can take many forms ‘they should incorporate key provisions to ensure compliance with Article 12’. Supported decision-making processes prioritise personal autonomy and recognise that individuals should be empowered with information to make decisions – even bad ones (acknowledging the dignity of risk).”

The UNCRPD defined substitute decision making as follows

“(i) legal capacity is removed from a person, even if this is just in respect of a single decision; (ii) a substitute decision maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and(iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective best interests of the person concerned, as opposed to being based on the person’s own will and preferences.

The UNCRPD suggested that substitute decision making regimes should be abolished and replaced by supported decision making regimes and the development of supported decision making alternatives.

Australia clarified its response to Article 12 in Australian Government, Submission to the UN Committee on Rights of Persons with Disabilities, Draft General Comment on Article 12 of the Convention – Equal Recognition Before the Law. It stated that:

“Australia acknowledges the importance of supported decision making where this is possible, but considers that a human rights based model of disability does not preclude all substitute decision making. Such decisions should only be made on behalf of others where this is necessary, as a last resort, subject to safeguards.

Australia was critical of Article 12(3) as never permitting substitute decision making stating that:

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 understand or make or communicate a decision.

It is unfortunate that the complexities of this issue are not acknowledged and discussed in the current draft.

We are of the view that there is scope to introduce a supported decision making model as an appropriate first step in assisting a person exercise their full legal capacity in accordance with Article 12. We are also of the view that it would be necessary to keep a substitute decision making model in place for those persons who were incapable of understanding the full nature and consequences of their decisions. We see the decision making process as a continuum with fully independent decision making by the principal at one end and substitute decision making at the other end. Along that spectrum supported decision making by the principal would sit. Allowing for processes to cope with the gradation of decision making and getting them right is the task that needs to be addressed.

A supported decision making model would be appropriate where the person could be assisted to make their own decision. Such persons would have the capacity, once assisted, to make their own decisions. The definition of capacity is the ability to understand the nature of decision, the choices involved, the consequences of those choices, and to communicate the decision.

A support person could be nominated by the person in need of support, or, in certain circumstances, by a designated Tribunal. We examine the options and the advantages and disadvantages of models proposed more closely in point 3 of this submission.

2. The basis and parameters for decisions made pursuant to substitute decision making model, if such a model is retained.

We are of the view that it would be necessary to keep a substitute decision making model in place for those persons who were incapable of understanding the full nature and consequences of their decisions.

Guardianship Orders in NSW

To make a guardianship order in NSW it is necessary to determine:

- (a) If the person lacks capacity (as defined by section 3 of the *Guardianship Act 1987*)
- (b) If the person is in need of a guardian
- (c) If the appointment of a guardian would be in the person's best interests.

Section 3 of the *Guardianship Act* provides as follows:

Section 3 definition in the Guardian Act 1987

person in need of a guardian means a person who, because of a disability, is totally or partially incapable of managing his or her person.

Section 3 (2) provides:

(2) *In this Act, a reference to a person who has a disability is a reference to a person:*

(a) *who is intellectually, physically, psychologically or sensorily disabled,*

(b) *who is of advanced age,*

(c) *who is a mentally ill person within the meaning of the Mental Health Act 2007, or*

(d) *who is otherwise disabled,*

and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.

The Seniors Rights Service has observed and notes that a person may lack mental capacity to make accommodation and lifestyle decisions or medical and dental decisions and lack insight into their current needs. It is also observed that the definition covers lack of physical capacity, where a person is of advanced age and is unable to undertake major life activities without “supervision or social habilitation”.

We submit that the definition of a person in need of a guardian could be narrowed not to include a compulsorily appointed guardian as substitute decision maker where the person has mental capacity but is physically frail. This might be a situation where a supported decision maker would be more appropriate to assist the person adjust to their changing circumstances.

We also note that capacity is a fluid concept and a person may have the capability to make some decisions affecting their lifestyle choices but not others. We note that the current guardianship regime will only make orders with limited functions where necessary (such as accommodation only or medical and dental only) and not make a plenary order covering other functions where the person still demonstrates decision making capabilities with supports in place.

