



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref:ELS:PWel1202249

20 February 2017

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 2: Decision-making models

The Law Society of New South Wales appreciates the opportunity to comment on Question Paper 2: Decision-making models. The Law Society's Elder Law, Capacity and Succession and Alternative Dispute Committees contributed to this submission and the Human Rights Committee supports it.

Question 5.1: Formal supported decision-making

(1) Should NSW have a formal supported decision-making model?

The Law Society supports supported decision-making. However, members have expressed concerns about the impact that a formal supported decision-making model may have on existing informal arrangements.

The Law Society agrees with the NSW Law Reform Commission's ("the Commission") observation that the right balance needs to be struck between informal and formal arrangements.¹ The Society notes that all of the overseas formal supported decision-making frameworks examined by the Commission appear to retain a mix of informal and formal arrangements and require certain conditions to be met before a formal decision-making arrangement is put in place. The Commission cites Alberta as an example in relation to co-decision making appointments, where a court needs to be satisfied that less intrusive and restrictive measures have been considered and are not likely to be effective.² Therefore, the Commission's suggestion that similar provisions be adopted to ensure that successful informal arrangements are allowed to continue in NSW is a sensible approach.³

The Law Society considers that the following issues need to be considered if a formal supported decision-making model is introduced:

¹ *Question Paper 2: Decision-making models* page 51 para [5.14].

² *Question Paper 2: Decision-making models* page 51 para [5.15].

³ *Question Paper 2: Decision-making models* page 51 para [5.15].

- (a) The nature and extent of the support to be provided by the supporter, including the limits of the role.
- (b) Criteria to be satisfied before a supporter can be appointed.
- (c) The training tools and information and support mechanisms required by supporters to ensure they are suitably qualified to support a person's decision-making.
- (d) The relevant capacity test to be satisfied in order to determine whether or not a supported decision-making model is appropriate.
- (e) The witnessing requirements and capacity test assessments to be undertaken by the legal and medical profession when considering whether a supported decision-making arrangement is appropriate.
- (f) A mechanism to review and remove a supporter from the role.
- (g) A mechanism to revoke a supported decision-making arrangement where it is no longer appropriate.
- (h) A mechanism or oversight to identify where a person who is being provided with support is no longer able to make decisions and requires the assistance of a substituted decision-maker.
- (i) Transitional provisions to facilitate the replacement of informal supported decision-making arrangements with formal decision-making arrangements.
- (j) Recognition of the validity and continuing operation of certain informal supported decision-making arrangements.

Consideration could also be given to the use of mediation to resolve disputes, where appropriate.

(2) If there were to be a formal supported decision-making model, how can we ensure there was an appropriate balance between formal and informal arrangements?

Please refer to the comments above.

(3) If there were not to be a formal supported decision-making model, are there any ways we could better recognise or promote informal supported decision-making arrangements in NSW law?

The Law Society considers that, if informal supported decision-making arrangements are to have an increased role or recognition in society, there will be a need for education of, and information for, the public, government agencies, businesses and service providers about how informal arrangements can assist people who need some assistance to form a decision or express a view. However, there are limitations to informal arrangements. Further consideration is needed about whether informal arrangements are appropriate or satisfactory for both the person who needs support or assistance and the government agencies, businesses and service providers.

Question 5.2: Key features of a formal supported decision-making model

(1) Should NSW have formal supporters?

As noted at 5.1(1) above, the Law Society supports supported decision making.

(2) If so, should NSW permit personal or tribunal appointments, or both?

The Law Society considers that the Guardianship Division of the NSW Civil and Administrative Tribunal would be best placed to consider the formal appointment of supporters.

Although personal appointments are appropriate for the roles of guardian and attorney, the Law Society has concerns about the personal appointment of supporters. If a person requires a supporter to help them make decisions, they are unlikely to be able to fully understand and appreciate all the potential consequences of the choice that they make in their selection of a supporter. The supported person needs to be able to understand that it is up to them to make the decisions, that their decision is final, and that the role of their supporter is to give them all the relevant information (both positive and negative) free from the supporter's own views. The supported person also needs to be able to express those decisions freely and to have them followed. The supporter needs to be able to understand and apply the same.

