

**Review of Guardianship Act 1987  
Question Paper 1**

**Multicultural NSW submission**

**Introduction**

Multicultural NSW appreciates the opportunity to provide comment in connection to the review of the *Guardianship Act 1987* (the Act).

The *Multicultural NSW Act 2000*, in defining *multicultural principles* as a state policy, notes that '*all individuals and institutions should respect and make provision for the culture, language and religion of others within an Australian legal and institutional framework where English is the common language*' (Sec 3.1(d)). One of the key roles of Multicultural NSW to support NSW Government agencies and institutions to ensure that policies, programs and services appropriately consider and do not disadvantage people from culturally, linguistically and religiously diverse backgrounds.

Multicultural NSW's response to Question Paper 1 discusses:

- the barriers impacting the extent to which people from diverse backgrounds, including the newly arrived, understand the core notion of formal guardianship and consequential impact on the effectiveness of the Act;
- different interpretations of, and confusion surrounding key concepts of the Act especially 'capacity' and 'disability'; and
- challenges faced by professionals during the assessment of people from diverse backgrounds.

These difficulties, exacerbated at times by restricted individual English language proficiency and limited knowledge of Australian legal processes, significantly inhibit the extent to which the provisions of the Act are operating to safeguard vulnerable community members from culturally, linguistically and religiously diverse backgrounds against neglect, abuse and exploitation.

**Summary of Multicultural NSW recommendations:**

1. That the NSW Trustee and Guardian develop a comprehensive communication strategy to ensure people from culturally, linguistically and religiously diverse backgrounds understand the Act and importantly, the rights and options available to impacted individuals.
2. That the NSW Trustee and Guardian develop an accountability framework, for completion by assessors, grounded in the existing Capacity Toolkit. Reports against this framework would require all assessors to declare that they had taken issues of cultural, linguistic and religious difference into consideration when making their assessment.

3. That the NSW Trustee and Guardian advocate for and support the provision of cultural competency training to establish or upgrade the capacity of assessors, including government employees and professionals such as medical practitioners, to make balanced decisions informed by a comprehensive understanding of cultural, linguistic and religious contexts and difference.

### **Understanding of the Act**

The current NSW *Guardianship Act* allows a **formal decision-maker** to be identified or appointed to make personal, financial and medical decisions for someone who does not have the 'capacity' to make those decisions themselves.

Multicultural NSW observes that the notion of legally appointing someone to make decisions on behalf of a person may be an unfamiliar concept to people from diverse backgrounds. Although it is not uncommon in many cultures for family or friends to provide care, amongst non-Anglo-Celtic cultural groups there may be little expectation or understanding of any other non-familial care mechanisms to take care of personal, financial and medical decisions for someone who may be incapacitated. Policy and decision makers should be aware that amongst some diverse groups, bringing the family situation to the 'law' or the 'government' could lead to a perception of shame or loss of face. A situation in which 'someone else', be it the government or any other non-familial party, makes decisions, questions or interferes in decision making related to a vulnerable family member, may be a difficult concept for people from some diverse groups to accept.

In addition, limited understanding of Australian law and fear of government agencies within some diverse communities, coupled with a lack of culturally responsive services, amplifies difficulties faced by government when attempting to ensure that impacted individuals and their families understand that the objective of the Act is to protect against abuse and exploitation.

### **Interpretation of concepts**

To judge whether a person has capacity, or what level of capacity the person has, is extremely difficult even for experts, as explored in this Question Paper.

To add further complication, 'capacity' when linked to disability, is interpreted and understood differently across different cultures. Often, in tight knit cultures, a person's identity is based on family clan or tribe. The person interacts and has multi-strand relationships with the extended family and community. Integrating the person with a disability into family and community life is normal and that person is expected and encouraged to participate in normal life to the best of the person's abilities. On the other hand, there are some cultures that traditionally stigmatise disabilities, believing people with a disability are contaminated. In some cases, people with a disability may be treated as out-casts.

The difference in interpretation of capacity and disability highlights the importance of strong inter-cultural awareness and competency amongst assessors and service providers interacting with individuals and families from diverse cultural groups. Whilst Multicultural NSW recognises the value of linking disability to capacity assessment concepts and principles, if such an approach were to be adopted in NSW, it is important that ageing-related illnesses and degenerative conditions are appropriately identified as disabilities for the purposes of capacity assessment. As highlighted in this response, any assessments of people from culturally diverse groups should necessarily take into consideration cultural difference, including language, when interacting with impacted individuals and their families to ensure that assessments are not incidentally prejudiced by any lack of cultural understanding on the part of the assessor or indeed the subject.

### **Assessment of capacity**

The above underlines the challenges faced when assessing people from diverse backgrounds. It demonstrates the significance of assessors being aware of the effect differences have on understanding amongst diverse communities of the core principles of the Act, and the importance of assessors being skilled in communicating the provisions of the Act and associated policies, in a culturally sensitive and appropriate way. Addressing these key issues is critical to ensuring the effectiveness of the Act amongst diverse communities.

The Department of Justice provides the Capacity Toolkit to government and community workers, professionals, families and carers in NSW. The Toolkit states that the assessor should never assume a person's lack of capacity because of the person's cultural or religious beliefs. It encourages use of interpreters when assessing people with limited English to ensure clear and appropriate communication.

The Toolkit serves as a suitable starting point for assessors. Multicultural NSW notes that the use of the Toolkit is currently voluntary. Multicultural NSW recommends that the Toolkit could be used as the foundation for an accountability framework with which assessors would be required to engage and report against in connection to all assessments. Reporting against the framework could be provided to the NSW Trustee and Guardian in connection to capacity related decisions and assessors required to keep records of completed accountability framework documentation. Such an approach would support a greater understanding amongst assessors of the key accountabilities inherent in making any assessment of capacity and support assessment approaches that provide for informed and reasonable decision making.

## **Recommendations**

Multicultural NSW proposes:

### **Recommendation 1.**

That the NSW Trustee and Guardian develop a targeted community communication strategy, addressing the complex cultural and interpersonal issues raised in this paper, to support the promotion of a clear understanding of the provisions of the Act amongst culturally, linguistically and religiously diverse communities.

In-language materials that provide this information are critical to this. Equally, it is very important that legal, medical and welfare professionals and community workers who frequently interact with people from such diverse backgrounds must have a sound understanding of the Act.

Any communication strategy should seek to utilise popular community media communication channels including ethnic radio, television and print to support a broader whole of community understanding of guardianship concepts and the Act itself.

### **Recommendation 2.**

Use of the Capacity Toolkit should be made obligatory and an accountability framework, grounded in the Toolkit, should be developed. All assessors should be required to complete a report against this framework and provide to the NSW Trustee and Guardian in connection to capacity assessments. The assessor should also be required to maintain records of all accountability framework reports against all assessments.

### **Recommendation 3.**

That the NSW Trustee and Guardian promote increased uptake of cultural competency training and skills enhancement amongst professionals involved in competency assessments. This should include government and community workers, health practitioners and legal practitioners. Training should include the development of operational skills, such as the procurement of and working with interpreters and softer skills, including reading and deciphering family or friend dynamics within diverse communities.

A number of cultural competence training packages are currently available. These aim to increase awareness of cultural differences, enhance inter-cultural competency skills and to support communication with clients from culturally diverse backgrounds. Multicultural NSW, in collaboration with SBS and International Education Services, has recently developed a Cultural Competence Program (CCP), which is an online resource accessed through a website or via an application to enable training in cultural competence, diversity and inclusion. Multicultural NSW is willing to provide more information on the resource.