THE LAW SOCIETY
OF NEW SOUTH WALES

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7 November 2016

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY

By email: nsw_lrc@agd.nsw.gov.au

Dear Mr Cameron,

Review of the *Guardianship Act 1987* – Question Paper 1: Preconditions for alternative decision-making arrangements

Thank you for the opportunity to provide this submission to the review of the *Guardianship Act 1987* ("Act") on Question Paper 1: Preconditions for alternative decision-making arrangements ("Question Paper 1").

1. General principles

The Law Society notes that this is the first of six question papers to be released by the NSW Law Reform Commission ("Commission"). Although Question Paper 1 deals with preconditions for alternative decision-making arrangements, the questions set out in this paper deal with central policy issues surrounding appropriate decision-making arrangements for people who may require assistance to make decisions in their everyday life, including personal, financial and medical decisions.

The Law Society supports measures which respect a person's autonomy and enable a person to exercise their will and preferences when making decisions that affect their everyday life. We do not object, in principle, to a model of supported decision-making, which differs from the current substituted decision-making model in New South Wales.

The Law Society notes, however, that the practical implementation of a supported-decision making model must include appropriate safeguards against abuse, particularly financial abuse. Given the complexities of financial management and the realities of elder financial abuse, the Law Society considers that the "best interests" model that currently operates in NSW should continue to operate together with supported decision-making.

The Law Society also considers that a "best interests" model continues to be appropriate for people whose will and preferences cannot be determined because of a serious cognitive impairment or serious mental impairment.

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2. Comments on questions

The Law Society provides the following comments on the questions in Question Paper 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 Law Society considers that a general principles framework about what it means to have decision-making capacity could be included in the Act to assist in the assessment and understanding of the meaning of capacity.

The Law Society observes that there have been changes in the terminology and definitions used in legislation, demonstrating the significant shifts in understanding of mental health issues.[1] We submit that advances in medical knowledge about capacity-related issues are occurring rapidly. We consider that an attempt to include a prescriptive or detailed definition in the Act may not accommodate advances in medical knowledge and technology.

The Law Society suggests that the general principles set out in the NSW Capacity Toolkit are a good basis on which to develop principles to be included in the Act. These principles are that, broadly speaking, when a person has capacity to make a particular decision, they are able to do all of the following[2]:

(a) Understand the facts involved.

(b) Understand the main choices.

(c) Weigh up the consequences of the choices.

(d) Understand how the consequences affect them.

(e) Communicate their decision.

The Law Society also supports the provision of further detail and practical guidance in resource tools such as the NSW Capacity Toolkit.[3] However, the Law Society notes that the NSW Capacity Toolkit is a guidance document and does not replace guardianship laws.

The inclusion of general principles about what it means to have decision-making capacity would assist the Supreme Court and the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") when applying the legislation. The Supreme Court and NCAT would continue to set an objective standard by which decision-making capacity is measured and applied on a case-by-case basis.

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[1] O'Neill, Nick; Peisah, Carmelle "Chapter 5 - The Development of Modern Guardianship and Administration" [2011] SydUPLawBk 7; in Capacity and the Law (2011) at http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/7.html.

[2] *Capacity Toolkit*, NSW Department of Justice, Section 2 What is capacity? at http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx.

[3] Question Paper 1, [2.32]. As noted by the NSW Law Reform Commission, law reform bodies in other jurisdictions have expressed support for the Toolkit and recommended that their states adopt a similar tool.

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?

The Law Society does not support linking a person's disability to the question of their decision-making capacity. The Law Society considers that the terms "cognitive impairment", "impairment" or "mental health impairment" could be included in the legislation as one of a number of factors to be considered when determining a person's decision-making capacity.

The current definition used in the Act includes a reference to physically and sensorily disabled people. As indicated in Question Paper 1, physical impairments are increasingly being overcome by assistive technology and the availability of a range of ongoing supports.[4] Including a person of advanced age within the definition discounts those people who fall within this description but do not suffer decision-making incapacity. Advances in medical science are providing greater assistance to people of advanced age so that even the progression of dementia and memory failure may be slowed for many people resulting in retention of decision-making capacity for a longer period.