Under a guardianship order a guardian must make decisions according to the section 4 principals under the *Guardianship Act 1987*. Whilst this includes a consideration of the wishes and preferences of the person these may be overridden by a consideration of the welfare and best interests of the person under guardianship.

The Australian Law Reform Commission Report 2014 in relation to safeguards for representative decision makers, it proposes that wills and preferences be given first priority and, if this cannot be ascertained, then the guardian speak to family and friends to try to determine what the person would have decided should they have had capacity. The only time such a decision would not be made is if this would cause harm to the person or another party. We support the National Decision Making Principles and Safeguards set out in the report and this could be considered for legislative change.

In addition we endorse the Rights of Persons with Disabilities set out in the United Nations Convention on the Rights of Persons with Disabilities and these could be included as part of the section 4 Principles under the *Guardianship Act*.

We note that it is important that obligations are not too complicated for private guardians to understand and implement and training on obligations could be provided.

Financial Management – Test for Lack of Capacity for Substitute Order

Financial Management orders are made when certain elements are satisfied including:

- (a) Does the person lack the capacity to manage their financial affairs?
- (b) Does the person need a financial manager?
- (c) Is it in the person's best interest that a financial manager be appointed?

In assessing a person's capacity to manage their finances and estate an examination is made of the person's ability, based on the person's circumstances, to understand: the size of their estate, understand their income and expenditure, understand how to budget now and in the future. They may not be able to undertake a more complicated transaction, such as a conveyance, but they may be able to understand and manage the income and daily expenditure they need to make. Case law in support of this position includes *P v R* 2003 NSWSC 819, *Re D* [2012] NSWSC 1006 and *PB v BB* [2013] NSWSC 1223.

In arriving at an understanding of the scope a person has to manage any of their affairs the Courts have posed these questions to ask:

- Can the person manage the ordinary affairs of living?
- Do they have an understanding of assets, liabilities and sources of income?
- Do they have some understanding of risks regarding what is proposed to be done by themselves and others with their assets or are their assets likely to be dissipated and lost?
- Do they have the ability to recognize when another person is attempting to benefit from the person's assets or money and the real risk they will be disadvantaged or money or assets lost.

If financial management orders are to be orders of last resort, and supported decision making models explored, then we support the view that the financial management orders be reviewed on a more regular basis (every year or 3 years) to determine whether the person has regained sufficient capacity for a supported decision maker or not. We refer to section 71(2) of the *NSW Trustee and Guardian Act* which allows part of the estate to be released to the person under management to manage and we would support that such a review would enable these sorts of orders to be reassessed. It would also provide a suitable check to ensure that the financial manager, whether it is a private manager or the NSW Trustee and Guardian, is acting in the best interests of the older person.

Section 4 Principles under the *Guardianship Act 1987*.

We set out below for your information the current section 4 Principles of the *Guardianship Act 1987* which apply to guardians and to financial managers.

Section 4 of the *Guardianship Act 1987* provides:

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,*
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,*
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,*
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,*
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,*
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,*
- (g) such persons should be protected from neglect, abuse and exploitation,*
- (h) the community should be encouraged to apply and promote these principles.*

3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model and costs of implementation.

Currently, there is no formal legislative model for supported decision making in NSW. There is an argument there is a need for formal recognition of family members engaged in supported decision making roles for people with disabilities where they assist the person to make their own decision based on their will and preferences.

United Nations Convention on the Rights of Persons with Disabilities – Article 12

The need for supported decision making models has been given support by the United Nations Convention on the Rights of Persons with Disabilities. We refer to our observations in point 1 of this submission regarding support for a Supported Decision Making Regime.

We endorse the National Decision Making Principles set out in the Australian Law Reform Commission Report 2014 and are of the view these principles should also be applied to the framework within which supported decision makers assist an older person to make decisions.

We summarize these principles below:

Principle 1 : The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2 : Support

Persons who require support in decision making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.

