

NSW DISABILITY NETWORK FORUM

Review of the *Guardianship Act 1987*: *Response to Question Paper 1*

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About the NSW Disability Network Forum

Initiated in June 2011, the NSW Disability Network Forum (DNF) comprises non-government, non-provider peak representative, advocacy and information groups whose primary aim is to promote the interests of people with disability. The aim of the NSW Disability Network Forum is to build capacity within and across all organisations and groups so that the interests of people with disability are advanced through policy and systemic advocacy. The Council of Social Service of NSW (NCOSS) provides secretariat support to the DNF.

NSW Disability Network Forum Member Organisations:

First Peoples' Disability Network NSW	Multicultural Disability Advocacy Association of NSW
Association of Blind Citizens of NSW	Being Mental Health & Wellbeing Consumer Advisory Group
Synapse (Brain Injury Association NSW)	NSW Council for Intellectual Disability
Deaf Australia NSW	NSW Disability Advocacy Network
Deaf Society of NSW	People with Disability Australia
DeafBlind Association NSW	Physical Disability Council of NSW
Deafness Council (NSW)	Positive Life NSW
Information on Disability and Education Awareness Services (IDEAS) NSW	Self Advocacy Sydney
Institute For Family Advocacy	Side By Side Advocacy Incorporated
Intellectual Disability Rights Service	Council of Social Service of NSW (NCOSS)

This submission was developed by NCOSS in consultation with the DNF members and approved by NCOSS Acting Deputy CEO.

Introduction

The DNF welcomes the opportunity to provide input into the first Question Paper of the review of the Guardianship Act 1987 (NSW) (Guardianship Act).

At the outset, we stress that the review provides an opportunity to ensure that the *Guardianship Act* aligns with the culture of rights, autonomy and high expectations of people with disability spearheaded by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the National Disability Insurance Scheme (NDIS).

This review coincides with a period in which many people with disability will have access to greater support than in the past, and corresponding opportunities to increase their decision-making capacity over time. The DNF envisages the Guardianship Act reflecting and promoting an empowered view of people with disability, rather than entrenching the low expectations of the recent past. To promote an empowered view of people with disability, it is important that the legislation mandates that people have access to support when making decisions, including information in a form accessible to

them. The broader issues of supported decision-making will be explored in our responses to Question Papers 2 and 3.

This submission should be read in conjunction with the DNF's preliminary submission to this review.¹

Question 3.1: Elaboration of decision-making capacity

(1) Should the *Guardianship Act* provide further detail to explain what is involved in having, or not having, decision-making capacity?

The DNF believes the *Guardianship Act* should include a definition of the core concept of "decision-making capacity". Legislative guidance would encourage Tribunal members to apply consistent criteria to each case considered, reducing the risk that individuals' liberty would be reduced on the basis of subjective judgements.

Some members of the DNF argue that that the definition of decision-making capacity should be referenced in the context of the supports provided i.e. the adequacy and appropriateness of those supports for the task at hand – not in the context of the individual.

(2) If the *Guardianship Act* were to provide further detail to explain what is involved in having, or not having, decision-making capacity, how should this be done?

The DNF believes that the definition of 'decision-making capacity' should be framed positively, and contain the following elements:

1. Clarify capacity is decision-specific by using the singular "decision" rather than "decisions about a matter";
2. Mandate that when determining a person's decision-making capacity, the Tribunal ensures that a person has access to:
 - relevant information in a form and format that is accessible to them; (for example Braille, Easy English or a language other than English); and
 - appropriate support to make the decision.
3. Outline that "decision-making capacity" in relation to a decision involves a person's ability to:
 - (a) understand the nature and effect of a decision (with appropriate support);
 - (b) freely and voluntarily make a decision; and
 - (c) communicate the decision in some way whether by talking, writing, using sign language, assistive technology, or any other means.
4. Provide that when determining whether a person understands the nature and effect of a decision, the Tribunal should consider factors including whether they can:
 - (a) with appropriate support, understand the relevant information (including the consequences of making or failing to make the decision);

¹DNF Preliminary Submission into Review of Guardianship Act 1987.

- (b) retain that information for a period that allows the decision to be made within an appropriate timeframe;
- (c) use the information or weigh it as part of the decision-making process.