The Law Society notes that most of the Australian guardianship and administration laws either use the term "impairment" or "disability". The UK *Mental Capacity Act 2005* uses the word "impairment" when defining lack of capacity. The *Adults with Incapacity (Scotland) Act 2000* uses the term "mental disorder" in its definitions section.

The Law Society submits that terms such as "disability" or "mental disorder" may be considered outdated. We note that the paradigm shift taking place is moving society away from thinking in terms of a person's disability, and instead focusing on their ability and capacity. This is reflected in human rights legislation and international conventions.

The Law Society notes that section 2 (interpretation section) of the Irish *Assisted Decision-Making (Capacity) Act 2015* takes a less prescriptive approach and makes no link to disability. A person lacking decision-making capacity is merely defined as a "relevant person whose capacity is in question… or who lacks capacity in respect of one or more than one matter". Legislation in the Canadian jurisdictions of Alberta and Ontario does not use any terms linking decision-making incapacity to disability or any other terms that may be considered outdated.[5]

The Law Society notes the Commission's concern that removing the link to disability might "unintentionally broaden" the scope of the Act to enable orders to be made for people who are capable of making decisions but are incapable of managing their personal life for whatever reason or live in a way that may be regarded as eccentric or unconventional.[6] We note that principles stating what should not lead to a conclusion that a person lacks capacity, to be included in a general principles framework, may address this concern.

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[4] Ibid, [3.31], [3.69].
[5] *Adult Guardianship and Trusteeship Act,* Statutes of Alberta, 2008, Chapter A-4.2; *Substitute Decisions Act,* 1992, SO 1992, c. 30.
[6] Question Paper 1, [3.22].

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?

If a link between disability and incapacity is to be retained, the Law Society suggests that the definitions of "cognitive impairment" and "mental health impairment" in the recommendations of the NSW Law Reform Commission Report 135[7] may provide guidance.

We consider that at a minimum, any definition must be broad enough to take into account conditions affecting cognition that do not amount to intellectual disability such as acquired brain injury, fetal alcohol spectrum disorder and degenerative neurological conditions.[8]

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?

The Law Society supports, in principle, an acknowledgment that decision-making capacity can vary over time and depends on the subject matter of the decision. We note that while the Act does not state that decision-making capacity can vary over time and depends on the subject matter of the decision, these principles are affirmed in case law. [9]

(2) How should such acknowledgements be made?

The Law Society supports the inclusion of such an acknowledgment in a general or guiding principles section of the Act.

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

See the response to question 3.4(2), above.

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

The Law Society supports the inclusion of such an acknowledgment in the general principles section of the Act using positive language that is the least prescriptive:

> A person's decision-making capacity is specific to the decision to be made.
>
> A person's decision-making capacity is not static and may fluctuate over time.

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[7] NSW Law Reform Commission Report 135, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, June 2012, Recommendations 5.1 and 5.2.

[8] See for example discussion of acquired brain injury from 5.84 in NSW Law Reform Commission Report 135, ibid, recommendations 5.1 and 5.2.and discussion of fetal alcohol spectrum disorder from paragraphs 5.119-5.139 in the House of Representatives Standing Committee on Social Policy and Legal Affairs Report, *FASD: The Hidden Harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012.

[9] *Hunter and New England Area Health Service v A* [2009] NSWSC 761 per McDougall J at [24].

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 and maximised.

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 Law Society supports the inclusion of a consistent set of guiding principles, rather than the inclusion of consistent definitions of decision-making capacity within NSW guardianship laws. We consider that, in practice, it may be difficult to apply such a definition to a range of decisions that require different capacity standards. A consistent, prescriptive definition may not accommodate or recognise the variation in the spectrum of decision-making.

We consider that there would be merit in the inclusion of a general principles framework on which to base an assessment of capacity. A general principles framework that is not prescriptive could be applied flexibly to individual facts and circumstances and accommodate advances in assistive technology. As noted in the response to question 3.1(1) above, the Law Society suggests that the general principles set out in the NSW Capacity Toolkit are a good basis on which to develop principles to be included in the Act.