Support Guidelines

- (a) Persons who require decision making support should be supported in making decisions*
- (b) The role of persons who provide decision making support should be acknowledged and respected – including family members, carers or other significant people chosen to provide support*
- (c) Persons who may require decision making support may choose not to be supported*
- (d) Assessing support needs.*

In assessing what support is required in decision making the following must be considered:

- (a) All adults be presumed to have the ability to make decisions that affect their lives*
- (b) A person must not be assumed to lack decision making ability on the basis of having a disability*
- (c) A person's decision making ability must be considered in the context of available supports*
- (d) A person's decision making ability is to be assessed, not the outcome of the decision they want to make.*
- (e) A person's decision making ability will depend on the kinds of the decisions to be made*
- (f) A person's decision making ability may evolve or fluctuate over time.*

Principle 3: Wills, Preferences and Rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Will and Preference Guidelines

1. Supported Decision Making

(a) In assisting a person who requires decision making support to make decisions, a person chosen by them as supporter must:

- (i) Support the person to express their will and preferences; and*
- (ii) Assist the person to develop their own decision making ability.*

(b) In communicating will and preferences, a person is entitled to:

- (i) Communicate by any means that enable them to be understood; and*
- (ii) Have their cultural and linguistic circumstances recognized and respected.*

2. Representative Decision Making

Where a representative is appointed to make a decision for a person who requires decision making support:

- (a) The persons will and preferences must be given effect;*
- (b) Where the persons current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.*
- (c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in a way least restrictive of those rights.*
- (d) A representative may override the persons will and preferences only where necessary to prevent harm.*

Principle 4 : Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision making support, including to prevent abuse and undue influence.

Safeguard Guidelines

1. General

Safeguards should ensure that interventions for persons who require decision making support are:

- (a) The least restrictive of a person's human rights;*
- (b) Subject to appeal; and*
- (c) Subject to regular, independent and impartial monitoring and review.*

2. Support in decision-making

- (a) Support in decision making must be free of conflict of interest and undue influence.*
- (b) Any appointment of a representative decision maker should be:*
 - (i) A last resort and not an alternative to appropriate support;*
 - (ii) Limited in scope, proportionate, and apply for the shortest time possible; and*
 - (iii) Subject to review.*

It is recommended that these principles and guidelines be incorporated in model legislation to guide supported decision makers in their role and also to guide legislators in conferring powers on Tribunals to appoint and review the appointment of supported decision makers.

What would be an Appropriate Model for Supported Decision Making?

Supported Decision Making Power of Attorney Appointment – Victoria Example

In this section we examine different models of supported decision making which have been proposed in states such as Victoria. We then make observations as to some advantages and risks to be considered in assessing supported decision making models and propose some safeguards to be considered.

The supported decision making power of attorney introduced recently in Victoria is really a more limited form of an enduring power of attorney to that which already exists in NSW. In Victoria the supported decision making power of the attorney is where the principal appoints a person to support themselves to make accommodation and lifestyle decisions and to make financial decisions. The conditions in the document can impose limits in the following areas:

- Ability to gather information on behalf of the older person

- Ability to explain information on behalf of the older person
- Ability to obtain older person's decision and once decided take steps to implement the decision.

The conditions in the supported power of attorney in Victoria are also limited in that the attorney cannot assist the older person to implement decisions in relation to making investments in excess of \$10,000 or sell property (they can only rent real estate). If these powers were required to be exercised the person would also need to have an enduring power of attorney in place or application made to the Tribunal (if person lacked capacity).

In this way it can be seen that the introduction of a supported decision making power of attorney is really an introduction of a more limited form of power of attorney, with conditions and limitations, restricting their powers to that of a supported decision maker.

Appointment of Supported Decision Makers by the Tribunal – Victoria Example

The Victorian Law Reform Commission Guardianship Final Report recommended the Victorian Civil and Administrative Tribunal recognize the appointment of a supported decision maker in appropriate circumstances. The Report included the following recommendations regarding the definition of capacity and assessment of capacity for supported decision making appointments and then sets out the considerations for making such an appointment.

Defining incapacity

24. A person is unable to make a decision if they are unable to:
- (a) understand the information relevant to the decision and the effect of the decision;
 - (b) retain that information to the extent necessary to make the decision;
 - (c) use or weigh that information as part of the process of making the decision; or
 - (d) communicate the decision in some way.

