



# **Review of the Guardianship Act 1987: Response to Question Paper 1 October 2016**

## **About Synapse**

Synapse is dedicated to reconnecting the lives of those affected by brain injury. Our vision is that those affected by brain injury in Australia are able to lead a quality life, based on their own decisions and choices. Synapse are the peak body representing people affected by brain injury within New South Wales (NSW). Our work as a peak body involves influencing government and industry to ensure legislation or policies meet the needs of people with a brain injury.

## **Introduction**

We welcome the opportunity to provide feedback in response to Question Paper 1, as part of the review of the Guardianship Act 1987 (NSW); referred to as “the Guardianship Act” throughout this document.

## **Question 3.1, 3.2 and 3.3: Elaboration of decision-making capacity**

Synapse believe that the Act should not have an all-encompassing specific definition as to decision making incapacity, as it is an issue that will be subject to medical opinion and vary with each individual. 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.

The Guardianship Act should provide further detail to explain what is involved in having, or not having, decision-making capacity.

Disability should not be a precondition to the appointment of alternative decision-makers. The focus of the legislation should be on decision-making capacity, any supports available to a person to maximise capacity, and any absence of capacity.

NSW Attorney General's Capacity Toolkit is a useful and important resource for explaining and providing advice on assessing capacity.

The tribunal should be required to be satisfied when considering if a person understands the nature and effect of a decision, whether or not the person:

- had access to appropriate supports to make the relevant decision and, if not, why these were not available; can retain the information to make the relevant decision; and
- can retain the information to make the relevant decision; and
- can use the information to weigh up the factors relevant to the decision to be made.

It is unnecessary for there to be a link between disability and incapacity.

A person's disability should not be linked to decision making capacity.

People with a cognitive disability often do not identify with having a disability.

#### **Question 3.4**

Synapse supports legislation recognising that decision-making capacity can vary over time and depend on the subject matter of the decision.

These factors should be considered at the initial stage as part of the process on which determinations are made but do not need to complicate the definition of decision-making capacity.

These matters need to be taken into account when deciding the specifics of any order, including length of time of the order, the extent of the order, the review process and whether or not a less restrictive measure will be more appropriate.

Synapse supports the approaches recommended by various law reform commissions to include assessment principles that need to be considered before any order is made. Such assessment principles include a consideration of:

- the kinds of decisions which are being considered;
- whether the incapacity is temporary, permanent or fluctuating; and
- whether or not any factors exist which are affecting decision making at the time the assessment takes place.

### **Question 3.5**

What is important is that the court or tribunal has flexibility to make orders to meet the particular and differing needs of the people who appear before it.

Legislation should reflect this need.

### **Question 3.6**

There should be a statutory presumption of decision-making capacity. The legislation should confirm the common law and include the presumption of capacity as one of the guiding principles of the legislation. To do so reflects contemporary thinking and acknowledges the legal starting point in New South Wales.

### **Question 3.8**

Synapse wholly supports the submission made by the Disability Network Forum (DNF) of which it is a member in relation to question 3.8.

### **Question 3.9**

As the court or tribunal already has a general power to inform itself, which power extends to seeking evidence from professionals, it is not necessary to include a special provision in the legislation.

### **Question 4.1**

In relation to 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?

Synapse refers to the DNF submission and quotes as follows;

"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"

#### **Question 4.2**

All decisions made under the Guardianship Act should be in the best interests of the person.

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 service providers or a person's family).

#### **Question 4.3**

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

There is merit in considering that the criteria for making guardianship and financial management orders should be modelled on the recommendation of the NSW Standing Committee (NSW, Legislative Council Standing Committee on Social Issues, (2010) Substitute Decision-Making for People Lacking Capacity, Report 43, Recommendation 8, [4.19] Discussion Paper.

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.

#### **Question 5.1:**

Synapse concurs with the submission made by the DNF of which it is a member in relation to question 5.1.