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NSW Law Reform Commission Submission: Review *Guardianship Act 1987 (NSW)*: Question Paper 4: Safeguards and procedures

The Mental Health Coordinating Council (MHCC) is the peak body representing mental health community managed organisations (CMOs) in NSW. In March 2016, we provided to this inquiry a preliminary submission; a second submission in August and a third in December. We thank the NSW Law Reform Commission (NSWLRC) for inviting us to comment on Question Papers 4; 5 & 6 made public in February 2017.

In this submission, MHCC only comment on some selected questions in all three Discussion Papers as there are other organisations and agencies better placed to respond to other topic areas.

3. Guardianship orders and financial management orders

Question 3.2: Time limits for orders

(1) *Are the time limits that apply to guardianship orders appropriate? If not, what should change?*

A temporary guardianship order is in force initially for 30 days and thereafter may only be reviewed once for up to 30 days. As mentioned in our preliminary submission, MHCC recommend further interim renewals, up to two of 30 days, and one further order for 6 months. We consider that this is preferable to invoking the use of continuing orders (either of one or three years). Some people may be detained in hospital for protracted periods of time, and may require a guardian to assist them make a diversity of decisions whilst in hospital. We would prefer shorter orders that take into account a person's potential for recovery and moving towards greater independence. However, our preference is that in a new environment following amendments to the Act, people can be provided with supported decision-making support that might obviate the need for substitute decision-making orders or renewals.

(2) *Should time limits apply to financial management orders? If so, what should these time limits be?*

MHCC agree with Epstein (2011)¹ that "a major shortcoming of the legislation" is the absence of a time limit for Financial Management Orders (FMOs). Whilst acknowledging the need for an interim order if a person is subject to an application, or when there is some difficulty in concluding as to a person's capacity, there may be an urgent situation to be considered and an onus on the person concerned to make their case.

¹ Epstein, T 2011, *Financial Management and the Rights of People with Disability: A Fine Balance*, University of New South Wales Law Journal 34: 835, 840.

MHCC highlight the distress that people living with mental health conditions experience when they feel unfairly limited to access to their funds, because of past behaviours when they were unwell. Consumers often report a deep sense of humiliation and stigma when both professionals and their families adopt a paternalistic attitude towards self-management of finances. There may be less consideration of their human rights in relation to day-to-day decision-making in contrast to others in the community.

We see no reason why an interim FMO should not be renewed when necessary and that a continuing order of 3 years should be reviewed unless it is patently clear that a person is permanently incapacitated (e.g. through extensive impairment as consequence of brain injury, or cognitive impairment due to dementia etc.).

Question 3.3: Limits to the scope of financial management orders

Should the Guardianship Act 1987 (NSW) require the NSW Civil and Administrative Tribunal to consider which parts of a person's estate should be managed?

We agree that the *Guardianship Act* should "mirror" the expression used in the *Trustee and Guardianship Act* that financial management orders can be made for "the whole or part of the estate of a person" (s.40).

Question 3.4: When orders can be reviewed

(1) What changes, if any, should be made to the process for reviewing guardianship orders?

- We are in favour of a regular review process that is consistent with principles of the UNCRPD;
- Regular reviews are more likely to pick up or address instances of abuse and exploitation;
- People with mental health conditions with FMOs often have poor access to supports that might assist them appeal, therefore regular reviews will help identify where people may be falling through service gaps;
- Regular reviews are consistent with a strengths-based approach that acknowledges the potential for people to manage their affairs better over time.

(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?

We propose that reviews are conducted every 3 years (following 9 months of short-term orders), unless a one year order is made for a particular reason, or unless permanent incapacity is established. In any event a person can seek the revocation of an FMO at any time, if their circumstances have changed.

Question 3.5: Reviewing a guardianship order

(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?

We propose that rather than specifying what the Tribunal **must** consider when reviewing an order, that the principles to guide its decision are utilised instead.

Question 3.6: Grounds for revoking a financial management order

(1) Should the Guardianship Act 1987 (NSW) expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

No. It is already possible under the legislation to revoke an order if a person has regained capacity to manage their finances.

(2) What other changes, if any, should be made to the grounds for revoking a financial management order?

A good reason for revoking an order is when a person's circumstances have changed. For example, when somebody close to the person concerned (who understands their will and preference concerning financial matters) is now available to support them to make decision that would otherwise be made by a financial manager, e.g., a family member/ carer has returned from overseas to live close to the person and support them, or the child of the person is now of an age to do likewise.

4. A registration system

Question 4.1: Benefits and disadvantages of a registration system

(1) What are the potential benefits and disadvantages of a registration system? Do the benefits outweigh the disadvantages?

Whilst we see the benefits of a registration system as identified in the discussion paper (4.6: 4.7) we do not see it as an effective safeguard against abuse and exploitation, and agree with points made in 4.9. (p.25). However, we agree that overall the benefits outweigh the disadvantages.

(2) Should NSW introduce a registration system?

MHCC propose that the system should be national.

(3) Should NSW support a national registration system?