Defining capacity

25. A person has the capacity to make a decision if they are able to:
- (a) understand the information relevant to the decision and the effect of the decision;
 - (b) retain that information to the extent necessary to make the decision;
 - (c) use or weigh that information as part of the process of making the decision; and
 - (d) communicate the decision in some way.

Presumption of capacity

26. A person must be presumed to have capacity unless it is established that the person lacks capacity.

Capacity assessment principles

27. *New guardianship legislation should contain the following capacity assessment principles:*

- (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.*
- (c) An adult's incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.*
- (d) A person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider to be unwise.*
- (e) A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.*
- (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.*

Chapter 8—Supporters

Introduction of supporters into Victorian guardianship laws

- 30. A new appointment, known as a 'supporter', should be introduced into new guardianship laws.*
- 31. The person supported under the arrangement should be known as the 'supported person'.*

Personal appointments of supporters

- 32. A person should be able to appoint a personal supporter or financial supporter through a written 'supported decision-making appointment' if they have the capacity to do so.*
- 33. The appointment should be in a prescribed form, written in plain English and available in an easy English format. Translated plain language and 'easy' versions of the form should also be available in community languages.*
- 34. The formal requirements for the creation of a supported decision-making appointment should be the same as for other personal appointments.*

VCAT appointed supporters—criteria for appointment

- 35. VCAT should be able to appoint a personal or financial supporter to assist a person if:*
 - (a) the person's ability to make or implement decisions about the matters referred to in the order is impaired in some way*
 - (b) the person would be assisted to make decisions about the matters referred to in the order if provided with appropriate guidance and support from one or more supporters*
 - (c) the person is unable to make the appointment themselves*
 - (d) there is a need for an appointment to be made*
 - (e) the proposed supporter/s is suitable to act in the role and consents to the appointment*

- (f) the person freely and voluntarily consents to:*
- (i) the appointment of the individual/s who are proposed to be appointed as a supporter*
- (ii) all other aspects of the order*
- (g) the appointment of the supporter/s will promote the personal and social wellbeing of the person.*

The identity of a supporter

36. In determining whether a person is suitable to act in the role of supporter, VCAT must take into account:

- (a) the wishes of the person*
- (b) the desirability of preserving existing family relationships, and other relationships of importance to the person*
- (c) the nature of the relationship between the person and the proposed supporter, and in particular whether the relationship is characterised by trust*
- (d) the ability and availability of the proposed supporter to assist the person to make the decisions about the matters to be referred to in the order*
- (e) whether the proposed supporter will act honestly, diligently and in good faith in the performance of their role*
- (f) whether the proposed supporter has a potential conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any potential conflicts. Professional supporters should not be appointed*

37. The Public Advocate should not be able to be appointed as a 'supporter'.

38. Supporters should not receive any direct financial remuneration for the performance of their role.

Types of decisions covered by support arrangements

39. The supported decision-making appointment or order should specify the areas of decision making in which the supporter is authorised to act.

40. The appointment or order should also specify any conditions or limitations upon the appointment.

Personal and financial decisions

41. Supported decision-making appointments and orders should be available for both personal and financial decisions.

42. Separate orders or appointments should exist in relation to the appointment of 'personal supporters' and 'financial supporters'.

Powers of supporters

43. A supported decision-making appointment or order should authorise a supporter to exercise some or all of the following powers in relation to a decision:

- (a) the power to access, collect or obtain or assist the supported person in accessing, collecting or obtaining from any person any relevant information to assist the supported person to understand the information;*
- (b) the power to discuss the relevant information with the supported person in a way the*

person can understand and that will assist the person in making the decision;
(c) the power to communicate or assist the supported person in communicating the decisions to other people, and advocate for the implementation of the person's decision where necessary.

44. The appointment or order should specify which of these powers the supporter is authorised to exercise.

45. To avoid doubt, the law should specify that:

(a) A supporter is not authorised to make decisions on behalf of the supported person, and may not exercise their authority without the knowledge and consent of the person.

(b) A supporter may not use their authority to access, collect or obtain information that the supported person themselves could not legally have accessed, collected or obtained if able to do so.