This is particularly important where the support person is a close friend or family member who, by virtue of their relationship with the supported person, may have interests that potentially differ from or conflict with those of the supported person. There is also a risk that the person chosen as the supporter may be encouraged or pressured to make substitute decisions by the supported person if they have previously been more involved or influential in decisions made by the supported person.

The Law Society considers it appropriate for the appointment process to include some scrutiny of these issues by the Tribunal, as a way of increasing the prospect of the model operating correctly. It is vital to the success of such a model that both the supported person and the supporter understand the nature and scope of their roles, including any limits, and are able to achieve its practical aims. Otherwise, there is a significant risk that this could become a less formal means of substituted decision making.

(3) Should NSW have formal co-decision-makers?

The Law Society does not support the introduction of formal co-decision-making model. We have not identified the benefits of introducing a co-decision-maker in addition to a supporter.

(4) If so, should NSW permit personal or tribunal appointments, or both?

Please refer to the response above.

(5) What arrangements should be made for the registration of appointments?

The Law Society notes that if formal supporters are appointed by the Guardianship Division of the NSW Civil and Administrative Tribunal, a registration process may not be necessary as the Tribunal's order would evidence the appointment.

Question 5.3: Retaining substitute decision-making as an option

(1) If a formal supported decision-making framework was adopted, should substitute decision-making still be available as an option?

The Law Society considers that the Guardianship Division of the NSW Civil and Administrative Tribunal should retain jurisdiction to appoint substitute decision-makers under the *Guardianship Act 1987* ("the Act").

(2) If so, in what situations should substitute decision-making be available?

The Law Society supports the retention of a substitute decision-making model for people whose will and preferences cannot be determined because of a serious cognitive or mental health impairment, and where giving effect to a person's will and preference exposes the person to an unacceptable risk of harm.

(3) Should the legislation specify what factors the court or tribunal should consider before appointing a substitute decision-maker and, if so, what should those factors be?

The Law Society considers that any legislation should be based on existing factors and considerations to be taken into account when appointing a guardian or financial manager under the Act.⁴

Question 5.4: Other issues

Are there any other issues about alternative decision-making models you would like to raise?

As noted at 5.1(3) above, if informal supported decision-making arrangements are to have an increased role or recognition in society, there will be a need for education of, and information for, the public, government agencies, businesses and service providers. In particular, education on the effect and operation of any new decision-making models will need to be provided to residential aged-care providers, Centrelink officers, Medicare officers, accountants, doctors, dentists, members of the legal profession, and disability service providers and advocates.

Question 6.1: When supporters and co-decision-makers can be appointed

(1) What requirements should be met before a person needing support can appoint a supporter or co-decision-maker?

The Law Society considers that the Guardianship Division of the NSW Civil and Administrative Tribunal would be best placed to appoint formal supporters. An informal arrangement is a matter for the individual person concerned and his/her informal support network to determine.

The involvement of the person needing support in the appointment process is central to the scheme, including their consent to any appointment, and their view should be given due consideration in the appointment process.

⁴ Sections 14, 17 and 25G.

(2) What requirements should be met before a court or tribunal can appoint a supporter or co-decision-maker?

The Law Society considers that the current requirements that need to be met in order for the Tribunal to appoint a financial manager or a guardian should apply to the appointment of formal supporters.⁵ The Tribunal's procedures should ensure the person who needs/wants support is able to express his/her views during the Tribunal hearing.

Question 6.2: Eligibility criteria for supporters and co-decision-makers

What, if any, eligibility criteria should potential supporters and co-decision-makers be required to meet?

The Law Society considers that eligibility criteria should not be overly prescriptive. The Tribunal should be able to examine all the relevant circumstances of a particular case when appointing a supporter.

The eligibility criteria listed in Question Paper 2 are appropriate, namely:

- the person must be above a certain age
- the person must consent to taking on the role
- the person must be able to act in the person's "best interests" or give effect to their "will and preference"
- the person must be suitable.⁶

Question 6.3: Characteristics that should exclude potential appointees

What, if any, characteristics should exclude particular people from being supporters or co-decision-makers?

The Law Society suggests that people who have been convicted of certain offences, including fraud and domestic violence, should be excluded from being supporters. Other relevant characteristics include circumstances where there is a clear conflict of interest or a person who is bankrupt. However, we query if bankruptcy should prohibit a person from supporting a person to make personal or health decisions.