Yes, we agree that a national registration system should be established but not mandatory.

Question 4.2: The features of a registration system

If NSW was to implement a registration system, what should be the key features of this system?

If NSW is to establish a registration system, it should not be mandatory. The registration authority should make clear that registration whilst established to provide useful information to those concerned as well as third parties, may give rise to potential privacy and other issues that may not protect the person in question.

5. Holding guardians and financial managers to account

Question 5.1: A statement of duties and responsibilities

(1) Should the *Guardianship Act 1987 (NSW)* and/or the *NSW Trustee and Guardian Act 2009 (NSW)* include a statement of the duties and responsibilities of guardians and financial managers?

Yes

(2) If so:

(a) what duties and responsibilities should be listed in this statement?

We recommend that the duties and responsibilities of guardians and financial managers are to:

- not exceed the powers granted under the appointment or under the statute
- act honestly, diligently and in good faith
- identify and respond to situations where the substitute decision-maker's interests conflict with those of the represented person
- ensure that as far as possible the represented person has been asked what their will and preference is (and supported to express their wishes where disability may compromise their capacity to do this); and to check whether there are family or carers or health professionals who may be able to provide additional important information
- request a review of the order if they believe a person has legal capacity
- ensure that the represented person's interests are always the paramount consideration, and seek external advice where necessary
- communicate with the represented person throughout the decision-making process and explain, as far as possible, decisions being made on their behalf
- treat the person and important people in their life with dignity and respect
- keep appropriate records; keep their property separate from that of the person they represent, and to exercise care, skill and diligence when making investments.

(b) should guardians and financial managers be required to sign an undertaking to comply with these duties and responsibilities?

Yes

(c) what should happen if guardians and financial managers fail to observe these duties and responsibilities?

A guardian or financial manager that fails to observe their duties currently would come before NCAT (GD). If the appointee fails to comply with the signed statement of duties and responsibilities, NCAT should consider the circumstances and assess whether the appointed person has complied with the statement and decide whether they should remain in the role or be reappointed in the future. Where a court is involved, they could also take on a role as independent representative.

Question 5.8: Reviewing decisions and conduct of public bodies

What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

People under guardianship or those connected to them may have considerable difficulty in advocating for themselves against public bodies. The Ombudsman, in addition to its role assessing and resolving a complaint, should have the resources to assist a person/s advocate their case. We recommend that such support persons be available to those requesting assistance.

If the NSW Trustee NSW Trustee and Guardian and the Public Guardian does not respond to the Ombudsman's recommendations, the represented person or those supporting them should, in the first instance be able to request an alternative representative be appointed.

Any adverse outcomes from a decision taken by the appointed guardian should continue to be reviewed by the Public Guardian, as well as NCAT who we understand can review decisions in this context. Should the Public Guardian morph into a Public Advocate (which is discussed elsewhere in this submission - Questions 7 p. 7) we would see that as a responsibility that would transfer to their authority. These bodies can refer these matters under the *Crimes Act 1990* (NSW) in the case of fraud, corruption, abuse or neglect.

Question 5.9: Criminal offences

Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

No, but because of the vulnerability of the represented person, and the role of trust incumbent on guardians and financial managers, it is necessary to introduce new civil penalties for the abuse, neglect or exploitation of people with impaired decision-making ability, as recommended by the VLRC(rec 305–314). These penalties should apply to all people responsible for caring for a person with impaired decision-making capacity, including substitute decision-makers and supporters. Whilst not involving the criminal justice system, this would involve civil procedures and fines.

As suggested by the VLRC (On the nature of civil penalties, see Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [18.86]–[18.92]) "it has the advantage of requiring a lower standard of proof and enabling the penalties to be educative in that they we be highlighting that it is unacceptable to mistreat vulnerable people."

6. Safeguards for supported decision-making

Question 6.1: Safeguards for a supported decision-making model

If NSW introduces a formal supported decision-making model, what safeguards should this model include?

As proposed in an [earlier submission](#), MHCC support a model of Supported Decision-Making (SDM) guided by a set of principles defined by the ALRC: National Decision-Making Principles.² They are also nicely articulated by the A.C.T. Disability, Aged and Carer Advocacy Service (ADACAS), which has developed SDM Principles to form a framework for providing decision-making support. We propose that embedding principles in the legislation is one way to protect the interests of both the supporter and the decision-maker.³ MHCC recommend that in the first instance these principles be laid out in General Principles of the Act. This would also ensure that the NSW legislation aligns with the UNCRPD.

Whilst our legislation allows for limited guardianship that is decision specific, in practice, guardianship arrangements are often difficult to modify or terminate once in place, even though an individual's skills and decision-making abilities may continue to develop.