(c) The power to communicate decisions under a support agreement should not authorise the supporter to enter into significant financial transactions, including:

(i) investing for the supported person

(ii) continuing the investments of the supported person, including taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding

(iii) signing any documents that have legal effect. Recognition of decisions made under support appointments

46. Any decision made with the assistance of a supporter or communicated by or with the assistance of a supporter within the authority of the appointment or order should be recognised as the decision of the supported person for all purposes.

Responsibilities of supporters

47. The law should specify that in performing their role, supporters should:

(a) assist the supported person to make the decisions specified in the appointment or order

(b) act honestly, diligently and in good faith

(c) act within the limits of the appointment, and comply with any conditions, limitations or requirements set out in the appointment or order

(d) identify and respond to situations where the supporter's interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary

(e) respect the privacy and confidentiality of the supported person by:

(i) only collecting personal information about the supported person in their capacity as supporter to the extent that is relevant to and necessary for carrying out the supporter's role, and

(ii) only disclosing such information: • with the supported person's consent, and • for a purpose that is relevant to and necessary for carrying out the supporter's role, or • for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings, or • with any other lawful excuse.

48. The law should also require that supporters:

(a) not use their authority to assist the supported person to conduct an illegal activity

(b) not coerce, intimidate or in any way unduly influence the supported person into a particular course of action. Regular reviews of supported decision-making orders by VCAT

49. Supported decision-making orders made by VCAT must be reviewed by VCAT at least once within the first 12 months of making the order and subsequently at least once every three years.

It is noted that whilst the introduction of a supported decision maker under a supported decision maker power of attorney has been introduced the above powers have not yet been introduced to VCAT in relation to supported decision maker appointments by VCAT.

When choosing an appropriate supported decision maker it would be important to ensure that the supported decision maker is free of any conflicts of interest with the older person (particularly financial) and is not a person who would exert undue influence on the older person with disability.

Conferring power on a Tribunal to make an appointment of a supported decision maker would be appropriate where there is conflict in the family, the older person has capacity, and could make decisions for themselves with appropriate support.

Observations of Seniors Rights Service NSW Regarding Supported Decision Making

Support for a Supported Decision Maker Model

If a person is able to make decisions the person should be supported to make those decisions. The support provided should be on a sliding scale and a tailored scale dependent on decisions that are needed to be made.

As capacity is a fluid concept we would endorse a legislative definition of capacity and of the presumptions to be applied in the assessment of capacity. These were set out in the Victorian Law Reform Commission Report and are cited above.

A clear definition of capacity would then make it clear when a supported power of attorney would be appropriate for a person or whether it would be appropriate for a Tribunal to appoint a supported decision maker as a decision maker of first resort. Legislative principles would ensure a uniform assessment of capacity for supported decision makers by the legal profession.

Currently in NSW where there is a dispute between the older person and the attorney as to whether the older person lacks the capacity to instruct the attorney, the attorney must make an application to the NCAT for a declaration under the *Power of Attorney Act 2003* that the person lacks capacity based on medical evidence. It is submitted a similar avenue for review of support decision making power of attorney would be

required to determine when the document has come to an end through lack of capacity and the enduring document commences.

We would support the introduction of similar legislative definitions and powers of appointment to the NCAT. This would provide a structure for the appointment of a supported decision maker as a first consideration where appropriate, rather than resorting straight to a consideration for appointment of a substitute decision maker. This would be consistent with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

Advantages of Supported Decision Making

Formal recognition of a supported decision maker is advantageous for families of persons with disabilities who currently informally undertake this role, as it provides them with formal recognition before the law. Recognition of a formal supported decision maker is advantageous as if there is conflict in the family, it enables the older person to be empowered by formally choosing who is to fulfil that role for them. It also enables the supported decision maker to be empowered by demonstrating to third parties they have been formally appointed under this role and have authority to assist the older person.

A supported decision making appointment for guardianship where the person has capacity would be useful where a person has a disability, such as they are blind or deaf, and have capacity and require assistance implementing their decisions. The appointment would empower them to choose their supported decision maker.

Disadvantages of Supported Decision Making

The concern with appointing a supported decision maker is, how would this be regulated? How would you know that the older person in fact made the decision and was supported to make the decision? If the older person had capacity and this issue was raised under a review of the situation then the older person could be asked if the decision was in fact made by them.

