National Disability Services

NDS response to the Review of the Guardianship Act 1987 Proposals

NDS response to the NSW Law Reform Commission Proposals:
Review of the NSW Guardianship Act 1987

9 February 2018

About NDS

National Disability Services is the peak industry body for non-government disability services. It represents service providers across Australia in their work to deliver high-quality supports and life opportunities for people with disability. Its Australia-wide membership includes over 1100 non-government organisations which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

Contact

Karen Stace
NSW Operations Manager
[redacted]

Jessica Lobo
Sector Support Consultant
[redacted]

Introduction

Over the past years, people with disability have been preparing to participate confidently in a disability system that places them at the centre-of decision making about their lives and is based on individualised budgets. The new Assisted Decision-Making Act ('the Act') provides the conceptual framework and practical vehicle to support this massive transition for people with disability, but also their families, carers and service providers as NSW transitions to the National Disability Insurance Scheme (NDIS).

NDS supports that the NSW Law Reform Commission's (NSWLRC) proposals are framed in terms of ability and move away from the language of disability and discrimination. We agree that the introduction of the statutory presumption of decision-making ability and the new will and preferences test is also a positive development but some guidance will need to be provided about how to manage this when preferences and best interests might conflict. While there is widespread support and enthusiasm for formalising supported decision-making models there are still some complexities that will need to be ironed out as decision-making arrangements must always be supported by good systems, communication and documentation. NDS believes the new act must be developed in the context of the NDIS and so this submission is divided into two sections:

- PART 1 Issues raised by the NDIS
- PART 2 Broader issues of complexity and concern

PART 1: Issues raised by the NDIS

Protections for service providers and participants – NDIS and service agreements

In some situations, provider staff are the only people in a person with a disability's life, especially in situations where they are living in supported accommodation. In NSW, a number of providers report significant numbers of residents who are without family, friends or visitors. In some instances this is because the individuals involved may have been relinquished by their families many years ago and placed where accommodation was available at that time and have lived in that place with the staff and other residents as the only regular people in their lives ever since. Because of this supported accommodation providers have typically been placed in the supported decision making role for residents and so for many the role of supporter is not new. In many cases a worker would be the most appropriate to fulfil the supporter role and the reforms provide an opportunity for this to be documented

A problem posed for providers (and participants), with the arrival of the NDIS, is that they are now required to contract with those residents for the range of services they

provide.[1] The NDIS itself requires of providers only that the participant understands and agrees to the provision of those services; they recommend the formation of service agreements as good practice but do not mandate it. Providers of supported accommodation on the other hand are contracting for services amounting in some cases to more than one hundred thousand dollars a year. They require some level of confidence that the people they are contracting with have the legal capacity to sign those service agreements.

While the NDIA's intention is laudable – they are trying to avoid an overly-bureaucratic approach to service delivery arrangements – it is not appropriate to engage in business dealings on this scale without the minimum protections for both parties afforded by a legally robust agreement. A person without a disability would not contract for a hundred thousand dollars' worth of building works on their home without a quote and a contract; why should people with a disability and those who provide services to them behave any differently?

Unfortunately, providers – knowing the limits on the decision-making capabilities of many of their residents and having been advised that this might call into question the validity of any contracts signed by those individuals – have experienced great difficulty in identifying and organising the participation of third-parties as supporting decision-makers capable and willing to sign service agreements in these circumstances. Guardianship agencies have been unwilling on the grounds that the people in question are not at risk. (After all, the protection sought is for the provider as much as the participant.) Advocacy and other support agencies see it as beyond their brief. NDIS Support Coordinators likewise.

In this situation, the NSW Law Reform Commission's (NSWLRC) proposals for the introduction of supporters (including those who are paid staff) are most welcome. They provide a pathway for providers in this situation to secure the standing – in agreement with the individual service user – that will allow them to form agreements that provide certainty to both parties. The issue of conflicts of interest which are flagged in the NDIA's proposals, discussed below, are real but adequately dealt with. If these proposals are accepted, the law should give providers much higher levels of assurance in their dealings with participants, that they have the protections required to form robust legal agreements, stated in proposal 2.16, which protect their own interests as well as the participant's.