When the CRPD was being negotiated, the Office of the UN High Commissioner for Human Rights prepared a "Background Report" reviewing the concept of legal capacity, and arrived at a definition that is inclusive of those who may not act entirely independently in their decision-making.⁴ The definition makes clear that legal capacity is about having the recognised "power" to enter transactions, contracts and legally-regulated relationships with others. For governments to "fulfil their obligations under Article 12 requires what many have referred to as a "paradigm shift" in the usual approaches to protecting and promoting the right to legal capacity".⁵

Common law assumes capacity as a legal right. Under the UNCRPD adults can no longer be required to demonstrate that they meet certain tests of mental capacity in order to have their rights to legal capacity equally respected and protected. The UNCRPD recognises this right and the supports needed to "exercise it as an obligation, under international law, of governments to create and honour what is called 'supported decision-making' ".⁶ In acknowledging that people can exercise their legal capacity in different ways, and with a range of supports, Article 12 provides the ground on which people with disabilities can retain and rebuild their self-determination.

The principles set out in the [National Disability Strategy 2010-2020](#) outline the need for people with disability to be involved in the design and delivery of programs and services that impact on them. Specifically, *Outcome2: rights protection, justice and legislation*, identifies a need to ensure supported decision-making safeguards are in place for people living with disability who need them, including accountability of legally appointed guardians.

Given a shift from substitute and best interest decision-making to supported decision-making, and the need to use options less restrictive and more supportive of self-determination than the traditional guardianship system, the possibility of exploitation and/or abuse remains, and appropriate protective mechanisms are needed. The key is to design mechanisms that avoid overprotection and recognise individual preferences, choices and "the dignity of risk," while setting "appropriate safeguards against coercion and malfeasance."⁷

² ALRC National Decision-Making Principles. Available: <https://www.alrc.gov.au/publications/national-decision-making-principles> [Accessed: 04.04.2017].

³ ADACAS Advocacy, Supported Decision Making: ADACAS Principles for Decision Supporters. Available at: <http://www.adacas.org.au/decision-support/AdacasprinciplesforSDM.pdf> [Accessed 27.10 2015]

⁴ Office of the United Nations High Commissioner for Human Rights, Legal Capacity, Background Conference paper 2005, [Accessed: 01.04.2017].

⁵ Ibid

⁶ Ibid.

⁷ Bach M & Kerzner L 2010, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* 15, 37 (Oct. 2010), Available: <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf> cited in: Beyond Guardianship: Supported decision-making by individuals with intellectual disabilities: Briefing paper for roundtable discussion, Author unknown, 2012.

The UNCRPD clearly recognises the need to “prevent abuse, neglect and exploitation; and take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home.” Article 16 names three types of such measures. Firstly, it recognises that support should include “the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse.” Secondly, it states that, to prevent exploitation, violence and abuse, “all facilities and programmes designed to serve persons with disabilities [must be] effectively monitored.” Thirdly, it addresses the need for services for victim recovery, rehabilitation and social reintegration.⁸

MHCC propose consideration of the following possible safeguards in establishing a supported decision-making ‘approach’ (rather than a model per se):

- Statement of Duties and Responsibilities for SDM support facilitators – based on values and principles:
- Principles as identified ([ALRC National Decision-Making Principles](#). And ADACAS Advocacy, [Supported Decision Making: ADACAS Principles for Decision Supporters](#))
- Values:
 - Empowerment for self-advocacy and self-determination towards greater independence
 - Acknowledge lived experience
 - Human-rights based
 - Respect
 - Person focused (strengths-based, not deficit-based)
 - Flexibility

Support facilitators will demonstrate:

- Transparency
 - Self-awareness
 - Promotion of choice and control
 - Understand dignity of risk
 - Collaborative and relation-based support
 - Reflective and ongoing skill development⁹
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- Include in statement the need to respect inherent dignity, individual autonomy, including the freedom to make one’s own choices, (in other words embrace the concept of ‘dignity of risk’).
 - Government support for training and accreditation of SDM (for the mental health/disability workforce) so that they can acquire the skills to support a person become more skilled and independent through decision-making supports. (Canadian Association for Community Living, in Statutory Framework).¹⁰
 - Implementation of accreditation, standards and screening for those serving in support roles.
 - Define standards that apply to different support roles.
 - Consider a role for Public Guardian or Public Advocate as the authority setting standards, guidelines and accreditation of support facilitators and undertaking review of complaints and consideration of ethical practice.

⁸ UNCRPD Article 16: Freedom from exploitation, violence and abuse <https://wfdeaf.org/human-rights/crpd/article-16-freedom-from-exploitation-violence-and-abuse/> [Accessed: 30.03.2017].

⁹ MHCC 2017, Supported Decision Making: Choice, Control and Recovery, Learning & Development Module.

¹⁰ Canadian Association for Community Living, in Statutory Framework), Available: <http://www.cacl.ca/publications-resources/statutory-framework-right-legal-capacity-and-supported-decision-making> [Accessed: 4.04.2017].