An issue that arises is where the supported decision maker abuses their position. For example, a sibling exercises undue influence over a parent not to spend funds. There would need to be a process where a person concerned with the welfare of the older person could apply to NCAT for a review of the document if there was a concern about abuse. A review would be necessary where the supported decision maker has a conflict of interest with the older person (particularly financial) or is likely to exert undue influence on the older person with disability.

An aspect to consider is that an enduring power of attorney that provided for a son or daughter to be a supported decision maker, whilst the person had capacity, means that the person may also require to be appointed as enduring power of attorney, with authority to act when the person lacks capacity. There may be some confusion created if the person appointed under the supported decision making document is different to the person appointed under enduring power of attorney document.

4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.

We make these comments based on our discussions with the Guardianship Division of NCAT at forum meetings. Our service essentially assists those people aged 60 years and over who rely on the HACC scheme and Commonwealth funded in home care services rather than the structures under the NDIS scheme.

Malcolm Shyvens in his Paper 2nd international Conference on Capacity in Berlin Germany 13 October 2015 sites the case of KCG [2014] NSWCATGD 7 in which the Guardianship Tribunal expressed the view that where a person lacked capacity and required a substitute decision maker, an appointment of a guardian was the most appropriate action to take, as opposed to the appointment of a nominee, as it provided safe guards for the older person.

Under a guardianship order the arrangement is regularly reviewed to ensure guardian is acting in older persons best interest and can be revoked where the arrangements are no longer needed.

In the case of KCG [2014] NSWCATGD 7 The Tribunal stated:

“Comparatively it is arguable that where National Disability Insurance Scheme is making decisions on behalf of a participant and the participant has diminished or no capacity to express a view or be supported to participate in the process, in addition to having no private support network to advocate on their behalf or any person to initiate a review of a decision by the NDIS, then there may be a lack of appropriate safeguards in place”.

Nominee scheme might be more suited to a person with a greater level of capacity to decide services that they want in place, with an insight into their requirements, and an ability to communicate those choices to their nominee.

The nominee would need to be a family member or trusted friend and not a person employed by the service provider as this would raise a conflict of interest between the service provider and the person with a disability.

5. Whether the language of disability is the appropriate conceptual language for the guardianship and financial management regime and to what extent ‘decision making capacity’ is more appropriate.

Disability advocacy organizations support the view the focus should be upon a person’s “ability” rather than their “disability”.

We refer to our submissions above where the definitions for implementation of supported or substitute based assessments should be based on an assessment of capacity and definitions of capacity set out in the legislation. These definitions should accommodate the fluid nature of capacity as relating to “decision specific” decisions.

Where a person is able to make some decisions but not others they should be supported to do so.

6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with decision making incapacity.

Where a person lacks decision making capacity and requires a procedure, such as a medical treatment, the guardian or person responsible as defined under the *Guardianship Act 1987* should always be consulted where possible. This should apply unless the medical procedure is an emergency and required to save a life in urgent circumstances.

Relatives or friends of people living in aged care homes are often concerned about issues involving the use of restraint of their relative. These concerns can include:

- What is restraint?
- When is restraint required?
- What is the appropriate use of restraint?
- Is authorization required and by whom?

Restraint is the act of preventing a person from moving according to their wishes or imposing other forms of control (physical or chemical) that limit the actions of that person. In residential aged care, restraint may be used as part of a home’s duty of care to protect someone from harm, whilst optimizing the person’s health status.

Under the *Aged Care Act 1997* and the Accreditation Standards established by the Commonwealth Government, expected outcomes for best practice in an aged care home should be:

- A restraint free environment whenever possible;
- That any restraint be the least restrictive type possible and only used after all reasonable alternatives have been explored;
- That a decision to restrain a resident is made in partnership between the resident (or his or her representative) and the aged care team.

Importantly, there is a duty of care to uphold resident's rights and this is as important as a duty of care to ensure their physical safety.

For example, some alternatives to restraint could include:

- Altering the person's physical environment;
- Changing the mix of residents in a bedroom or adjacent rooms;
- Avoiding activities or situations that might cause anxiety in a person;
- Providing social and developmental activities that the resident enjoys.