Role of supporters: interface with the NDIS nominee scheme

NDS fully supports the introduction of the suite of formal supported decision-making options within the proposed Act. However, we note these changes will add to the confusion that currently exists surrounding the interface of the National Disability Insurance Scheme (Nominees) Rules 2013 and the NSW Guardianship Act 1987.

Some of the confusion has been addressed in-part by cases considered by NCAT in relation to the appropriateness of appointing a guardian for the purposes of accessing the NDIS or making decisions around the implementation and

[1] NDIS, Service Agreements with Participants, https://www.ndis.gov.au/document/service-agreements-providers

management of an NDIS plan (both where the subject person has informal supports or does not). The NDIA has even participated in and made submissions in recent guardianship hearings outlining their level of willingness to appoint nominees[2] which adds a small degree of clarity.

Despite some clarification, NDS submits that there must be greater guidance beyond the common law that sets out unequivocally what the interface of these two schemes means for participants, particularly given the expanded continuum of decision-making options under the both the proposed Act and commonwealth laws. The importance of clear, up-to-date and accessible documentation, of who is making decisions is particularly important to ensure the person with disability is empowered to understand who is involved and in what situations. For providers, clarity about who is able to make a decision about the range of matters that require decisions is critically important for them to be able to deliver timely services to people with disability. This is a point we will come back to later in the submission more generally.

NDS's concerns including the following:

- If a tribunal appointed a person as a supporter or if a person had a personal support agreement it appears this would this automatically enable them to have the status of nominee under National Disability Insurance Scheme (Nominees) Rules 2013 (Cth) r 4.8(a). However, these roles do not sit together neatly because under the Nominees Rules "the plan nominee can take action for the participant and in doing so it will be as if the act has been done by the participant. In this way, a plan nominee can effectively be a substitute decision maker, and therefore it is not a less restrictive option than guardianship"[3]

- A nominee also has a duty "to apply their best endeavours to developing the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary"[4] and it is expected that the NDIA will assist nominees in fulfilling this duty.[5] If the nominee is also a supporter, though we have established that the roles don't fit together neatly, where would the responsibility fit in terms of the role of the new NSW Public Advocate in providing training to supporters in fulfilling their role given the potential overlap?

- It should be noted that plan nominees also have a duty to avoid conflicts of interest.[6] Where supporters are paid workers it appears that this would also

[2] *LBL* [2016] NSWCATGD 22
[3] John Chesterman, Office of the Public Advocate Victoria, Guardianship and the NDIS: Discussion paper http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/decision-making/70-guardianship-and-the-ndis-discussion-paper-2014/file. p14
[4] National Disability Insurance Scheme (Nominees) Rules at 5.10 https://www.legislation.gov.au/Details/F2013L01062
[5] National Disability Insurance Scheme (Nominees) Rules at 5.11 https://www.legislation.gov.au/Details/F2013L01062
[6] National Disability Insurance Scheme (Nominees) Rules at 5.14 https://www.legislation.gov.au/Details/F2013L01062

preclude them assisting a supported person with NDIS related decisions or becoming a nominee (NDIA have stated they would not appoint service providers as nominees due to their conflict of interest[7] although NDS has anecdotal evidence to the contrary). Is there somewhere that workers go to receive support and training about how to manage such conflict of interest?

- Although the NDIA rarely appoint nominees, we know that as a last resort the NDIA would appoint a nominee in preference of considering a guardian/representative arrangement[8]; how is this impacted when supporters are offered as a less restrictive option and where do they sit in the continuum of options?