- Impose penalties for failure of duties.
- Reviews of outcomes for clients when reassessing decision-making arrangements. Revoke arrangements where necessary, and regularly review arrangements as discussed earlier
- Supervision of SDM providers. Registration of SDM facilitator supervisors to be considered. (Many professionals are required to have regular supervision, provided by someone more experienced, or a peer. This could be a requirement for ongoing accreditation).
- Provision of records concerning SDM process/ outcomes brought to supervision and available for scrutiny at any time.
- SDM providers to be remunerated so that they can access supervision and self-reflective practices.
- Reporting to PG or Public Advocate if the SDM supporter observes changed circumstances (either where consent is no longer clear, where support is no longer required, where capacity has become impaired and a more formal arrangement is necessary).
- Public Advocate to consider concerns about where SDM approach is contrary to the personal and social wellbeing of the supported person.
- Consider whether a model of limited guardianship could be developed that provides people requiring SDM with a step-up and step-down process as required.

7. Advocacy and investigative functions

Question 7.1: Assisting people without guardianship orders

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

We support the idea that NSW should introduce new advocacy and investigative powers vested in an independent office holder (e.g., an Office of the Public Advocate). We recommend that their role include the list identified on p.46:

- supporting people with disability to resolve problems
- seeking assistance from government departments, institutions, welfare organisations and service providers on behalf of people with disability
- making representations on behalf of or acting for people with disability
- advising and supporting people prior to an application for guardianship or administration and representing people with disability coming before a guardianship tribunal or board
- advising people about guardianship legislation in general, and supporting people not under guardianship
- assist people to access supported decision-making or other forms of decision-making support
- advise government regarding systemic and legislative change
- promote protection, investigate and monitor service delivery of support facilitators
- provide education and supervision to the workforce undertaking these roles.

Establishing such a body would provide a step-up/ step-down alternative to substitute decision-making. Public advocates could assess the needs and goals of a person to be represented and make recommendations to support a person develop capacity and skills in decision-making and investigate complaints and difficulties.

MHCC's preference is for the consideration of a model whereby the Public Advocate (PA) would incorporate the role currently performed by the Public Guardian. The new PA could provide for a range of support persons across the continuum from supported decision-making to substitute decision-making considering matters medical, dental, and day-to-day living as well as financial. A supported person might have several representatives, but only one order.

The work of such a body would likely result in a reduction of substitute decision-making orders, make broader use of the PG's ability to undertake advocacy (both individual and systemic) and facilitate access to data and information exchange. The major departure from the PG's current role is the enhanced and independent investigative role that we are keen to see established, as well as an increased role in court and tribunal processes; and overseeing performance of support facilitators. These changes would be expected to increase the scope for promoting best practice, improved resource sharing and thus better informed practitioners; and lead to improved relationships between the supported person and the services that they engage with.

Question 7.2: Potential new systemic advocacy functions

What, if any, forms of systemic advocacy should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to undertake?

As suggested in our answer to question 7.2, the Public Advocate could incorporate an independent division tasked to deal with matters of advocacy. Its role would be to represent the interests of a person who might need a guardian or a SDM facilitator. They would also be better placed to investigate complaints or allegations of corruption or abuse from the person, their carer or the guardian/administrator. This would not in any way duplicate functions of the Guardianship Division. We understand that the NSW Ombudsman does not see such a role as conflicting with theirs.

Question 7.3: Investigating the need for a guardian

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

The system for appointing a guardian is in itself an investigation into need for one. However, if as the question suggests there could be a stage prior to this occurring, where the person would benefit from investigation as to whether, with a support facilitator they could make decisions and improve their skills without the need to go directly to formal guardianship, then this is desirable. We propose that a Public Advocate could undertake this role; assessing need along the spectrum.

Question 7.4: Investigating suspected abuse, exploitation or neglect

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

MHCC agree with the NSW Legislative Council Committee that this role would be best placed in the hands of a Public Advocate. We also agree that this role should apply to all adults with care and support needs. Their evidence could be utilised in legal actions; revoking of support role status and penalties as well as advocating for alternative support persons, guardians or administrators.

Question 7.5: Investigations upon complaint or "own motion"

If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?

MHCC support the concept of 'own motion' investigations. This is in addition to responding to complaints or allegations or direction by another party. We agree with the Standing Committee's recommendation that there may be a need where no complaint has been made, but where people live in institutions or facilities and may require guardianship or a support facilitator, and require some form of safeguard mechanism put in place.

Question 7.6: Powers to compel information during investigations

What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

We agree that a Public Guardian or a Public Advocate should have the right to compel people to provide information for the purposes of investigating a complaint or allegation. Failure to comply should be an offence.

Question 7.7: Powers of search and entry

What powers of search and entry, if any, should the Public Guardian or a public advocate have when conducting an investigation?

The Public Advocate should have the powers to search and enter in relation to investigation, whether in a residential facility, institution, or disability service, provided they have a warrant. We disagree that this should only be a power bestowed on police agencies.

Question 7.8: A new Public Advocate office

Should NSW establish a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

If the Public Advocate were to be established and have the two-fold functions of advocacy, support and representation as well as investigative responsibilities, these should be established as entirely different divisions. This is so as not to give rise to conflicts of interest, should a complaint be made against an advocate or SDM facilitator also provided by the Public Advocate.