The aged care home must have a restraint policy. They must ensure that staff, general practitioners, health professionals, families and others are aware of the policy, how it is implemented, when it is to be reviewed and by whom.

If restraint is a predictable, ongoing requirement for a particular resident, then lawful authority to use it is required under section 4 of the NSW *Guardianship Act 1987*.

For further information: refer Australian Aged Care Quality Agency,
www.aacqa.gov.au

7. In light of the requirement of the UNCRPD that there be regular reviews of any instrument that has effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for regular review of financial management orders.

Consistent with Article 12 of the UN Convention on Rights of People with Disabilities which indicates that the appointment of substitute decision makers should be an appointment of last resort, we would advocate for the review of financial management orders every 12 months or every 3 years where appropriate.

This ensures there is a safeguard in place to check that:

- The person continues to require a financial manager due to the inability to manage their financial affairs as determined according to the appropriate legal tests (refer above) and the medical evidence;

- The financial manager continues to act according to and in the best interests of the older person and the older person is not subject to undue influence or exploitation.

We note that where a private manager is appointed under the supervision of the NSW Trustee and Guardian the private manager is required to submit annual accounts and this provides a means to check on the management of the private manager to ensure that no inappropriate or conflict transactions are entered into. It is our view that a financial manager should be required to file returns on the decisions taken and accounts managed each year. These returns should be provided to the government agency responsible for regulating the *Powers of Attorney Act 2003*. They would be available for any review of the appointment that was undertaken by the Tribunal.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.

We do not often get enquires through the Seniors Rights Services regarding clinical trials and persons lacking capacity and therefore do not make any submissions on this basis, other than to recognize that currently under the *Guardianship Act 1987* clinical trials require the approval of the Guardianship Division of NCAT.

9. Any other matter the NSW Law Reform Commission considers relevant to the terms of reference.

Separate Role of Guardian and Attorney in NSW

In NSW an enduring power of attorney appointment covers financial and legal decision making only and does not cover accommodation and lifestyle decision making, unlike other jurisdictions.

There is a disadvantage in having two separate decision makers in these roles, where conflict arises between the guardian and the attorney. For example, when an older person lacking capacity requires a nursing home the guardian chooses the nursing home and the attorney arranges the funding for this choice. If the attorney and guardian cannot agree this can frustrate the decision and it is necessary for the appointments to be reviewed by the tribunal. The NSW Trustee and Guardian may be appointed under a financial management order where conflicts arise.

We would propose consideration of an instrument in NSW where the powers of a person appointed as a substitute decision maker in the event of lack of capacity cover both guardianship matters and legal and financial decision making matters under a power of attorney. This might cause the Principal to consider the need to appoint people likely to agree if they are to appoint more than one person in this role.

Orders of Tribunal / Proposed Power to Freeze Bank Accounts

Once the NSW Trustee and Guardian are appointed under a financial management order they have the power to freeze bank accounts. It is suggested that the Guardianship Division of NCAT also have the power to issue injunctions and interim Orders to freeze bank accounts (allowing only for expenditure on basic necessities) until disputes about management of older persons' financial affairs are resolved. The Tribunal should also have the power to order that caveats be placed on properties. These orders would remain in place until the final decision of NCAT.

Orders of Tribunal / Compensation Orders

The Victorian Civil and Administrative Tribunal have recently been granted the power to make compensation orders against attorneys. We would support the introduction of similar powers in the NSWCAT for the ordering of payment of compensation. These orders need to be made as soon as possible.

Amendment to Power of Attorney Act 2003 / Register for Power of Attorney

We support the view that there be a register for enduring power of attorney made in NSW. This would enable banks and third parties to be able to resort to a register and to be assured they are dealing with the most recent enduring power of attorney for the older person. Banks and Financial Institutions should keep a copy of the most recent power of attorney on their records together with any signatory authorization.

Once an enduring power of attorney is registered it should be a requirement that returns be submitted on an annual basis. In this way if there are any inappropriate transactions the inappropriate transactions are identifiable in the returns.

Seniors Rights Service NSW
18 March 2016