The third and fourth elements are modelled by the approach to defining capacity recommended by the Queensland Law Reform Commission (“QLRC”). The QLRC recommended the elements of the definition in the *Mental Capacity Act 2005 (UK)* (outlined above at point 4) are used to explain what it means to “understand the nature and effect of a decision” rather than as separate criteria which need to be satisfied.² The DNF believes that this approach allows the Tribunal discretion when applying a rights-based framework to the facts of each case.

Question 3.2: Disability and decision-making capacity

How, if at all, should a person’s disability be linked to the question of his or her decision-making capacity?

In its preliminary submission to this review, the DNF expressed the view that, in accordance with Article 12 of the UNCRPD (appended to this submission), disability should not have a direct link to a person’s decision-making capacity.³ Article 12 of the UNCRPD requires that guardianship legislation is disability neutral, albeit disability responsive.

Some members of the DNF believe the *Guardianship Act* should include a capacity assessment principle that a person does not lack capacity on the basis of having a disability (see Question 3.7). Others take the view that NSW should develop a regime that recognises that all people have equal recognition before the law, and all people have legal agency, but that some people may require support in order to exercise it.

² Question Paper, [3.14-3.15]

³ DNF Preliminary Submission, note 1, p6.

Question 3.3: Defining disability

If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?

The DNF does not support the retention of a link between disability and incapacity. However, in the event that a link between capacity and disability is retained:

- the narrowest possible definition should be used; the Western Australian definition (“an intellectual disability, a psychiatric condition, an acquired brain injury and dementia”⁴) is preferred from the examples provided because it is limited to impairments which may impact a person’s decision-making ability; and
- a qualification should be included in the legislation so that a disability only leads a person to be covered by it if they are “unable to make the relevant decision, including with appropriate support”. The proviso in the current NSW legislation, namely that a person needs to be:

*by virtue of [their disability], restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.*⁵

has the potential to be unduly restrictive, reaching people who require supervision in a life activity which is unrelated to decision-making capacity.

Some members of the DNF do not support any model that assumes that some people have the ability to make decisions and some do not. It is preferred that all people are viewed from the same starting point, and the lack of the appropriate support is seen as the cause of a person’s limitation in expressing their individual will and preference.

Question 3.4: Acknowledging variations in capacity

(1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?

It is crucial that the law acknowledge that decision-making can vary over time and depend on the subject matter of the decision, and indeed on the context of each individual decision. This is particularly important in the context of roll-out of the NDIS. As the NDIS allows people with disability to experience greater choice and control in their lives, people will increasingly be able to take more control over the decisions that affect their lives.

(3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?

(4) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

Many members of the DNF considers that variation in capacity should be acknowledged in many areas of guardianship law, as outlined below:

1. The definition of capacity should clarify that capacity is decision-specific, and that a person only needs to retain relevant information for a period relevant to a particular decision.

⁴ *Guardianship and Administration Act 1990* (WA) s3(1) definition of “mental disability”.

⁵ *Guardianship Act 1987* (NSW) s 3(2).

2. Capacity assessment principles should include the following combination of the principles developed by the Victorian Law Reform Commission and the Australian Law Reform Commission:
 - A person’s capacity is specific to the decision to be made.
 - A person’s decision-making ability may evolve or fluctuate over time, and can increase.
 - 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.
3. As a precondition for making an order, the Tribunal should consider whether capacity is likely to be regained or could improve over time with appropriate support (this is modelled on the *Assisted Decision-Making (Capacity) Act 2015* (Ireland)).⁶ Members believe that orders should be reviewed when there is evidence that capacity has been regained.⁷ In the case of NDIS participants, where capacity is likely to increase, orders should be reviewed annually. This practice would be in accordance with Article 12 of the UNCRPD, being a restriction as short as possible.

Other members of the DNF believe that the test of a person’s ability to exercise their legal agency is the assessment of the supports available being adequate and appropriate to that particular task, rather than an assessment of the person’s capacity.

Question 3.5: Should the definitions of decision-making capacity be consistent?

(1) Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements?

The DNF believes there should be a single, overarching, definition of capacity that is applicable in all civil law contexts, to ensure consistency and emphasise the presumption of capacity.