Our preference is that the Public Advocate absorbs the existing role of the Public Guardian as substitute decision-maker as well as providing the oversight of decision-making supporters or representatives across the spectrum of need. We see the Public Advocate also having a role as systemic advocate as well as providing direct support for people at hearings for guardianship, financial or legal matters. We see the investigative role of the Public Advocate as an entirely separate role/division. Therefore, ideally the Public Advocate would perform three functions: providing and overseeing guardians and support facilitators; and offering advocacy and investigative services both individual and systemic in nature.

Question 7.9: Other issues

Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new public advocate?

We understand that the establishment of such an office and the staff required would require considerable additional expenditure. However, we propose that this is a vital addition to the current system particularly in view of the evolving NDIS and mental health reforms occurring in NSW. Alongside reforms that promote the concept of choice and control, and the move towards keeping people well and out of hospital and living well in the community, people with psychosocial disability will hopefully have less contact with public hospitals and require an increased range of different supports and advocacy options.

In this context, there is a growing need for increased monitoring and safeguards of community-based services and programs as well as insuring that people can be empowered to access and use a range of services and support mechanisms that will provide them with greater independence as well as improved decision-making skills.

8. Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal

Question 8.5: When a person can be represented

When should a person be allowed to be represented by a lawyer or a non-lawyer?

A person coming before the Guardianship Division should be entitled to legal representation, where necessary and desirable. Alternatively they could be represented by the Public Advocate if such a body were established. People should always be entitled to have someone speak on their behalf, whether that person is from their natural support network or is an accredited support facilitator. However, they should not have to seek leave to do so if someone is a professional advocate or support facilitator. As it stands Public Guardians rarely participate in hearings and we would ideally like to see them or the Public Advocate (if established) take part as the norm where this might assist the process.

Question 8.6: Separate representatives

How should separate representation be funded?

NSW Legal Aid should be provided with additional funds to cover their role where necessary and desirable. When a person can afford to pay costs these should be paid from the person's estate. If the person is represented by the Public Advocate, fees should be likewise considered as appropriate.

Question 8.7: Representation of a client with impaired capacity

Should the *Guardianship Act 1987 (NSW)* or the *Civil and Administrative Tribunal Act 2013 (NSW)* allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

A representative other than a lawyer could be appointed for someone who is the subject of a Guardianship Division case if there are serious doubts about the person's capacity to instruct a lawyer.

A lawyer or other professional representative should be available if any other reasons identified in 8.4 (p.62) exist:

- there is intense conflict between the parties about the person's best interests
- the person is vulnerable to pressure or intimidation by other people involved
- there are serious allegations of abuse, exploitation or neglect
- other parties have been granted leave to be represented, or
- the case involves particularly serious issues likely to have a profound impact on the person's interests and welfare.

Submission: Review *Guardianship Act 1987 (NSW)*: Question Paper 5: Medical and dental treatment and restrictive practices

4. Consent to medical and dental treatment

Question 4.13: Legislative recognition of advance care directives

(1) Should legislation explicitly recognise advance care directives?

Despite the complex relationship between the *Guardianship Act 1987* and the *Mental Health Act 2007* we believe that Advance Care Directives (ACD) should be recognised in this piece of legislation. As it stands the legislation could be redrafted to make the relationship between ACDs and the powers of substitute decision-makers clearer. We submit that the case law gives clear guidance concerning ADCs, and that entrenching recognition in the Act would provide for the objective of promoting a best practice approach rather than assist in dealing with individual circumstances.

(2) If so, is the *Guardianship Act 1987 (NSW)* the appropriate place to recognise advance care directives?

In principle we agree that ADCs be recognised in legislation, but we are unsure as to whether the *Guardianship Act 1987 (NSW)* is the most appropriate instrument. We are unsure as to where else it might be suitably recognised, although we understand that in SA there is a specific *Advance Care Directives Act 2013*. Whilst a substitute decision maker should take on board a person's expressed will and preference, a separate Act might provide greater clarity across a number of potential circumstances. In this context, we support the findings of the Supreme Court (2009) in circumstances where a person is not under Guardianship, "If the adult makes an advance care directive at a time when they have capacity, and it is clear and unambiguous, and extends to the situation at hand, the ADC must be respected."

Question 4.17: When an advance care directive should be invalid

In what circumstances should an advance care directive be invalid?

- the person did not have the capacity to make the directive, did not make it voluntarily or made it because of inducement or coercion
- at the time the directive was made, the person did not understand the nature of the decision or the consequences of making the decision
- following the directive would mean that a person could avoid mandatory treatment, including mental health treatment
- circumstances have arisen which the person could not have reasonably anticipated when making the directive, and which would have caused a reasonable person in their position to change their mind about the treatment decision
- the directive does not reflect the person's current wishes
- the health care proposed is not consistent with relevant professional standards, or does not reflect current standards of health care
- there are conscientious grounds for a practitioner to refuse to comply with the directive
- relying on the directive would cause the person unacceptable pain and suffering, or would otherwise be so "wholly unreasonable" as to justify overriding the person's wishes.