In putting forward these questions, NDS notes that to date the NDIA has formally stated its reluctance to utilise the nominee scheme and, instead, prefers to rely on the participant's informal support network, such as family or close friends, to assist in the development of a person's plan of supports. Someone who has this degree of support around them does not, in the NDIA's view, need a guardian or a nominee to be appointed.[9] Anecdotally, NDS notes this position has not been applied consistently and it is a simple process in some cases to become appointed nominee for a participant. While the proposal paper also suggests that the new supporter scheme does not intend that support agreements take the place of informal arrangements that are working well, we would be cautious of taking that view and the presumption that those informal arrangements are working well without a proper examination.

From NDS's perspective, we would encourage providers to formalise any defacto arrangements using the support agreement process given the complexities that will be discussed and the challenges involved in seeking sign-off for service agreements. Of course we see support agreements as being one of a suite of different assisted decision-making options, but they will not suit every circumstance.

In practice, it is envisaged that a person might have two or more different assisted decision-making arrangements in place at any one time; for example, both a support agreement and an enduring representation agreement. Which one applies will depend upon the person's decision-making ability for the decision at hand".[10] Whilst we support this flexibility we note some of the complexities around managing this arrangement when there is the potential for different supporters, representatives or nominees performing different functions which may indeed overlap. To overcome this issue, the NSWLRC could reconsider its view about not recommending the establishment of a register of decision-makers, or consider recommending an alternate mechanism so that providers can ensure they are including all relevant people/ agencies when a decision needs to be made.

---

[7] Christine Fougere , Guardianship Division, New South Wales Civil & Administrative Tribunal
Guardianship, financial management and the NDIS: NCAT's experience, Hobart, 23 March 2017, Heads of Guardianship Meeting at 77

[8] *Ibid*

[9] Fougere at 83

[10] NSW Law Reform Commission, Draft proposals, http://www.lawreform.justice.nsw.gov.au/Pages/Guardianship-draft-proposals.aspx p5

Restrictive practice (Proposal 8.1)

NDS supports the proposal that NSW closely monitor the implementation of the NDIS Quality and Safeguarding framework ('The Framework'); first, to judge its effectiveness, and second, to consider if NSW should apply comparable regulation in state-regulated sectors, such as education and mental health (Proposal 8.1(1)). Given the devolution of FACS's role in disability support it is unclear where the monitoring for service gaps for people with disability will sit.

As outlined in detail in our response to Question Paper 5 of this review, the NDIS will create gaps and operational changes to how restrictive practices can be approved. Law and/or policy needs to be brought into accord with these current conditions. We understand that the regulation of restrictive practice may not fall within the scope of this particular Inquiry, however, NDS submits it is not outside the duties and remit of the NSW LRC to further inquire into the urgent need for regulation of restrictive practice in NSW.[11] NDS disputes the premise made in the proposal paper that it is the commonwealth's intention is to introduce a comprehensive regulatory scheme for restrictive practice for the disability sector when in fact states and territories remain responsible for the consent and authorisation of restrictive practices.

NDS suggests that there is a joint role for the NSW LRC as well as the new Public Advocate to monitor consent and authorisation of restrictive practice in NSW. NDS strongly supports a role for the Public Advocate in educating and advising families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination (Proposal 9.(3)(b)).

There is also an urgent need to ensure consistency of approaches to restrictive practice in a range of settings accessed by people with disability including health, education, mental health and disability services. However, it is not clear which kinds of restrictive practices decisions can be made by supporters or representatives, and which kind of decisions require authorisation by the Tribunal. The NSW LRC could consider specifying the kinds of restrictive practices they would require authorisation by the Tribunal for, and clarify if the Tribunal can confer that authority onto a representative relating to those specific restrictive practices.

Powers of the Public Advocate (Proposal 9.1)

The proposal for a new body to undertake advocacy and investigations is strongly supported. Given the gaps created by the withdrawal of FACS, the new Public Advocate's focus on ensuring that appropriate safeguards and services are maintained after the transition to the NDIS is critically important for NSW.