As previously stated, a person's decision-making capacity is specific to the decision to be made.[10] For example, a person may have capacity to make a will but not have capacity to manage their financial affairs. Different capacity standards apply depending on whether a person is making a will, making a power of attorney, entering a contract, deciding to commence litigation or conducting those proceedings or making decisions that do not have legal consequences such as where to live, what to buy or when to go to the doctor.

The Law Society notes that decision-making in the context of guardianship laws deals with decisions relating to personal, financial and medical decisions. Although decision-making capacity is decision specific and depends on the nature and complexity of the task to be performed, this would not mean that a consistent and aligned set of principles about decision-making capacity could not be included within NSW laws.

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

Refer to the response to question 3.1 above.

Question 3.6: Statutory presumption of capacity

Should there be a statutory presumption of capacity?

The Law Society does not object, in principle, to a legislative provision presuming capacity. This would be a codification of the existing common law presumptions.

[10] *CJ v AKJ* [2015] NSWSC 498 at 32.

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 Law Society considers that a general principles framework could state what should not lead to a conclusion that a person lacks capacity. Such principles should be positive statements regarding individual attributes, such as age, appearance, condition or an aspect of behaviour[11].

An impairment, condition or attribute that does not impact on a person's ability to make a particular decision should not lead to a conclusion that a person lacks capacity.

The Law Society notes that jurisdictions with capacity assessment principles in their legislation have different emphases – some on appearance, behaviour and beliefs, others on unwise decisions or methods of communication. We note that there is support in many sectors for alignment and conformity in definitions and principles.

The Law Society also supports the continued use of informal guidelines, such as those set out in the NSW Capacity Toolkit, which can be amended and updated as required.

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

See the response at 3.7(1), above.

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 Law Society agrees that appropriate support, assistance and adjustments are relevant to assessing capacity and should be provided if required for an individual whose decision-making capacity is being assessed. Such supports may include technology that assists a person to communicate his or her decision. We acknowledge that assistive technology is already being used to support people to make known their decisions, and it is expected that advances in such technology will continue to support people in this way.

We note there is a difference in the use of assistive technology to support a person's decision-making capacity and decision-making support provided by another person, for example a support worker or family member. We consider that the support and assistance provided by a support worker or family member should not be relevant to assessing a person's decision-making capacity. A person's decision-making capacity should be assessed independently of this support, but with the use of assistive technology if required.

We also note that where support is provided by another person, there must be safeguards to ensure the decision is that of the person requiring assistance and not that of the caseworker or family member.

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[11] Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Recommendation 27(c).

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

An acknowledgement that a person may require support, assistance or adjustments could be reflected in the law.

We note that the Supreme Court, in its protective jurisdiction, and NCAT are not bound by the rules of evidence and are able to call for expert advice on assistive technology and the availability of a range of continuing supports that may help a person to make their own decisions.

The Law Society supports the existing approach where the NSW Capacity Toolkit provides advice on assisting or supporting a person to make a decision. The Toolkit acts as a guide to professionals and lay people working with and assisting people make decisions. The Toolkit provides advice on communicating in a way that the person is best able to understand, in the person's preferred communication mode and format including, where necessary, the use of a particular communication system. The communication needs of people from culturally and linguistically diverse communities should also be taken into consideration.

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?

The Law Society notes that assistance is already provided to the court and tribunal by way of expert evidence.

(2) How should such a provision be framed?

The Law Society does not believe that the provision of professional assistance, including the imposition of training, or assessment methods or procedures, is the domain of legislation.

The Law Society notes that the Canadian jurisdictions of Ontario and Alberta have implemented a training and certification system where professionals, such as doctors, nurses, psychologists and social workers, are eligible to become "capacity assessors".[12] The Law Society considers that introducing such a system would be a costly enterprise and raises questions about who will bear the cost.

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?

The Law Society supports the inclusion in the current legislation of a precondition before the order is made that the court or tribunal is satisfied that the person is "in need" of an order.

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[12] Question Paper 1, [3.77]; Ministry of Attorney General - The Capacity Assessment Office, *https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php#eligible*; Government of Alberta - Human Resources, http://www.humanservices.alberta.ca/guardianship-trusteeship/resources-for-capacity-assessors.html.

As the Law Society commented in its preliminary submission, informal family arrangements should be considered and encouraged before any formal management is put in place. Currently, the Guardianship Division of NCAT and the Supreme Court avoid making an order if there is an informal arrangement that is appropriate.