6. The relationship between the *Guardianship Act* and mental health legislation

Question 6.1: Relationship between the *Guardianship Act* and the *Mental Health Act*

(1) Is there a clear relationship between the *Guardianship Act 1987 (NSW)* and the *Mental Health Act 2007 (NSW)*?

The overlap between the two Acts is clear in that orders or decisions made under the *Mental Health Act 2007 (NSW)* take precedence over guardianship orders and enduring guardian instruments. However we propose that section 34(2) C could be redrafted to provide greater clarity.

(Note: As it stands s 34 reads "Mental health inquiries to be held

(2) An authorised medical officer of the mental health facility in which an assessable person is detained:

(c) as soon as practicable after notifying the Tribunal under section 27 (d), and at or before the inquiry, must provide the Tribunal with all relevant medical reports of the examinations in step 1 or step 2, as referred to in section 27 (d), and any additional information required by the Tribunal for the purposes of the inquiry.")

This is unnecessarily convoluted. We defer to the MHRT we understand are recommending an appropriate redraft.

Question 6.3: Whether mental health laws should always prevail

(1) Is it appropriate that mental health laws prevail over guardianship laws in every situation?

Yes, if the matter concerns any aspect of a person's psychiatric treatment and care. For example, we agree with the MHRT that it is not the role of the Guardian to make decisions about a patient's discharge. Whilst it should be the MHRT's role to make all psychiatric treatment decisions when a person is detained in a mental health facility, the Guardian should still be able to make medical decisions that are unrelated to the mental health treatment a person is receiving whilst in a mental health facility.

We understand that there is some confusion with regards to the role of Guardians in respect of voluntary patients when they wish to discharge themselves. MHCC agree that the *Guardianship Act* be amended to describe the limits powers in relation to voluntary patients, prohibiting them from overriding their right to be discharged, or re-admitting them when they have just discharged themselves (*Sarah White v the LHA* [2015] NSWSC 417).

7. Restrictive practices

Question 7.1: Problems with the regulation of restrictive practices

What are the problems with the regulation of restrictive practices in NSW and what problems are likely to arise in future regulation?

Both guardianship and mental health law should explicitly address the use of restrictive practices in relation to people to whom the law applies. There is general agreement of the need to change current practices and implement strategies to reduce and eliminate seclusion and restraint. The drivers for change include human rights, the principles of trauma-informed recovery-oriented practice approach and a person-centred approach to care.

In the first instant the use of restrictive practices may breach Article 15 of the UNCRPD. The National Mental Health Commission supported a number of options for reform to reduce and eliminate seclusion and restraint in mental health and related services in Australia, which we propose for consideration.

Recommendation 1: Uniformity in Regulatory Frameworks across Australia

To ensure uniformity in definitions of seclusion and restraint and the regulation of these practices, model legislation and guidelines should be drafted which could:

- Define seclusion and all forms of restraint, as well as emergency sedation or rapid tranquilisation used to manage behaviour and/or facilitate transport to health services
- Provide clear limits to the use of these practices
- Clarify that seclusion and restraint must be a last resort and in what exceptional circumstances that may be applied as a matter of last resort
- Require that seclusion and restraint must end as soon as the intervention is no longer needed
- Require continuous or regular intermittent monitoring to assess whether the seclusion or restraint should be continued
- Impose specific time limits and timeframes for assessment
- Require recording and reporting
- Provide penalties for breaching legislation and mechanisms to enforce them
- Clarify liability issues
- Establish effective complaints and review procedures

MHCC add to this that following such events that strenuous efforts should be made to debrief and support a consumer, and make every attempt to minimise the trauma or re-traumatisation that these events may give rise to. We propose that the relevant Acts should reflect trauma-informed best practice objectives promoting strategies that will eradicate the need for these practices in the future.¹¹

Regulation through legislation has the advantage of:

- Making the use of seclusion and restraint a matter of last resort
- Setting clear and consistent standards
- Clarifying the circumstances in which a breach occurs
- Giving policies a legislative structure
- Making the regulatory framework easier to locate

¹¹ National Mental Health Commission 2015, *Our Position Paper: A Case for Change on seclusion, restraint and restrictive practices in mental health*. Available: <http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project/our-position-paper-a-case-for-change.aspx> [Accessed: 5.05.2017].

A combination of laws, policies and accreditation may ultimately constitute 'best practice'. The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector*¹² contains a number of high-level principles and core strategies for implementation across the disability services sector. This is a model which could be adapted and applied to the mental health and guardianship legislation.

Question 7.2: Restrictive practices regulation in NSW

(1) Should NSW pass legislation that explicitly deals with the use of restrictive practices?

Yes

(2) If so, should that legislation sit within the Guardianship Act or somewhere else?

It should sit uniformly across several pieces of legislation in NSW including the: *Guardianship Act*, *Mental Health Act*; the *Forensic Provisions Act*; *NSW Disability Act*, and Commonwealth legislation such as the *Disability Discrimination Act 1992* etc.

(3) What other forms of regulation or control could be used to deal with the use of restrictive practices?

