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31 October 2016

The Chairperson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

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Dear Mr Cameron,

Thank you for the opportunity to provide feedback to the NSW Law Reform Commission on its review of the *Guardianship Act* 1987.

The submission enclosed is made on behalf of Mid North Coast Community Legal Centre and Disability Advocacy, two programs of Advocacy Law Alliance in NSW. We have not addressed every question, but have identified the questions to which our submission relates.

Yours faithfully
Mid North Coast Community Legal Centre & Disability Advocacy NSW

[redacted]

[redacted]
Ndinawe Mtonga
Advocacy Coordinator, DANSW

31 October 2016

Law Reform Commission Review of Guardianship Act QP1

This submission is a collaborative effort between Disability Advocacy NSW ('*DA*') and Mid North Coast Community Legal Centre ('*MNCCLC*'). *DA* and *MNCCLC* are grateful for the opportunity to provide the NSW Law Reform Commission ('*NSWLRC*') with input relevant to their review of the *Guardianship Act 1987* (NSW).

About Disability Advocacy (DA)

DA helps people of all ages with any type of disability or mental illness get fair treatment in the Hunter, New England, Mid North Coast, Central West and Hawkesbury-Nepean regions of NSW. DA's core purpose is to ensure that people with a disability realise these rights in practice by advocating with and for them.

About Mid North Coast Community Legal Centre (MNCCLC)

MNCCLC provides safe, reliable and accessible legal services to socio-economically disadvantaged people living in the local government areas of Kempsey Shire, Port Macquarie-Hastings and MidCoast (Manning region). *MNCCLC* aims to increase access to justice and empower individuals with knowledge of their rights and the ability to resolve their legal issues.

Both organisations believe strongly in advocating for people with impaired ability. In a just and fair society, where the legal system is accessible to all members of the community, there is a need for our laws to reflect current normative values regarding disability. As the *NSWLRC* has noted, the increased frequency with which the New South Wales Civil and Administrative Tribunal ('*NCAT*') is dealing with guardianship applications from people with diminished capacity, shows there is a need to review the suitability of the current legal framework governing guardianship in NSW.[1]

[1] New South Wales Law Reform Commission, *Review of the Guardianship Act*, Background Paper (2016) 12–13[3.1]–[3.5].

To help with our responses to the discussion points in Question Paper 1 we conducted a workshop at a local mental health recovery clubhouse, Endeavour Clubhouse. Endeavour Clubhouse provides a safe, supportive space for people with a lived experience of mental illness. It is run by members, for members. During the workshop we asked participants to consider their responses to the three questions included in the online survey.

We collated their responses and have used them to help inform our recommendations. Participants are anonymous and their responses are identified as P1, P2, P3, P4 etc.

We have chosen to provide responses to the following questions from Question Paper 1.

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?

Case Studies MNCCLC

MNCCLC reviewed eight recent cases where we had provided assistance relating to guardianship matters. Our practice reflects the legal position that the critical matter is the issue of capacity, rather than whether a person has a disability. However, we recognise that in several of the cases we reviewed, the reason advice was sought was because the person in question had a disability, rather than a concern regarding whether or not they had capacity to make particular decisions.

Case Study DA

A client supported by Disability Advocacy NSW was brought before the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) after their psychiatrist had made an application for Financial Management Order (FMO). The psychiatrist made the application on the belief that due to the client's developmental disorder (which impacted upon their learning and interpersonal skills), the client would be more vulnerable to financial exploitation from others who may be aware of an inheritance the client was due to receive from their late father's estate.

Although the client had acknowledged their below average education and disability, they considered that their condition only had a mild impact on their day-to-day functioning and they had been able to manage their affairs responsibly throughout their entire adult life with little support from others.

MNCCLC and DA consider that it is important that the legislation is reflective of contemporary paradigms which underpin the United Nations Convention on the Rights of Persons with Disabilities, such as the social model of disability. The social model of disability promotes not only presumed capacity, but also the principles of least restriction and assisted decision-making. The model sees barriers to movement and decision-making in the world as arising from social norms and structures.

In the DA case study above, it was the presumption that a disability equated to lack of capacity which led to the Tribunal hearing. A better starting point for consideration as to whether an application is necessary would be to assess the client's capacity rather than consider their disability.

In summary, it is MNCCLC and DA's experience that a person's disability is by no means wholly determinative of whether or not they have what a relevant Tribunal or body would deem to be 'adequate' or the 'necessary' decision-making capacity.