This body should not be seen as an alternative to the benefits of other individual and systemic advocacy bodies across the community. Some of the confusion arises due to proposal 3(c)(i) where it is stated that the Public Advocate will assist in seeking help for people who need decision-making assistance from government agencies (including the NDIS), institutions, welfare organisations and service providers, and

[11] Law Reform Commission Act 1967 Section 10
http://classic.austlii.edu.au/au/legis/nsw/consol_act/lrca1967242/s10.html

negotiating of their behalf to resolve issue. The NSWLRC should clarify whether this means that the Public Advocate might step in to advocate for people to around NDIS access and planning in lieu of funded advocacy.

NDS strongly supports the Public Advocate's own motion powers in investigating suspected incidents of alleged abuse in (3)(f) and we believe this role is critically important given the lack of or inconsistent oversight mechanisms across mainstream services in NSW accessed by people with disability. However, it is not clearly apparent to NDS how the advocacy and investigation functions differ to the current functions of NSW Ombudsman or future functions of the NSW Quality and Safeguarding Commission.

We also note (3)(f)(i) which requires service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences might be adding an additional layer oversight. A service provider may already be subject to investigation by the NDIS Quality and Safeguards Commission and it would be an unnecessarily burdensome for the provider to be subject to both.

The exchange powers in 3(f)(iv) will support collaboration and sharing of information between state and national bodies including the NDIS Quality and Safeguards Commission regarding matters affecting the safety of a person with disability. However, it would also be useful if the Public Advocate could exchange information with non-government bodies like disability service providers to address risks and prevent abuse and neglect of a person with disability or impaired decision-making ability.

PART 2: Broader issues of complexity and concern

Terminology

The proposal to shift terminology from 'disability' to 'decision-making ability', and from 'best interests' to 'will and preferences' and 'personal and social wellbeing', are positive reflections of the UNCRPD. Nevertheless, there are several consequences. Currently, identifying whether or not a person has capacity to make lifestyle and/ or financial decisions often relies on the assessments of health professionals, e.g. neuropsychologists, geriatricians, etc. The various capacity assessment tests that are currently used do not necessarily differentiate between the types of decisions a person can or can't make other than in broad terms, nor what level of support is needed for each area of decision-making. As a consequence, the NSW LRC should make known that there must be accompanying changes to the way decision-making ability is validly assessed may need to occur.

Over time, this information will improve the nature and quality of evidence available when it is identified that a person may need support of some kind to make one/ more decisions. In the meantime, more clarity about indicators of decision-making ability and support needs may be useful. The LRC could consider providing clarification

about how supporters, representatives and persons responsible could assist decision-making when the areas of decision-making are not clearly identified.

It may be difficult for supporters, representatives and persons responsible to know how to proceed when a person is unable to understand the various factors involved in a decision, and/ or cannot express their will and preferences – as a person's 'best interests' will not be able to be relied on as a means of decision making. It is noted that the Tribunal currently has a role in providing advice, but that this is not utilised. It is also noted that OPG and NSWTAG also have a role in providing advice in some circumstances. The NSW LRC could assist by identifying which agency(s) have a role in providing advice to supporters, representatives and persons responsible.

Healthcare decisions

In the first section of this paper we identified the role played by disability services and in particular accommodation service providers in supporting people with disability with decisions. This includes health care decisions at moments that are crucial for participants without decision-making capacity, such as admission to hospital. Unfortunately, the current and proposed law excludes such service providers from decision-making processes, even when they might be a supporter. This is because they cannot be considered the person responsible given they are paid for the services and support delivered (see definition of "person who has the care of a person" in 6.20). Supporters who are also provider staff members are in a good position to know and understand a person's will and preferences and act in accordance with them if there is no other person responsible in the hierarchy available. NDS believes whether the "person who has the care of the person" is renumerated or not is an irrelevant consideration, especially in the context of the healthcare decisions and the fact that the hierarchy itself is a fairly blunt instrument at times.