(2) If the definitions of decision-making capacity were to be aligned, how could this be achieved?

The DNF considers that to align the definitions of decision-making capacity, the legislation could specify that:

- an alternative decision-maker (personal or financial) may only be appointed if the person lacks capacity to make some decisions about his or her life or property that foreseeably arise for the person after having had access to adequate and appropriate support to do so;
- an alternative decision-maker may only consent to treatment if the person lacks capacity to decide about the particular treatment;
- an enduring guardian may only make decisions about which a person lacks capacity; and
- an enduring attorney is bound by the instructions of the person unless the person lacks capacity for a decision.

⁶ *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(9).

⁷ NSW Attorney General’s Department, *Capacity Toolkit* (2009) 19-23.

Question 3.6: Statutory presumption of capacity

Should there be a statutory presumption of capacity?

The DNF believes a legislative presumption of capacity is a crucial component of ensuring that the *Guardianship Act* aligns with Article 12 of the UNCRPD. A presumption would re-enforce common law principles and serve as an educational tool, reinforcing to Tribunal members that the burden of disproving a person's capacity rests on the party seeking to restrict a person's autonomy.

A legislative presumption of capacity has been incorporated in the guardianship laws of Queensland and Western Australia, and has been recommended by the Victorian Law Reform Commission and the NSW Standing Committee.⁸

Question 3.7: What should not lead to a finding that a person lacks capacity?

(1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?

The inclusion of factors that do not lead to a finding that a person lacks capacity would provide a useful safeguarding element of guardianship legislation, reinforcing the presumption of capacity. Such factors would also protect against unintentional widening of the application of the legislation if the term disability was no longer included in the definition of "person in need of a guardian."

(2) If capacity assessment principles were to include such statements, how should they be expressed?

The DNF believes the following capacity assessment principles should be adopted, in addition to the positively framed principles discussed elsewhere in this submission:

- A person must not be assumed to lack decision-making capacity on the basis of having a disability (emphasising the separation of disability and decision-making capacity). Alternatively, this principle could be framed positively, emphasizing that all people should be assumed to have capacity - but some people, at different times may require support to exercise that capacity
- 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 (this principle encourages the provision of such support).
- 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 (emphasising that the legislation judges a person's ability to make a decision, not the outcome of the decision they make).
- No assumption of a person's ability to make a decision should be assumed based on their age, appearance, or an aspect of their behaviour (including but not limited to level of literacy or education, religious or sexual practice, or past and/or present dependence on alcohol and/or drugs).

⁸ Guardianship and Administration Act 2000(Qld) sch 1 pt 1 cl 1; Guardianship and Administration Act 1990(WA) s 4(3). Victorian Law Reform Commission (2012), *Guardianship*, Final Report 24; Recommendation 26; NSW, Legislative Council Standing Committee on Social Issues, (2010) *Substitute Decision-Making for People Lacking Capacity*, Report 43, Recommendation 2.

Regarding the last point, the DNF observes that guardianship legislation in the Northern Territory and Australian Capital Territory specifies numerous behavioural factors which should not lead to a conclusion that a person lacks capacity. We consider it is preferable to include some of these criteria as examples of what constitutes ‘aspect of behaviour’ rather than as stand-alone criteria. Listing the factors individually creates the risk that a Tribunal may impermissibly find that another aspect of behaviour not included in the legislation is determinate of a person’s decision-making capacity. Framing the principle as a general statement followed by some examples would encourage the Tribunal to adopt a broader view.

Question 3.8: The relevance of support and assistance to assessing capacity

(1) Should the availability of appropriate support and assistance be relevant to assessing capacity?

The availability of support and assistance is highly relevant to assessing capacity; in many cases, it is a determinative factor. We also stress that there may be a need to assess whether appropriate support has been provided in the period leading up to the Tribunal’s involvement-not just to make decisions, but to engage in the community and build skills more broadly.

Generally, people make decisions through trial and error with support and guidance as they mature. If people with disability have not been exposed to choice and have been denied appropriate support to make decisions, they will have limited experience in expressing their will and preference. In some cases, institutional arrangements such as segregation may have led peoples’ ability to express their wishes to diminish if they were not provided with appropriate communication, supports and stimulation. For example, members are aware of deafblind people losing the ability to communicate because interpreters in their group homes did not know hand-over sign-leaving the person with no opportunity to express themselves.