Workshop Participant Comment:

"Law should not just assume without thorough investigation" (P2).

Recommendation:

A person with a disability should not be presumed to lack capacity on the basis of the disability. Capacity should be presumed unless otherwise determined. A person should not be considered to lack capacity until all practicable steps have been taken to assist the person and it is clear that the person cannot make a decision about a particular matter. The general principles in s 4 of the *Guardianship Act (1987)* NSW need to include the presumption of capacity.

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?

(2) How should such acknowledgements be made?

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

The *Guardianship Act* (1987) NSW does recognise variations in decision-making capacity, in that it acknowledges that through Enduring Guardianship a person may be able to plan ahead for a future point when their capacity may permanently deteriorate. The common law recognises that different tasks require different levels of capacity.[2] The law does not, however, easily deal with people who may suffer temporary or intermittent loss of capacity.

MNCCLC would support legislative amendment to allow for fluctuations in capacity to be recognised. This may be as simple as acknowledgement that in some cases, loss of capacity may not be permanent.

MNCCLC and DA consider that it is important for the community and the legislation to recognise that if a person was unable to make a certain decision in the past, they may be able to make it at a later point in time. Capacity should be understood as decision-specific at specific times.

Workshop Participant Comment:

"I know myself when I'm not well. Most of the time I'm very well (95%) and can make my own decisions" (P5).

[2] Gibbons v Wright [1954] HCA 17.

Case Study (DA Client)

X is a young man with an intellectual disability and schizophrenia. There is a Guardianship Order in place for X however he asserts that he does not need a guardian. In making a decision to appoint a guardian, the Tribunal relied heavily on psychometric testing of his cognitive ability. X requested a review of the decision, however it was upheld on the basis that there was no evidence that X had regained capacity. When capacity is recognised in terms of an IQ score, any change in capacity is unlikely. However, when capacity is assessed in a decision-specific manner it may be more likely to recognise that although a person's cognitive "score" may not change, their ability to make decisions can fluctuate. In this particular case, the Tribunal also failed to recognise that the impact of the mental illness X suffers on his capacity to make decisions, fluctuates according to how well managed the illness is at the time.

Recommendation:

The law should acknowledge that decision-making capacity can vary over time and will depend on the subject matter of the decision. The law should look to appropriate guidelines to assist in assessing capacity.

One legislative tool the Commission could consider is that of incorporating guidelines or a code of practice into a schedule or regulation supporting the *Guardianship Act (1987)* NSW (for an example of this approach see the Code of Practice for the *Mental Capacity Act 2005* (UK)).

MNCCLC and DA favour the philosophical basis of "The Capacity Toolkit" produced by the NSW Attorney General's Department which takes a positive approach to asserting and assessing capacity. We endorse the inclusion of The Capacity Toolkit guidelines into regulations supporting the legislation similar to the Code of Practice in the *Mental Capacity Act UK 2005.* The inclusion of a code of practice in the amended legislation would ensure its enforcement.

Question 3.5: Consistency within the definitions of decision-making capacity

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

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

MNCCLC and DA consider it may place additional constraints on people to have one standardised definition of decision making capacity. However if this measure were to be taken, it should be consistent across the legislation.

The inclusion of explanatory notes in the legislation amended as a result of this review could address the problem of multiple references to decision-making capacity in NSW legislation. The UK has included such an explanatory note attached to the *Mental Capacity Act 2005* (UK).

In this way, explanatory notes could include the following issues for consideration to assist in understanding the elements of decision-making capacity, without having to develop a statutory definition of capacity itself:

(i) the ability to understand the facts and the choices involved,
(ii) weigh up the consequences, and
(iii) communicate the decision.

Question 3.6: Statutory presumption of capacity

(1) Should there be a statutory presumption of capacity?

(2) How would a statutory presumption of capacity change the way the act operates?

A presumption of capacity has long been recognised at common law. The presumption goes so far as to allow that capacity continues where an individual has alleged mental incapacity, so that the burden of proof lies with those that assert incapacity.[3] MNCCLC and DA support the inclusion of a *statutory presumption* of the existence of capacity, and consider that such

[3] *Hunter and New England Area Health Service v A* [2009] NSWSC 761, [23].

change may assist the most vulnerable in our community to identify and uphold their decision-making rights in the face of challenges to their autonomy.

