



Mental Health Commission
of New South Wales

Review of the *Guardianship Act 1987 (NSW)*

***Preliminary Submission by Mental Health Commission of
New South Wales***

April 2016

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 mental health and wellbeing for people in NSW. It works with Government and the community to secure better mental health and wellbeing for everyone and to prevent mental illness, and to ensure the availability of appropriate supports in or close to home when people are unwell or at risk of becoming unwell.

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 as well as broader health

The Commission works in three main ways:

- Advocating, educating and advising about positive change to mental health policy, practice and systems in order to support better responses to people who experience mental illness, and their families and carers.
- Partnering with community-managed organisations, academic institutions, professional groups or government agencies to support the development of better approaches to the provision of mental health services and improved community wellbeing, and promote their wide adoption.
- Monitoring and reviewing the current system of mental health supports and progress towards achieving the Actions in the Strategic Plan, and providing this information to the community and the mental health sector in ways that encourage positive change.

Throughout this submission the term 'disability' is used broadly to encompass people who experience psychosocial disability.

Consumer involvement and carer involvement in the review process

It is essential that consumers and carers are meaningfully consulted in relation to the review of the Guardianship Act.

As noted in the NSW government's strategic plan for mental health, *Living Well*,

"Putting people, not processes, at the heart of service delivery goes beyond service design and practices. Legislation and policy need to support the autonomy of the individual receiving care and their journey towards recovery. Unfortunately, the development processes for legislation and policy can create barriers to recovery. This requires urgent change."¹

The types of matters the NSW Law Reform Commission (NSWLRC) has been asked to consider will have a direct impact on the lives of people subject to guardianship orders. For this reason, every effort should be made to support the people who will be most closely affected by this review to participate.

¹ NSW Mental Health Commission (2014), *Living Well: A Strategic Plan for Mental Health in NSW*, Sydney, NSW Mental Health Commission, p 49

It is disappointing that the Terms of Reference for the review of the *Guardianship Act 1987 (NSW)* (the Act) do not explicitly require the NSWLRC to have regard to the views of consumers and carers. However, this is implicit in the requirement to have regard to:

- The report of the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*² (the ALRC report) – at the core of the recommendations of this report is the recognition that people must have direct involvement in decisions and processes that effect their lives
- The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) – the Convention enshrines the principle of consumer involvement. Recognising the valuable contributions to be made by people with a disability, which enhance society as a whole as well the individual experience. The Convention enshrines the recognition that persons with disabilities should have the opportunity to be actively involved in decision making processes about policies and programs including those directly concerning them.

In consulting consumers about the Act, it will be important to make a space that empowers people with a lived experience to share their views on their terms.

The Guardianship Act and the Mental Health Act

The Guardianship Act provides that where provisions or orders made under that act differ from the Mental Health Act 2007 (NSW) or Mental Health (Forensic Provisions) Act 1990 (NSW), the mental health legislation prevails.³ While this provides clarity in the application of legislation to an individual's circumstance, the differences between the legislation cause confusion in practice, particularly as it relates to medical treatment.

For example, the Mental Health Act has a number of provisions relating to who can approve surgical procedures or special medical treatments on behalf of a patient. However, the definitions of both the procedures and treatments under the Mental Health Act differ from those under the Guardianship Act. Indeed surgical procedures are not defined under the Guardianship Act, although most would fall into the category of major medical treatment as defined by the Guardianship Regulations. Even where the procedures or treatments covered by the respective pieces of legislation overlap, there are different hierarchies of decision makers under both pieces of legislation with the Guardianship Act providing that the person responsible can approve major medical treatments and the Guardianship Tribunal being able to approve any form of treatment. However, under the Mental Health Act, the person's carer alone cannot provide consent but rather an application must then be made to the Secretary of Health⁴ or the Mental Health Review Tribunal can consent with or without the carers consent.⁵

These inconsistencies cause real confusion for clinicians providing medical treatment to people who are patients under the Mental Health Act, or who transition either under or out of the Mental Health Act during a course of treatment, and ultimately can result in delays to treatment. The Commission believes that these differences should be resolved with Part 5 of the Guardianship Act regarding

² Report No. 124 (2014)

³ see for example ss 3C and 34 *Guardianship Act 1987*

⁴ S 100 Mental Health Act 2007

⁵ S 101 Mental Health Act 2007

medical and dental treatment applying to all individuals, although providing that the Mental Health Review Tribunal is the relevant Tribunal for patients under the Mental Health Act.

