

# Submission to the New South Wales Law Reform Commission on the Review of the *Guardianship Act 1987* (NSW) Draft proposals

National Mental Health Commission

February 2018

## Introduction

The National Mental Health Commission (NMHC) welcomes the New South Wales Law Reform Commission (NSW LRC) review of the *Guardianship Act 1987* (NSW) and its Draft proposals.

The purpose of the NMHC is to provide insight, advice and evidence on ways to continuously improve Australia's mental health and suicide prevention systems and to act as a catalyst for change to achieve those improvements. This includes increasing accountability and transparency in mental health through the provision of independent reports and advice to the Australian Government and the community. Part of this role includes advocating for people with mental health difficulties, their families, carers, friends and other supporters to ensure that they can lead a contributing life. A contributing life means a fulfilling life enriched with close connections to family and friends, and experiencing good health and wellbeing to allow those connections to be enjoyed, without experiencing discrimination due to having a mental health difficulty. As such, the proposed changes to the legislation that allow for supporters to develop a person's decision-making ability and maximise their autonomy align strongly with our views.

The NMHC welcomes the review of the *Guardianship Act 1987* (NSW) and commends the NSW LRC on incorporating the United Nations Convention on the Rights of Persons with Disabilities in its proposals; the new statutory presumption of decision-making ability; and the acknowledgement that a person's decision-making ability can vary.

The NMHC advocates for a system where people living with mental health difficulties, their families, carers and support people have a positive experience of mental health related services and support, and vital to this is the various legislation that underpins the system. As such, legislation needs to reflect a person-centred and recovery-oriented approach. Core to this approach is the acknowledgement that capacity is not determinate and can vary over time, as well as from decision to decision.

At times, legislation can be difficult to understand and it is not always clear to the lay-person how provisions affect their rights, treatment and care. For this reason, the NMHC recommends that any changes to the *Guardianship Act 1987* (NSW) and the *Mental Health Act 2007* (NSW) (MH Act) are communicated in a way that allows people to navigate the system with ease and clarity.

Given the NMHC's remit of work, this submission details specific responses to some of the proposals that concern changes specific to people living with mental health difficulties and those affected by the MH Act.

## Review of the *Guardianship Act 1987* (NSW) Draft proposals: National Mental Health Commission Responses

### 14.1 The Mental health Act

The new Act should provide:

- (1) An order or agreement for support or representation may be made in respect of a patient or affected person within the meaning of the MH Act.
- (2) An order or agreement for support or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the MH Act.
- (3) If a supported or represented person is, or becomes, subject to orders under the MH Act, any order or agreement for support or representation made under the new Act is only effective to the extent it does not conflict with orders made under the MH Act.

**Response:** The NMHC agrees with this recommendation however for the purpose of transparency and simplicity, the NMHC recommends that the language in the new Act explicitly states that the MH Act will take precedence should an order or agreement for support or representation made under the new Act conflict with any order in the MH Act. This is to ensure that people subjected to the MH Act, their families, carers and support people do not get confused between the rights afforded to them under the MH Act and those of the new Act.

### 14.2 The Mental Health (Forensic Provisions) Act

The new Act should provide:

- (1) An order or agreement for supported decision-making or representation may be made in respect of a forensic patient or a correctional patient within the meaning of the MH(FP) Act.
- (2) An order or agreement for supported decision-making or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the MH(FP) Act.
- (3) If a supported or represented person is, or becomes, subject to orders under the MH(FP) Act, any order or agreement for supported decision-making or representation made under the new Act is only effective to the extent it does not conflict with orders made under the MH(FP) Act.

**Response:** The NMHC agrees with this recommendation and again recommends that this is clearly communicated to avoid confusion between the two Acts.

