

**AGED & COMMUNITY SERVICES NSW & ACT RESPONSE TO THE
NSW LAW REFORM COMMISSION REVIEW OF THE GUARDIANSHIP ACT 1987
QUESTION PAPERS 2 AND 3**

Aged & Community Services NSW & ACT (ACS) is the leading peak organisation representing not-for-profit, church and charitable providers of services in retirement living, community aged care and residential aged care in NSW and the ACT. ACS represents around 300 organisations, providing over 2,000 services to more than 100,000 people.

ACS supports the review of the Guardianship Act and consideration of more enabling approaches to decision-making for those who want, or would benefit, from assistance in this area and welcomes the opportunity to comment, expressing in this submission the views of our members, management and staff.

ACS is pleased to see that the question paper acknowledges that ‘cases involving people with dementia are most common’¹ in the Tribunal’s workload as there are differences in the experience and trajectory of dementia as opposed to other issues which impact a person’s capacity, and these differences need to be accommodated within any changes to the legislation.

ACS makes the following comments on selected questions in Question Paper 2:

Question 5.1: Formal supported decision-making

ACS supports the introduction of a formal supported decision-making model as a supplement to the informal supported decision making processes that already exist and believes that for those who are not able to have an informal support person to assist with decision-making that a formal process would permit them greater autonomy.

Both models would benefit from clear guidelines and ACS supports the four National Decision-Making Principles as proposed in the Australian Law Reform Commission (ALRC) 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*²

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence

There should be the option of both personal or tribunal appointments for supported decision-making. If there are concerns with the performance of personally appointed supporters, the Tribunal should have the authority to review, and if found necessary, amend or over turn those appointments.

¹ NSW Law Reform Commission 2016, *Review of Guardianship Act 1987, Question paper 2, Decision Making Models* pg 2.

² Australian Law Reform Commission (ALRC) 2014, *Equality, Capacity and Disability in Commonwealth Laws* Report 124 (2014) rec 3-1

Question 5.3: Retaining substitute decision-making as an option

ACS supports the retention of substitute decision-making as a last resort alternative in those instances where supported decision-making is impractical or has been found to be used contrary to the will and preferences of the person. There are limits to how well supported or co-decision making may work for people in the later stages of dementia.

ACS supports the requirement within Northern Ireland's Mental Capacity Act ³ that substitute decision-making only be lawful if "all practicable help and support to enable the person to make a decision about the matter have been given without success". Substitute decision making orders should be a last resort, very specific, defining as tightly as possible the area/s in which substitute decision making can occur, and should wherever possible, be time limited.

ACS would like to reiterate the need for safeguards in developing formal supported and/or co-decision making legislation. There is a risk that people with limited capacity may be subjected to undue influence or manipulation to agree to decisions being proposed, which would undermine the intent of the changes.

While the entire review and all the questions posed are important, to ACS members these two are the critical ones and feel others are better placed to comment on the operational details. For many in the cohort of people that our members support a diagnosis of dementia adds an additional layer of difficulty for them. Too often it is assumed that they lack capacity to make any decisions and this is most often not the case, certainly not in the early stages of dementia. Enshrining supported decision-making in legislation will help ensure these people the ability to make decisions for so long as they are able.

However, for some there comes a time when they are either not able, or not confident, to make some decisions or the process is confusing and distressing for them and substitute decision-making provides a means in which those who know the person well and what their wills and preferences would be to make decisions on their behalf.

Unfortunately, we do see from time to time this responsibility being subverted to the benefit of the person with Guardianship and so it is also important that the Tribunal be an option for appointing a guardian in these circumstances as well as in those circumstances where there is no-one close to the person to act in this role. No-one should be in a position where they are disadvantaged by a failure of required decisions being made.

Colleen Rivers
Manager Policy & Consultancy
Aged & Community Services NSW & ACT
02 8754 0400

³ *Mental Capacity Act (Northern Ireland) 2016 (UK) s 5, s 1(4)*