The implication of this precondition is that the court or tribunal has considered less restrictive options such as supportive or assisted decision-making.[13]

(2) If such a precondition were required, how should it be expressed?

We note that there is currently a precondition in the legislation, but it does differ between the sections depending on whether the order is for financial management or guardianship, and in relation to the *NSW Trustee and Guardian Act 2009* in respect of Supreme Court orders.

The Law Society considers that the precondition could be expressed in a more uniform manner across all relevant sections in the Guardianship legislation and the *NSW Trustee and Guardian Act 2009.* A statement could be included in the general or guiding principles that the court or tribunal should consider the means which is the least restrictive of a person's freedom of decision-making and action. To include anything further, such as how a court or tribunal must do this, may invite costly proceedings requiring the filing of extensive material. The court or tribunal should be able to make decisions without having procedures that will put an unfair cost burden on the parties.

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"?

(2) If such a precondition were required, how should it be expressed?

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

The Law Society, in its preliminary submission, commented that it is reluctant to entirely abandon the "best interests" model that currently operates in NSW. We cited the complexities of financial management and the realities of elder abuse, the subject of recent and current enquiries by both the NSW Parliament and the Australian Law Reform Commission.

The Law Society supports retaining the "best interests" standard, though we note the concerns that have been expressed about it.

The Law Society considers that the "best interests" standard can be helpful if it is applied correctly. Before making an order the wishes of the person should be given weight, where appropriate, with will and preferences included as part of a best interests consideration.

[13] *BLC* [2016] NSWCATGD 3.

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?

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

We support the alignment of the preconditions in relation to both financial management and guardianship. We acknowledge that the decisions pertaining to one's person or finances can be different but in many instances relate to each other, such as the example of where a person should live, which will have financial and social repercussions. In the majority of cases, spouses and partners will be the primary decision makers for each other, and it would be usual for them to make both financial and personal decisions. This may be done on an informal basis, through a power of attorney or enduring guardianship appointment, or as a last resort through a court or tribunal order.

The NSW Trustee and Guardian, and the Public Guardian, have a policy to consult each other when these agencies have a client in common, and to work together in resolving the personal and financial issues.

The preconditions should be expressed in the least prescriptive manner possible to accommodate the differences in the different decision-making arrangements.

The relevant provision could be expressed to the effect that if the court or tribunal is satisfied that the person is in need of an order, the court or tribunal may make an order for guardianship and/or financial management of a person and/or their estate. When determining whether a person is in need of an order, the availability of a less restrictive and appropriate alternative should be considered.

This does not necessarily mean that the court or tribunal will make an order in favour of one person to carry out both decision-making roles; the court or tribunal will recognise when it is appropriate to appoint different people for each role.

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 Law Society supports the alignment of general or guiding principles for both guardianship and financial management orders – that is, applying the same overarching principles for both guardianship and financial management in terms that are broadly drafted.

The Law Society supports the retention of the current section 4 of the Act, with the addition of a general or guiding principles framework.

While we acknowledge the importance of family support for people with decision-making capacity issues, there are cases that go before the Supreme Court and NCAT in which family members are the perpetrators of physical and financial abuse. It is for this reason that, if there is to be any expansion of the current section 14(2)(a)(ii) of the Act to include family members and carers, an amended provision should include the words "if the relationship between the person and the spouse/family/carer is close and continuing", or similar wording.

2. Human rights principles – supported decision-making

The Law Society notes that the terms of reference of the Review of the Guardianship Act refer to the *Convention on the Rights of Persons with Disabilities*. The Law Society supports the principle that persons with disabilities are entitled to enjoy legal capacity on an equal basis with others in all aspects of life.[14]

It is noted that Article 12 outlines that States must take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.[15] All measures implemented for this purpose are to respect the rights, will and preferences of the person, and must be free of conflict of interest and undue influence.[16]

[redacted]

Yours sincerely,

[redacted]

President

[14] UN General Assembly, *Convention on the Rights of Persons with Disabilities*: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: http://www.refworld.org/docid/45f973632.html, article 12(2).
[15] Ibid, article 12(3).
[16] Ibid, article 12(4).