### 14.3 Decision-maker for healthcare decisions

(1) The new Act should provide as follows:

- (a) An authorised medical officer (as defined in the MH Act) may give, or authorise, any “mental health treatment” which he or she considers appropriate, to a supported or represented person who is detained in a mental health facility (as defined in the MH Act), subject to any orders under the MH Act or MH(FP) Act. An authorised medical officer may also give, or authorise, any healthcare that is incidental to “mental health treatment.”
- (b) “Mental health treatment” is a course of action taken to:
  - (i) remedy a mental illness
  - (ii) diagnose a mental illness
  - (iii) alleviate or manage the symptoms or reduce the effects of the illness
  - (iv) reduce the risks posed by or to the person with the mental illness, or
  - (v) monitor and evaluate a person’s mental health.
- (c) “Mental illness” refers to a mental illness or mental disorder as defined in the MH Act or a mental condition as defined in the MH(FP) Act.
- (d) Any decisions relating to healthcare other than mental health treatment for supported or represented people, are subject to the new Act.

(2) The MH Act should be amended to include an identical definition for “mental health treatment”.

**Response:** The NMHC agrees with this recommendation and recommends that the definition for mental health treatment is either adopted by the MH Act (as per 14.3 (2)) or in the event that the MH Act establishes its own definition, the new Act should be identical and subject to the definition provided in the MH Act.

Additionally, there is no definition for ‘any healthcare that is incidental to “mental health treatment”’ in either the MH Act or the new Act. Given that 14.3 (1)(a) provides authorised medical officers with the power to give or authorise such healthcare, the NMHC recommends that the new Act adopts a definition for ‘incidental healthcare’ as it can be interpreted as a manner of treatments that range in severity. This should take into consideration existing provisions including Division 2 ss 35-37 of the *Guardianship Act 1987* (NSW) which directs the use of medical and dental treatment, as well as Part 3 ss 98-104 of the MH Act which directs the use of other medical treatment including surgery and special medical treatment.

#### 14.4 Consent for special healthcare

- (1) The provisions in the new Act relating to special healthcare should apply universally, including to people subject to the MH Act.
- (2) The MH Act should refer to the new Act for matters relating to special healthcare and all provisions relating to “special medical treatment” in the MH Act should be repealed. The MH Act should continue to regulate Electro-Convulsive Treatment.

**Response:** The NMHC agrees with this recommendation on the basis that there should be one consistent definition and provision for special healthcare. Given that people subject to the MH Act may be subject to special healthcare, there will be patients and practitioners who will refer to the MH Act for guidance. Therefore, instead of repealing s 102 in the MH Act, it could be amended to reflect the provisions in the new Act.

#### 14.5 Voluntary patients

- (1) The new Act should provide as follows:
  - (a) In cases where a representative has relevant healthcare and/or personal functions:
    - (i) a represented person may be admitted to a mental health facility as a voluntary patient if their representative makes a request to an authorised medical officer and the represented person does not object to this request being made
    - (ii) a represented person must not be admitted as a voluntary patient if they, or their representative, objects to the admission to the authorised medical officer
    - (iii) an authorised medical officer must discharge a represented person who has been admitted as a voluntary patient if the represented person requests to be discharged, and
    - (iv) an authorised medical officer must give notice of the discharge of a voluntary patient who is a represented person to the person’s representative.
  - (b) A supporter with relevant healthcare and/or personal functions may assist the supported person to make decisions relating to voluntary admission and discharge from a mental health facility (as referred to in s 5 and 8 of the MH Act).
- (2) The MH Act, specifically s 7 and 8, should be amended to reflect this proposal.

**Response:** The NMHC agrees with this recommendation.

#### 14.6 Financial Arrangements for involuntary patients

- (1) The provisions of the NSW Trustee and Guardian Act 2009 (NSW) that relate to Mental Health Review Tribunal orders for management of estates of mental health patients (s 43 51 and 88) should be repealed so as to remove the Mental Health Review Tribunal's jurisdiction over a detained patient's financial matters.
- (2) The new Act should provide that the Tribunal has the power to revoke any orders relating to financial management that were made by the Mental Health Review Tribunal pursuant to the NSW Trustee and Guardian Act 2009 (NSW) or a by a magistrate conducting a mental health inquiry.

**Response:** The NMHC agrees with this recommendation. This recommendation, however, changes the role and function of the Mental Health Review Tribunal and the NMHC advocates that such changes are clearly communicated to people affected by the MH Act, their families, carers and support people. For the purposes of transparency and simplicity, there needs to be a clear course of action to differentiate between decisions made under the MH Act including powers of the Mental Health Review Tribunal and those made under the new Act including powers of the NSW Civil and Administrative Tribunal.