Social model v medical model of disability

Article One of the UNCRPD sets out the scope of the instrument and articulates a social model of disability as the basis for the following provisions. Article One states,

“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

The social model of disability recognises that disability stems from interaction with the environment and therefore responsibility rests with society to adapt the environment to accommodate disability. This is in contrast to the medical model, which views disability as a health condition requiring intervention by medical professionals. This approach positions disability as the problem of the individual, rather than of society.⁶ It encourages a paternalistic treatment model based on substituted decision making on the principle of ‘best interests’.

The medical model has been the prevailing approach in NSW. The UNCRPD represents a significant cultural shift away from this. Australia was instrumental in bringing about the UNCRPD, marking a turning point in how we understand and respond to disability. Increasingly this shift is being seen in legislative reforms⁷. Most relevantly for this jurisdiction, the NSW Parliament adopted the Disability Inclusion Act 2014 (NSW), which commenced on 3 December 2014. This Act gives expression to the social and relational understanding of disability. The objects of the Act are⁸:

- (a) to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights,*
- (b) to promote the independence and social and economic inclusion of people with disability,*
- (c) to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports and services,*
- (d) to provide safeguards in relation to the delivery of supports and services for people with disability,*
- (e) to support, to the extent reasonably practicable, the purposes and principles of the United Nations Convention on the Rights of Persons with Disabilities,*
- (f) to provide for responsibilities of the State during and following the transition to the National Disability Insurance Scheme.*

⁶ People with Disability, *The Social Model of Disability*, <http://www.pwd.org.au/student-section/the-social-model-of-disability.html>, accessed 19 March 2016

⁷ For example, *Mental Health Act 2014 (Vic)*

⁸ S 3

Importantly, for the review of the Guardianship Act, the Disability Inclusion Act enshrines the principle that

“People with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support.”⁹

Of the legislation in NSW aimed at protecting, supporting or caring for people with disabilities, the Disability Inclusion Act is the most recent and gives the clearest expression to contemporary understanding of disability.

Decision making

Capacity

Everyone should be able to live a thriving and contributing life. An important element of this is the autonomy to make our own decisions.

In common law there is a presumption of a right to self-determination, even when a person makes a decision that others may regard as unwise.¹⁰ This presumption is rebuttable where it is shown the person making the decision does not have capacity to do so.

The Victorian Law Reform Commission defines the meaning of capacity as

“a legal concept that describes the level of intellectual functioning a person requires to make and accept responsibility for important decisions that often have legal consequences.”¹¹

Capacity and incapacity are not black and white positions. It is widely agreed that there is a continuum, depending on the importance of the decision that is required.¹² For example, the decision to take out a personal loan requires a higher level of understanding than the decision to enter a contract to buy a cup of coffee. Further, capacity may fluctuate overtime.¹³ Fluctuating capacity is not adequately dealt with in the current Act. This is a particular concern in relation to psychosocial disability given the fluctuating nature of many types of mental illness.

Of course, the legislative provisions of the Guardianship Act and the Mental Health Act create a separate framework for the assessment of capacity. This largely relates to when the presumption may be rebutted and the processes to be followed to support people identified as having impaired capacity.

⁹ S 4 (5)

¹⁰ Per McDougall J, *Hunter and New England Area Health Service v A* [2009] NSWSC 761, at 7

¹¹ Victorian Law Reform Commission, *Guardianship: Final Report*, Report No. 24 (2014), http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf, accessed 22 March 2016, p. 99

¹² Per McDougall J, *Hunter and New England Area Health Service v A* [2009] NSWSC 761, at 24

¹³ ACT Civil and Administrative Tribunal, *In the Matter of ER (Mental Health and Guardianship and Management of Property)* [2015] ACAT 73, at 75

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The UNCRPD is hugely significant in considering questions around capacity and decision making. This has been well canvassed, especially in the ALRC report, *Equality, Capacity and Disability in Commonwealth Laws*.¹⁴

In the context of the Guardianship Act review, perhaps the most crucial aspect of the UNCRPD is Article 12, which enshrines the right to equal legal capacity for people with disabilities.