The [National Standards for Disability Services](#) (National Standards) helps to promote and drive a nationally consistent approach to improving the quality of services. The standards focus on rights and outcomes for people with disability. A standard about restrictive practices should be included.

[The National Standards for Mental Health Services 2010, Standard 2 Safety](#) refers to "the MHS reduces and where possible eliminates the use of restraint and seclusion within all MHS settings." This standard could be further expanded and enhanced.

Question 7.3: Who should be regulated?

Who should any NSW regulation of the use of restrictive practices apply to?

All services working with vulnerable people should be regulated and come under greater scrutiny than currently occurs. Public services as well as non-government services based in the community and services operating in multiple contexts should have to adhere to and be audited against the National Standards. This must include aged care services and privately run businesses and individuals providing services in the home, whether under the NDIS or other local authority programs and services. As it stands the standards for mental health services relates to "a revised set of mental health service standards which can be applied to all mental health services, including government, non-government and private sectors across Australia." However, in the emerging NDIS environment, regulation is of increasing importance to those accessing a diversity of services from an increasingly wide range of suppliers.

Question 7.4: Defining restrictive practices

How should restrictive practices be defined?

The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector provides a good definition of restrictive practices. This is presented in the NDIS Quality and Safeguarding Framework and the definition should be consistently evident across state and Commonwealth legislation.

Question 7.5: When restrictive practices should be permitted

In what circumstances, if any, should restrictive practices be permitted?

¹² Department of Social Services 2013, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, Available: https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf [Accessed: 20.04.2017].

We should all be working towards eliminating restrictive practices. It has been shown that in mental health acute care environments that seclusion and restraint critical incidents can be substantially reduced by supporting and training staff to practice strategies utilising a trauma-informed approach. Staff armed with the skills and strategies to use alternative methods to de-escalate crisis situations have nevertheless recognised that there may be specific circumstances where involuntary seclusion and restraint are required for the safety of the individual and other people. However, Involuntary seclusion and restraint should only ever be used a last resort emergency safety measure and in those instances carried out in a respectful way, with checks and balances, by appropriately trained staff.¹³

Question 7.8: Requirements about the use of behaviour support plans

(1) Should the law include specific requirements about the use of behaviour support plans?

Best practice evidence suggests that high quality support plans result in “less restrictive interventions”. However, the legislation does not include specific requirements for this. To encourage their use and improve quality and consistency should be embedded in national standards and guidelines and part of organisations policy and practice improvements.

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2. Objectives, principles and language

Question 2.1: Statutory objects

What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

The Act is to be exercised or performed so that:

- the means by which the Act is enforced is the least restrictive as is possible of a person's freedom to make a decision and take action in the circumstances; and assist them participate in decision-making
- the best interests of a person with a disability are promoted; and where possible their “will and preference” is taken into account and given effect
- to protect the rights of persons under guardianship
- to provide oversight and safeguards in relation to people under guardianship.

Question 2.2: General principles

(1) What should be included in a list of general principles to guide those who do anything under guardianship law?

The following principles apply for the purposes of this Act.

- An Act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests, whilst taking into consideration their will and preference as can be best ascertained;

¹³ National Mental Health Consumer & Carer Forum (NMH CCF) Working Group 2009, Seclusion & Restraint. Ending Seclusion and Restraint in Australian Mental Health Services. Available: https://nmhccf.org.au/sites/default/files/docs/seclusion_restraint.pdf

- consideration must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he had capacity to make decisions autonomously but only so far as there is reasonably ascertainable evidence on which to base such an opinion;
- the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes;
- consideration must, in the case of the making or affirming of a guardianship order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her affairs and to the desirability of not disturbing those arrangements;
- the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.
- In making decisions on behalf of the person the need to recognise a person's right to privacy should be considered
- In making a decision it is an important consideration to include the concept of choice, and building capacity to make decisions with the aid of decision-making support arrangements.

(2) Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situations and what principles should be included?

No, overarching one set of overarching Statutory Objects and General Principles is sufficient.

Question 2.5: Language of disability

(1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?

No, it is rather paternalistic.

(2) What conceptual language should replace it?

We agree with the discussion, and reiterate our comment in our preliminary submission that the current language use primarily demonstrates a deficit-based perspective. We would be encouraging a strengths-based perspective that fosters empowerment, choice and control and supporting people to live a fulfilling life in their community of choice.

Question 2.6: Language of guardianship

What terms should be used to describe participants in substitute and supported decision-making schemes?

Our preference is for the use of the term "representative" as opposed to guardian. We also prefer the term "represented person" for the person under guardianship. We feel that these terms reflect the functions and the potential revised aims of the Act.

In the context of supported decision-making, we see the appropriate terms as "support facilitator" and "supported person".

7. Orders for guardianship and financial management

Question 7.1: A single order for guardianship and financial management

(1) Should there continue to be separate orders for guardianship and financial management?

A single order is appropriate, with the particular decisions being laid out to be conducted by one or more individuals. If an order only requires personal matters to be oversights, then so be it.

It is desirable for a new name to be given to the order that is less stigmatising. Perhaps an Administration Agreement or Administration Order; Community Living Order or Community Living Support Order.