NDS supports the NSW LRC's proposal for legislation to explicitly include advance care directives as they are beneficial in clarifying the person's will and preferences prior to a time when they are unable to express those views. This would be another important protection for service providers involved in healthcare decision making to be able to rely on in their decision-making.

Overall, the ultimate point we wish to make in this section is the necessity for some degree of consistency across supported and substitute decision-making processes as these apply to different categories of decision-making (lifestyle, accommodation and healthcare, in this case).

Protections for supported or represented persons

The proposals allow for a person to make an agreement with paid staff in the role of supporters or enduring representatives. This occurs in the context of a safeguard that these agreements are subject to review by the Tribunal. Despite some rigorous safeguards in place within the proposals, NDS still has a number of concerns about the following proposals.

Firstly, we have concerns around financial decision making under proposal 2.3 which allows a person who has been declared bankrupt or has been found guilty of an offence of dishonesty to assist with financial decision making as long as it is recorded in the support agreement. It is not clear how the recording of this history will mitigate the risk to the supported person given the position of trust and influence they represent for the supporter. As the same rule applies to representation agreements we believe this would be a step back from the current financial management regime where those with the said financial history have been precluded from appointment.

Secondly, NDS is not convinced by the rationale behind proposal 4.3(2) in which enduring representatives (or their spouse, child, brother or sister) are eligible for appointment as an enduring representative even if they are *subsequently* engaged to provide for fee or reward, healthcare, accommodation or other support services to the appointing person. This is a significant change of circumstance and we believe it is a potential risk for a participant without decision-making capacity - particularly if such a situation is was originally precluded in earlier proposal 4.3(1)(b). NDS would recommends the NSWLRC address the conflict behind proposals 4.3(2) and 4.3(1)(b).

Thirdly, the proposal to combine lifestyle and financial decisions into personal representative agreements is beneficial, as it replaces two instruments, i.e. Enduring Guardian and Enduring Power of Attorney. Currently, in some states, these documents can only be finalised with a solicitor, who makes undertakings that they are satisfied about the person's understanding of the effect of the documents. There does not seem to be any comparative requirement under the proposals, which may expose some people to undue influence to make agreements that they do not sufficiently understand.

We also note the need for clarity with regard to the functions of representatives given the single regime. Clear documentation of the decision-making areas of a representative should be available to all relevant parties involved in providing services and support to a represented person particularly given the newness of the terminology.

Complexity – theory vs practice

As we have discussed through the course of this paper. While the proposed changes do have a sound conceptual framework and streamlined elements, the range of decision making structures has the potential for more complexity and confusion with a larger scale of decision-making options to contend with:

a. The person themselves
b. Informal support – family/ friends/ support staff
c. Personal Support Agreement – written agreement of person and supporter
d. Tribunal Support Order – made with consent of person and supporter
e. Enduring Representation Agreement

f. Tribunal Representation Order

g. Person Responsible – for healthcare, medical and dental consents

h. Tribunal decisions – for emergency orders, and special medical consents

i. Supreme Court orders

j. NDIS Plan Nominees

From a practical point of view, there is potential for confusion if the above roles conflict or have different views about how a decision should be made, and whether or not one decision-maker has precedence over another. From a service provider perspective it is important to know who to contact when a specific decision-needs to be made, particularly if a person is unable to provide information about who should be involved in these decisions.

The NSW LRC needs to ensure that the new proposals that work together are more than the sum of its parts. The NSW LRC should learn from the widely reported structural and design problems associated with the NDIS roll-out. Implementing and transitioning to a system based on different philosophical and operational underpinnings is challenging particularly when there are risk factors involved for people with disability. NDS commends the NSW LRC for their work on the Proposals for new Assisted Decision Making Act and looks forward to involvement in ongoing consultation and review.