Appropriate support, tailored to a person’s needs, underpins whether or not a person is able to make a specific decision, at a specific time. This will fluctuate over time depending on the quality and appropriateness of those supports. It is crucial that this is recognised in the legislation, and before making an order, the Tribunal inquires whether a person has access to appropriate support, and whether their support can be increased. These issues will be explored in our responses to Question Papers 2 and 3.

(2) If the availability of such support and assistance were to be relevant, how should this be reflected in the law?

This DNF considers the availability of support and assistance should be reflected in the *Guardianship Act* by incorporating:

- an obligation on the Tribunal to ensure people have access to information in a form and format accessible to them (including having support to process the information) before a determination is made in relation to a decision;
- the capacity assessment principle that “a person’s capacity should be determined in the context of appropriate supports”; (‘available supports’ as recommended by the Australian

Law Reform Commission⁹ has been changed to ‘appropriate support’ to emphasise the obligation to provide such support); and

- a recognition of alternative forms of communication available to a person to express their will and preference’.¹⁰

Question 3.9: Professional assistance in assessing capacity

(1) Should special provision be made in NSW law for professional assistance to be available for those who must assess a person’s decision-making capacity?

(2) How should such a provision be framed?

Professional assistance should be available for capacity assessors in order to ensure a consistent rights-based approach is adopted in accordance with Article 12 of the UNCRPD. Failure to provide such assistance runs the risk of eroding the presumption of capacity if decision-makers apply negative judgements of people with disability based on low social expectations of previous eras. The assessment should start with the support available and the capacity of these support to enable an individual to make their own decisions.

Question 3.10: Any other issues?

Are there any other issues you want to raise about decision-making capacity?

The DNF emphasises that the *Guardianship Act* needs to be framed in a manner that is live to the fact that its amendment coincides with a period in which many people with disability will have opportunities to increase their decision-making capacity.

The enhanced inclusion, choice and control created both by the NDIS and the *Disability Inclusion Act 2014 (NSW)* contrasts with the low expectations and a lack of support people with disability have experienced in recent times. The DNF observes that there is likely to be a lag before the new paradigm of increased inclusion and support leads to observable changes in outcomes, which have to date been shaped by low expectations.

In light of these substantial cultural shifts occurring, the DNF recommends that the *Guardianship Act* incorporate a statutory review period set to measure how it operates within an environment where people with disability have access to increased support and autonomy, and are viewed socially as full citizens. A review period of three years would ensure that the Act is relevant and responsive to this new environment which is evolving and cannot be fully anticipated.

⁹ See Australian Law Reform Commission, (2014) *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) Recommendation 3-2(2)(c).

¹⁰ *Assisted Decision-Making (Capacity) Act 2015 (Ireland)* s 3(2)(d), Question Paper [3.74].

Question 4.1: The need for an order

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the person is “in need” of an order?
- (2) If such a precondition were required, how should it be expressed?

The DNF believes that the pre-condition that the Tribunal must be satisfied that the person is “in need” of an order should be included as a safeguard in accordance with Article 12 of the UNCRD. As a further safeguard, we endorse the inclusion of Australian Capital Territory’s additional pre-condition which requires the Tribunal to be satisfied that, if nothing is done:

- the person’s needs will not be met, and
- the person’s interests will be significantly adversely affected.¹¹

Question 4.2: A best interests precondition

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person’s “best interests”?

The DNF believes that this pre-condition should not be retained, as it will conflict with the “will and preference” terminology of supported decision-making to be analysed in later Question Papers. However, it is important for the *Guardianship Act* to emphasise that the interests of the person about whom the order is made must be prioritised over other considerations (such as the interests of services or a person’s family).

- (3) What other precondition could be adopted in place of the “best interests” standard?

Alternatives to the ‘best interests’ precondition could include:

- “promoting a person’s health, safety and welfare”¹²
- “be likely to produce benefits” that would “outweigh any adverse consequences” for the person.¹³

Alternatively, the additions to the pre-condition specifying the nature of the ‘need’ for an order modelled on the Australian Capital Territory – outlined above at question 4.1 – could be sufficient to replace the ‘best interests’ precondition.

