



# NDS submission on the review of the *Guardianship Act 1987*

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**March 2016**

## About National Disability Services

National Disability Services is the peak body for non-government disability services. Its purpose is to promote quality service provision and life opportunities for people with disability. NDS's Australia-wide membership includes more than 1030 non-government organisations, which support people with all forms of disability. NDS provides information and networking opportunities to its members and policy advice to state, territory and federal governments.

# Overview

NDS welcomes the opportunity to make a submission on the NSW Law Reform Commission's (NSW LRC) review of the *Guardianship Act 1987* (the Act). A number of issues relevant to the terms of reference have been identified and should be examined during review processes. In particular, NDS would like to draw attention to the need for changes to the Act to be aligned with broader state and national disability reforms. Alignment with these reforms will require significant consideration to the model of supported decision-making that will be adopted. In addition, the relationship between the Act and the National Disability Insurance Scheme (NDIS) and the circumstances in which the use of restrictive practices is lawful will need to be considered.

NDS supports the adoption of nationally consistent definitions, processes and safeguards around legal capacity and decision support. NDS also believes that changes to the Act must be consistent with the *United Nations Convention on the Rights of Persons with Disabilities 2006* (UNCRPD). National and state reforms that have given effect to the UNCRPD should guide changes to the principles and language of the Act. In particular, the objectives of the NDIS are to enable people with disability to exercise choice and control in their lives and to enhance their social and economic participation. The *NSW Disability Inclusion Act 2014* supports the objectives of the NDIS. Section 4(5) refers to the right of people with disability to make decisions that affect their lives:

“People with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support.”

In this context, the Act should therefore focus on supporting people to exercise choice and control, make their own decisions, express their will and preferences or, where this is not possible, appoint a representative to consult with people in their lives to determine what that person would most likely want. <sup>1</sup> In NSW it is the

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<sup>1</sup> NDS response to the issues paper: *Equality, Capacity and Disability in Commonwealth Laws January 2014*, p4

overriding duty of appointed guardians and administrators to ‘consider’ the interests, welfare and views of the person.<sup>2</sup> These principles should be amended to align with the notion of supporting and building the capacity of a person to make decisions and exercise choice and control.

## Supported decision-making

An appointed representative would be appropriate for people who require full decision-making support, but supported decision-making should always be the preferred alternative to substitute decision-making. NDS hopes the NSW LRC will examine the National Decision-Making Principles outlined in the Australian Law Reform Commission’s *Equality, Capacity and Disability in Commonwealth Laws, Report 124 (2014)*.<sup>3</sup> The report refers to a Commonwealth decision-making model which introduces a formal supporter role that is distinct from both the informal support and the substitute decision maker role. NDS broadly supports such a proposal and believes it could be replicated at a state level in the Act provided there are proper safeguards and oversight in place.

Additionally, there is nothing to preclude a paid worker or organisation from taking on the formal supporter role.<sup>4</sup> The critical role that service providers have played in the lives of many people with disability should be noted. With service providers often being the only support network in a person’s life, all the knowledge and expertise about the person’s needs, goals and preferences lies with that provider.

Consideration of the views of providers in decision-making processes is of critical importance in reviewing the Act. However, this should not lead to additional cost burdens for providers.

## Guardianship and the NDIS

As individuals begin to roll into the NDIS, some decisions may require a formal appointment of a guardian or financial manager. The resultant increase in

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<sup>2</sup> *Guardianship Act 1987, s.4*

<sup>3</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws, Report 124 (2014)*, p 63

<sup>4</sup> NDS response to the discussion paper: *Equality, Capacity and Commonwealth Laws June 2014* p2

applications for guardianship will require greater harmonisation of the Act with the *NDIS Act 2013* and will have a large impact on the resourcing of the relevant departments and tribunals. The increase will also be more pronounced in the context of changes with the transfer of government services to the non-government sector. Adults with significant and permanent disability who are transitioning from large residential centres and to more personalised settings will need assistance to make decisions. We have a number of questions and concerns outlined below.