Legal capacity is not defined in the UNCRPD, but it is understood to mean

“the right to have a decision recognised in law, and is used to support the general principle established in the CRPD that disability alone should not disqualify a person from being able to make decisions for themselves and for those decisions to be respected in law.”¹⁵

Supported decision making

The ALRC report¹⁶ explored the impact of Article 12 at length in terms of its application to Commonwealth laws. Ultimately, that report concluded that Article 12 required a supported decision making scheme. The Commission agrees that supported decision making should be the primary model to ensure that all people are empowered to exercise their legal identity.

The Commission is fully cognisant of the complexity of the task required to introduce supported decision making. It represents a ground breaking cultural shift both for those working with and caring for people who have a disability, and also the people themselves. When an individual has not had the opportunity to express their wishes before it can be daunting and they will need support to occupy this space. In NSW, there are a range of pilots underway to explore these issues.

In 2013/14 the NSW Trustee and Guardian, the Public Guardian and the Department of Family and Community Services (FaCS) ran a small supported decision making pilot. The pilot successfully demonstrated that it was possible to enhance the legal capacity of a number of people with disability to make their own decisions. Following this pilot FaCS has funded an additional six projects to build the capacity of services and individuals to apply supported decision making in practice.¹⁷

Advance care directives

Advance care directives set out a person’s treatment preferences, in case they lose decision making capacity in the future. Initially used in end of life treatment decisions, they are increasingly being used for people who experience episodic mental illness.

For people who do experience episodic mental illness, once they regain capacity, they are often able to reflect and make informed decisions about their preferences should they experience another

¹⁴ Report No. 124 (2014)

¹⁵ Bernadette McSherry in Sascha Callahan and Christopher Ryan, *A Submission on the issues raised by the review of New South Wales Mental Health Act 2007, Part I: Criteria for detention and treatment*, accessed http://ses.library.usyd.edu.au/bitstream/2123/11931/2/NSW_MHA_review_submission.Part_1-2012.pdf, 22 March 2016, p 10

¹⁶ *Equality, Capacity and Disability in Commonwealth Laws*, Report No. 124 (2014)

¹⁷ Family and Community Services, *Supported Decision Making Projects*, https://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making/sdm-projects, accessed 22 March 2016

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episode of illness.¹⁸ Advance care directives recognise and promote the individual as the expert in their own recovery, supporting the recovery journey.

Nepean Blue Mountains Local Health District is currently trialling an advance care directive project. This project is a partnership between Nepean Blue Mountains Mental Health Services and Aftercare HASI, supported by the Social Policy Research Centre UNSW, and funded through the Nepean Blue Mountains PHN Partners in Recovery Innovation Fund.

The aim of the project is to ensure that people who reside in the Nepean Blue Mountains Local Health District who experience mental illness/distress have the opportunity to develop their own Advance Statement to support personal control and decision-making during times of crisis.

Substitute decision making

It is unavoidable that, even with decision making support, there will be circumstances in which a person's decision making capacity is impaired to the extent that a substitute decision will be required. In such cases, the Commission supports the proposal of the Victorian Law Reform Commission in its review of that jurisdiction's *Guardianship Act*, that the notion of 'best interest' be replaced with that of 'personal and social wellbeing'.¹⁹ To meet with the requirements of the UNCRPD this should also be for as short a time as possible and subject to regular review.

Anecdotally, the Commission has been told by some carers that they will not apply for guardianship for their loved one for fear a public guardian will be appointed rather than them and they will then be cut out of the decision making process. This may result in the person being unable to enforce their legal rights, as they lack the capacity themselves and have no one to make the decision in their place. This fear appears to arise where the Guardianship Tribunal has possibly been used as a threat where carers might be seen as difficult or obstructive.

National Disability Insurance Scheme

The National Disability Insurance Scheme is being rolled out across NSW from July 2016. This will put the funding for disability support services into the hands of individuals. This will bring great opportunities for the commission and delivery of disability support services. However, it will also bring its own set of challenges.

Many people with a disability have never been asked how they want to live their lives, yet this is the sort of question National Disability Insurance Agency planners will be asking. Consideration will need to be given to how people can be supported to answer this question in a way that best meets their goals and aspirations. This will, inevitably have implications for the operation of the Guardianship Act.

¹⁸ Sudeep Saraf (2015), "Advanced statements in the new Victorian Mental Health Act", in *Australian Psychiatry*, vol 23 (3) 230-232, p 231

¹⁹ Victorian Law Reform Commission, *Guardianship Final Report*, Report No.24 (2014), http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf, 22 March 2016, p 383