Question 4.3: Should the preconditions be more closely aligned?

- (1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?

The DNF believes the pre-conditions for making guardianship and financial management orders should be aligned, to provide greater consistency.

¹¹ See *Guardianship and Management of Property Act 1991* (ACT) s 7(1)(b) and (c), s 8(1)(b) and (c); Question Paper [4.4].

¹² *Guardianship and Administration Act 1993* (SA) s 29(1)(a).

¹³ *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 26(7)(g), (i), s 46(7)(e).

Some members of the DNF believe that as capacity is decision-specific, a person's lack of capacity to make a decision (necessitating the appointment of a substitute decision-maker) should be judged by the circumstances of the decision, rather than according to subject matter.

Other members believe that the capacity of the supports for each decision should be the driver as to whether or not an order is needed, and the order should first and foremost be aimed at pursuing every possible avenue to provide the supports required.

(2) If so, in relation to what orders or appointments and in what way?

Some members of the DNF consider that the criteria for making guardianship and financial management orders should be modelled on the recommendation of the NSW Standing Committee¹⁴, with modifications to replace the "best interests" standard.

Under this formulation, a substitute decision-maker could be appointed if:

- a person is not capable of making a decision even after appropriate support had been provided; and
- there is a need for a substitute decision-maker to be appointed; and
- the order is likely to produce benefits that would "outweigh any adverse consequences" for the person.

Other members argue that a representative decision-maker should only be appointed where there is no formulation of support that can allow a person to exercise their legal agency.

Question 4.4: Any other issues?

Are there any other issues you want to raise about the preconditions for alternative decision-making arrangements?

To recognise fluctuations in capacity, the DNF considers that an additional pre-condition that is modelled on the *Assisted Decision-Making (Capacity) Act 2015* (Ireland)¹⁵ should be added to the *Guardianship Act*. The Irish provision specifies that before making an order, the Tribunal must consider:

- (a) the likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and
- (b) the urgency of making the intervention prior to such recovery.

We believe that this provision should be incorporated into the *Guardianship Act*, but that the phrase "matter concerned" should be changed to "decision concerned", in order to highlight that decision-making capacity is decision-specific. In addition, we believe the Tribunal should consider whether a person's decision-making capacity could improve over time with appropriate support.

¹⁴ NSW, Legislative Council Standing Committee on Social Issues, (2010) *Substitute Decision-Making for People Lacking Capacity*, Report 43, Recommendation 8, [4.19] Discussion Paper.

¹⁵ *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(9)

Question 5.1: What factors should be taken into account?

(1) What considerations should the Tribunal take into account when making a decision in relation to:

- (a) a guardianship order
- (b) a financial management order?

(2) Should they be the same for all orders?

(3) Are there any other issues you want to raise about the factors to be taken into account when making an order?

The DNF believes the same considerations should be taken into account for all orders and recommends the following amendments to the criteria in NSW:

- **Addition of human rights considerations** - The *Guardianship Act* should affirm that all people with disability have the same human rights and fundamental freedoms as other members of the community, including the right to equal benefit and protection of the law. Specific rights considerations should include:
 - the person's freedom of decision and action being restricted as little as possible;
 - the person being encouraged, as far as possible, to be self reliant and fully included in the life of the community; and
 - the person being protected from neglect, abuse and exploitation.
- **Additional consideration of the adequacy of existing informal arrangements** as acknowledged in South Australia¹⁶. We consider that the phrase "the desirability of not disturbing them" should not be included, as informal support arrangements should not be continued if they do not represent the best option for the person.
- **Broadening of cultural and linguistic considerations to include** Aboriginal and Torres Strait Islander culture, language and custom, where relevant.¹⁷
- **Recognising broader concept of family** - Consideration of the views of a person's family members, rather than only their spouse, acknowledges that many people have a diversity of important relationships in their lives. This consideration should be expressed as "views of family members where the relationship is close and continuing."

The DNF believes that the legislation should provide that these factors form part of a holistic assessment of a person's circumstances, and not need to be considered individually or balanced against each other.

¹⁶ *Guardianship and Administration Act 1993* (SA) s 5(c).

¹⁷ *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9(2).

Appendix

Article 12 UNCRPD

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.