Although the NDIS Act makes it possible, there has been no evidence to suggest that the practice of appointing a plan nominee where there is already a state appointed guardian or financial manager in place has occurred in any of the NDIS trial sites to date. Therefore, state appointed guardians/financial managers will play a significant role in NDIS decision-making processes. In light of this fact, the NSW LRC should turn its attention to the following issues.

**1) The suitability and requirements of the state appointed guardians acting for individuals in NDIS matters**

NDS strongly supports the appointment of state-appointed guardians for such commonwealth duties relating to the NDIS<sup>5</sup>, especially in the cases where the individual does not have any informal supports in place as can be seen in Ms KCGs Case<sup>6</sup> in NSW. As this case noted, there were limitations for a guardian not being appointed where a person has no informal supports especially in regard to substituted decisions being made and their plan being managed by the agency without any independent scrutiny.<sup>7</sup> NDS has serious concerns about this and though they are not in the direct scope of this review, the lack of safeguards/oversight in the appointment of nominees under the NDIS Act should be given due regard in any such review.

NDS qualifies its support of state-appointed guardians, by acknowledging that such an appointment should not be automatic. We would like to know whether there are alternatives and whether the state decision maker is best suited to

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<sup>5</sup> *Ibid*, p3

<sup>6</sup> KCG [2014] NSWCATGD 7

<sup>7</sup> NSW KCG at 69

take on NDIS duties, in place of advocacy services, informal supports or an equivalent body of last resort in the commonwealth jurisdiction.

There is a presumption that the state-appointed decision maker will take on the role of the nominee (but only where the nominee is appointed on the initiative of the CEO).<sup>8</sup> This raises the issue as to whether a guardian can reasonably be expected to fulfil and accept appointment as plan nominee for the person for whom they are guardian.<sup>9</sup> NDS also supports the proper training/resourcing of state appointees especially if they are tasked to make important decisions, monitor the quality of a participant's services and hours delivered. The bigger question that would need examination is: if a public guardian was appointed as a plan nominee would it fall within their statutory function?

## **2) How inconsistencies can be rectified to best equip NSW appointed guardians/administrators to facilitate NDIS decision-making functions in the least restrictive manner**

Guardianship is a restrictive order applied in certain circumstances. The NSW Public Guardian is only authorised to make substitute decisions (as opposed to supported decisions). The NDIS Act seems to offer a less restrictive option than guardianship through the nominee provisions, which includes (but does not delineate between) both a support and a substitute function.<sup>10</sup> A further consistency issue includes allowing the appointee to make both lifestyle and financial decisions where they relate to the NDIS funding package; should guardians be able to make both lifestyle and financial decisions? It is imperative these inconsistencies are addressed.

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<sup>8</sup> NDIS Rules, Rule 4.8(a)

<sup>9</sup> Office of the Public Advocate, *Guardianship and the NDIS*, Tess McCarthy, 1 September 2014 p21

<sup>10</sup> *Ibid*, P14

## Restrictive practices

Restrictive practices should always be used as a last resort and it is critical for clear processes to be in place before the decision to use restrictive practices is made. Disability services have developed considerable expertise in positive behaviour supports that reduce or eliminate the need for restrictive practices. This expertise must be called upon in situations, while also regulating the circumstances where it may occur. Guardianship laws in NSW should include effective safeguards that protect a person needing decision-making support from abuse. This is in line with the National Decision-Making Principles. The National Framework for Reducing and Eliminating the Use of Restrictive Practices could be used to guide the inclusion of safeguards and the use of restrictive practices in NSW guardianship law.<sup>11</sup>

## Need to review cross-jurisdictional arrangements

On a finishing note, with cross-over decision-making structures between the commonwealth and the states, there is room for confusion. People with disability and their families could experience additional jurisdictional hurdles across different areas of their lives. Our members report both inconvenience and more serious disruption as a result of inconsistent approaches to the appointment of guardians, administrators, nominees or the recognition of enduring powers of attorney or guardianship. The experiences of people with disability and their families should be assessed and ways to maximise recognition of cross-jurisdictional arrangements should be put forward.

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<sup>11</sup> NDS response to the issues paper *Equality, Capacity and Disability in Commonwealth Laws* P6

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