

21 March 2016

NSW Law Reform Commission

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NSW Law Reform Commission review of the *Guardianship Act 1987*

Dear Sir/Madam,

Carers NSW welcomes the opportunity to provide a preliminary submission to the NSW Law Reform Commission's review of the *Guardianship Act 1987* (the Act). Carers NSW is an organisation for people who provide informal care and support to a family member or friend who has a disability, mental illness, drug or alcohol dependency, chronic condition, terminal illness, or who is frail. Carers NSW supports and advocates for carers in NSW and is the only state-wide organisation that has all carers as its primary focus. Carers NSW is also part of the National Network of Carers Associations, which works collaboratively to lead change and action for carers.

We understand that the Commission is currently seeking preliminary submissions and that ongoing stakeholder consultation will take place in coming months. Our submission briefly highlights some key issues and questions that Carers NSW hopes the review will address.

Terminology

Carers NSW believes that the terminology used in the Act must be brought up to date and made consistent with other related pieces of State and Commonwealth legislation, in particular:

- The usage and definition of 'disability' should be consistent with the NSW *Disability Inclusion Act 2014*, the United Nations Convention on Persons with Disabilities (UNCRPD) and the Commonwealth *National Disability Insurance Scheme Act 2013*. This would include replacing 'persons who have disabilities' and 'disabled' with 'people with disability'.
- References to a person who 'has the care of another person' could be better articulated using the terminology of 'carer', in line with the NSW *Carers (Recognition) Act 2010*.
- References to the 'carers' pension' should be replaced with the correct term 'Carer Payment'.

- The Act should specify whether ‘close friend or relative’ includes the broader definition of ‘relative’ in an Aboriginal and Torres Strait Islander context, as included in the *NSW Mental Health Act 2007*.
- The use of ‘cultural and linguistic environments’ is unusual, and would be better replaced with terms such as ‘cultural and linguistic diversity’ and ‘cultural background’ in line with the *NSW Disability Inclusion Act 2014*, *NSW Carers (Recognition) Act 2010* and *NSW Mental Health Act 2007*.
- To correspond with the strengths-based approach of the National Disability Insurance Scheme (NDIS) and the current emphasis on recovery-oriented approaches in the mental health sector, the Act should focus on the concept of decision making capacity rather than disability, as having a disability does not necessarily impact decision making capacity; and decision making capacity can be affected by other conditions not conventionally referred to as ‘disability’, for example mental illness and dementia.

Determining decision making capacity

Many people with mental illness experience fluctuation in their decision making capacity. However, it can be difficult for informal supporters to identify when a person has lost or gained capacity. Similarly, in cases where capacity is declining over time, ascertaining when a person needs increased support may not be straightforward. Carers NSW recommends that the review of the Act explore whether additional mechanisms can be implemented to assist decisions around capacity and support. For example, opportunities for the person themselves and/or their carers to document advance guidance regarding warning signs of loss of capacity may be beneficial.

Enduring guardians

Currently no person can appoint the NSW Trustee & Guardian as their enduring guardian; the body can only be appointed when a person has lost capacity. This may be problematic for people who do not have anyone in their life who is willing and able to perform the role of enduring guardian, but who would like to plan ahead for when they lose capacity, including people with mental illness who may want to plan ahead for periods of fluctuating capacity. This situation may put pressure on family members or friends who are not in a position to perform this role to be appointed. Carers NSW recommends that the review examine this provision.

Supported decision making

Carers NSW is a strong proponent of supported decision making, provided that there are diverse models and adequate information and assistance for supporters. Substitute decision making options should also

remain for cases where this may be necessary. We understand that much supported decision making occurs informally, and that formal arrangements are generally discouraged if there are other options available. However, Carers NSW suggests that this review consider whether formalising informal supported decision making arrangements would provide greater safeguards to persons in need of support, as well as ensure that supporters can access the information and authority they need to effectively fulfil their role.

Interface with national reforms

Carers NSW recommends that the interaction of the Act with the national aged care and disability reforms be considered in the review. For example, in the NSW *Mental Health Act 2007*, the guardian, if there is one, is automatically given the status of designated carer. However, the Commonwealth *National Disability Insurance Scheme Act 2013* does not specify that the role it calls a 'nominee' would automatically be fulfilled by a state-appointed guardian.

Thank you for accepting our submission. For further information, please contact Sarah Judd, Senior Policy and Development Officer, on [REDACTED] or email [REDACTED]

Yours sincerely,



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CEO
Carers NSW