(2) What arrangements would be required if a single order were to cover both personal and financial decisions?

Whilst we agree that decision-making skills for financial orders and personal matters may require different skills, there is no reason why one order should not involve two appointees. Where financial management is straightforward an appointee could most likely undertake both roles.

10. Handling personal information

Question 10.1: Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

A representative or support facilitator should be entitled to access, collect or obtain personal information (except financial information) that is relevant to their authority and the carrying out of their duties and responsibilities

A support facilitator should only be able to access, collect or obtain (or help someone to access, collect or obtain) personal information (except financial information) that is relevant to the decision if the supported decision-making authorisation entitles them to do so.

A representative with responsibility for financial matters must be entitled to access, collect or obtain financial information relevant to their authority and the carrying out of their duties and responsibilities.

Question 10.2: Disclosure of personal information

(1) In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?

We agree with the current prohibition stated in 10.10 that in NSW, a person is prohibited from disclosing any information obtained in connection with the administration or execution of the *Guardianship Act*. Exceptions to this prohibition include where the disclosure was: in connection with the administration or execution of the *Guardianship Act* or the *Civil and Administrative Tribunal Act 2013* (NSW) or the conduct of legal proceedings under these Acts, or with any "lawful excuse" including the consent of the person from whom the information was obtained.

(2) In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?

We agree with the recommendation that a substitute decision-maker "should only collect personal information that is relevant to and necessary for carrying out their role under the Act" and that it be an offence for substitute decision-makers to breach confidentiality.

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MHCC thank the NSW Law Reform Commission for providing us with this opportunity to comment on these three last Discussion Papers that review the *Guardianship Act 1987* (NSW). We express our willingness to be further consulted on any matters related to this review and this submission. We look forward with great interest to reading about the reforms recommended to Government in the near future. We congratulate the NSW LRC on having conducted a robust and consultative process which we have greatly valued being a part of.

For any further information regarding this submission please [REDACTED]

Yours sincerely,

[REDACTED]

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References

ADACAS Advocacy, Supported Decision Making: ADACAS Principles for Decision Supporters. [PDF] Available: <http://www.adacas.org.au/decision-support/AdacasprinciplesforSDM.pdf> [Accessed 27.10.2015].

ALRC National Decision-Making Principles. Available: <https://www.alrc.gov.au/publications/national-decision-making-principles> [Accessed: 04.04.2017].

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

Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(6) (b), s 8(10).

Bach M & Kerzner L 2010, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* 15, 37 (Oct. 2010), Available: <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf> cited in: Beyond Guardianship: Supported decision-making by individuals with intellectual disabilities: Briefing paper for roundtable discussion, Author unknown, 2012.

Canadian Association for Community Living, in Statutory Framework). Available: <http://www.cacl.ca/publications-resources/statutory-framework-right-legal-capacity-and-supported-decision-making> [Accessed: 4.04.2017].

Department of Social Services 2013, National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector, Available: https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf [Accessed: 20.04.17].

Epstein T 2011, *Financial Management and the Rights of People with Disability: A Fine Balance*, University of New South Wales Law Journal 34: 835, 840.

Littlejohn S & Foss K 2008, *Theories of Human Communication* (9th Ed.) Belmont, CA: Thomson Wadsworth.

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Martin W et al., 2016, *The Essex Autonomy Project: Three Jurisdictions Report: Towards Compliance with CRPD Art 12*, in 'Capacity/Incapacity Legislation across the UK, Position Paper', (2016) 13.

Malkmus DD 1989, *Community re-entry: Cognitive-communication intervention within a social skill context*, *Topics in Language Disorders*, 9, 50-66.

Mental Health Coordinating Council 2017, *Supported Decision Making: Choice, Control and Recovery, Learning & Development Training Module*.

National Mental Health Commission 2015, *Our Position Paper: A Case For Change on seclusion, restraint and restrictive practices in mental health*. Available: <http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project/our-position-paper-a-case-for-change.aspx> [Accessed: 5/05/2017].

National Mental Health Consumer & Carer Forum (NMH CCF) Working Group 2009, *Seclusion & Restraint. Ending Seclusion and Restraint in Australian Mental Health Services*. Available: https://nmhccf.org.au/sites/default/files/docs/seclusion_restraint.pdf

Office of the United Nations High Commissioner for Human Rights, *Legal Capacity, Background Conference paper 2005*, [Accessed: 01.04.2017].

United Nations, Committee on the Rights of Persons with Disabilities, General Comment No 1: Article 12: Equal Recognition before the Law, UN Doc CRPD/C/GC/1 (2014) [20]–[21] [Accessed: 23.03.17]; Article 16: Freedom from exploitation, violence and abuse <https://wfdeaf.org/human-rights/crpd/article-16-freedom-from-exploitation-violence-and-abuse/> [Accessed: 30.03.2017].

Victorian Law Reform Commission, *Guardianship, Final Report 24 (2012) rec 21*. Available: http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf [Accessed: 20.04.2017].