Further consideration should be given to whether it would be appropriate to appoint a person who is currently subject to supported decision making themselves, and anyone who has been removed from the role previously.

The characteristics identified should not be exhaustive or prescriptive. Any legal framework should be flexible and responsive to the needs of a person who requires the assistance of a supporter. Ultimately, the Tribunal should be able to determine who is suitable depending on the circumstances of the case.

Question 6.4: Number of supporters and co-decision-makers

What limits, if any, should there be on the number of supporters or co-decision-makers that can be appointed?

The Tribunal should only appoint one formal supporter for each type of matter, i.e. one for financial matters and one for personal/health matters. However, the same person could be appointed to both roles, subject to any conflict of interest issues.

⁵ Sections 14, 17 and 25G.

⁶ *Question Paper 2: Decision-making models* page 60 para [6.5].

Question 6.5: Public agencies as supporters or co-decision-makers

(1) What are the advantages and disadvantages of allowing public agencies to be appointed as supporters or co-decision-makers?

Advantages include oversight and monitoring, uniformity of approach, in-house information sharing and guidance. Disadvantages include cost, training and adequate resources.

(2) In what circumstances should public agencies be able to act as supporters or co-decision-makers?

Public agencies should be able to act as supporters where a person has no family or other support. Without such a facility people without family or other support may be unable to access supported decision-making arrangements.

Question 6.6: Paid workers and organisations as supporters and co-decision-makers

(1) What are the advantages and disadvantages of allowing paid care workers to be appointed as either supporters or co-decision-makers?

The Law Society considers that conflicts of interest could arise should supporters be paid care workers.

(2) In what circumstances should paid care workers be appointed as supporters or co-decision-makers?

There may be a role for paid care workers in certain circumstances. For example, where a person does not have anyone else to act and has a particular rapport or trust with a paid carer, it might be detrimental to the supported person if the staff member were precluded from taking on this role. The Tribunal should have discretion to appoint a paid care worker if it was appropriate to do so in the circumstances of a particular case.

(3) What are the advantages and disadvantages of allowing professional organisations to be appointed as either supporters or co-decision-makers?

Advantages would include knowing the person in need of support and their life circumstances, and how to communicate with them.

(4) In what circumstances should professional organisations be appointed as supporters or decision-makers?

There may be a role for professional organisations in certain circumstances. The Tribunal should have discretion to appoint a professional organisation if it was appropriate to do so in the circumstances of a particular case.

Question 6.7: Volunteers as supporters and co-decision-makers

(1) What could be the advantages and disadvantages of appointing community volunteers as supporters?

(2) What could be the advantages and disadvantages of appointing community volunteers as co-decision-makers?

(3) In what circumstances do you think community volunteers should be appointed as supporters or co-decision-makers?

The Law Society does not support the appointment of community volunteers as supporters.

Question 6.8: Powers and functions of supporters

(1) What powers and functions should the law specify for formal supporters?

The Law Society considers that formal supporters should have powers and functions to engage with and guide a person to form a decision or express a view.

(2) What powers or functions should the law specifically exclude for formal supporters?

Formal supporters should be prohibited from acting without a person's knowledge and consent. Consideration should also be given to excluding certain categories of decision-making with significant or grave consequences, for example, entering into or ending a marriage or a sexual relationship, reproductive decisions, or disposals or dispositions of real property (including succession planning).

Question 6.9: Powers and functions of co-decision-makers

(1) What powers and functions should the law specify for formal co-decision-makers?

The Law Society does not support the role of a co-decision-maker.

(2) What powers and functions should the law specifically exclude for formal co-decision-makers?

Question 6.10: Duties and responsibilities of supporters and co-decision-makers

(1) What duties and responsibilities should the law specify for formal supporters?

The Law Society considers that formal supporters should generally have the same duties and responsibilities as guardians and attorneys. However, we note that supporters would not make decisions on behalf of the person they support.

If you have any queries about this submission, please do not hesitate to contact Chelly Milliken, Principal Policy Advisor, on (02) 9926 0218 or by email at chelly.milliken@lawsociety.com.au.

Yours sincerely,

A large black rectangular redaction box covering the signature of the President.

President