There is no legislated *definition* of capacity in NSW, which may conceivably present problems for a statutory presumption. The NSW Parliamentary Standing Committee on Social Issues argued that a definition of capacity was central to determining the need for substitute decision making.[4] It recommended the NSW Government pursue legislation providing for a single definition of capacity that applied to all legislation relating to substitute decision making, including the *Guardianship Act 1987* (NSW).[5]
MNCCLC and DA do not support this, as we believe capacity is something which ought to be determined according to individual circumstances.

Recommendation:

The starting point of the *Guardianship Act 1987* (NSW) should be the presumption that a person has capacity unless it can be shown otherwise. The *Guardianship and Administration Act 2000* (Qld),[6] and the *Guardianship and Administration Act 1990* (WA) contain a statutory presumption of capacity.[7] The *Mental Health Act 2015* (ACT) provides comprehensive principles which may reinforce a presumption of capacity.[8] MNCCLC and DA recommend that these are used as a template to establish similar provisions in a Code of Practice or explanatory notes for NSW.

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

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

MNCCLC and DA submit that the following should not be conclusive factors in the assessment of capacity:

- Age
- Gender identity
- Disability

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[4] Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision Making for People Lacking Capacity*, (2010) 33.
[5] Ibid 35.
[6] Section 7.
[7] Section 4.
[8] Section 8.

- Cultural background
- Educational level
- Communication method
- Behaviour
- Appearance

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 use of the term 'best interests' is problematic as it raises the question of what constitutes 'best interests' and who should make this determination. MNCCLC and DA submit that the principles which guide an assessment of "best interests" (currently in s 4 of the *Guardianship Act 1987 (*NSW)) should also include reference to exhausting all other reasonable opportunities for support prior to an order being made. The current General

Case Study (MNCCLC Client)

X is a person with an intellectual disability whose finances are currently managed informally by family. An application for Financial Management was made for X by a caseworker, and MNCCLC acted as a separate representative in the matter. As at the time of the Tribunal hearing, the family member had not had any referral to financial counselling or support to assist them to understand the way household finances were working. MNCCLC considers that the best interests principles could include reference to "all reasonable alternatives" or "all reasonable informal supports" being explored prior to any orders being made.

Principles do (at s 4(b) of the *Guardianship Act 1987* (NSW)) provides that

> "the freedom of decision and freedom of action of such persons should be restricted as little as possible"

This clause, however, does not place any positive obligation on applicants to investigate reasonable alternative supports prior to seeking a Tribunal hearing. MNCCLC and DA submit that, where reasonable, a positive obligation to do so be met. In this manner, the Tribunal is assured of dealing with matters where substituted decision making is a last resort.

Workshop Participant Comment:

"Distinguish certain areas where help is needed" (P2)

"You should talk to the person" (P5)

Recommendation:

In reference to consideration of 'best interest' in relation to capacity in decision-making , the legislation should specifically recognise that a person should not be deemed to lack capacity on the basis they make a decision which in the opinion of others is unwise.

In addition, the current General Principles contained in s 4 of the *Guardianship Act* 1987 (NSW) could include requiring all reasonable alternatives to be explored prior to an order being made.

Question 5.1

(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*?

Currently the legislation only provides grounds for when an order for financial management is made.[9]

In DA's experience, the process of application and making of financial management orders has been largely appropriate to the circumstances. We believe this is because this process

[9] *Guardianship Act 1987* s 25G

is better aided by the existence of legislative grounds. DA believes that the absence of grounds pertaining to the making of guardianship orders is a source of confusion.

Case Study (DA Client):

An older person who had been subjected to life-long abuse was made increasingly vulnerable after the death of one of their parents. There was demonstrated risk to the person's finances from people around them and an inability to make decisions regarding their life and health generally. The person was largely non-verbal. The Tribunal made a financial management order for the person but would not make a guardianship order for the person, stating there were insufficient grounds based on professional and informal supports already in place. As a result the older person's family were required to return the matter to the Tribunal for a second hearing based on the continued influence of persons who had been identified as a risk.

If there had been legislated grounds for guardianship; or a separate representative who could assist to make the best interests case for guardianship, the outcome may have been different.

Recommendation:

Grounds should be included into legislation for the making of a guardianship order.

DA also considers it may be helpful for more frequent appointments of separate representation in Tribunal proceedings, as the time constraints in hearings do not always allow for a clear understanding of individual circumstances. Independent evidence gathered outside the hearing and provided by the separate representative may overcome difficulties which present as part of the Tribunal process. This may assist the Tribunal when making a decision for the individual. This recommendation is consistent with the NSW Standing Committee's recommendation that further consultation and development be taken in progressing a proposal for the establishment of an Office of the Public Advocate.