

NSW Law Reform Commission
Department of Justice

Parramatta Justice Precinct
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88/78 William St
Woolloomooloo NSW 2011

14 April 2016

Dear NSW Law Reform Commission,

Review of the *Guardianship Act 1987* (NSW): Preliminary Submissions

Mental Health Carers Arafmi NSW Inc. is the peak body representing mental health carers in NSW. Our vision is for an inclusive community and connected carers; and our mission is to empower carers for mental health. We undertake systemic advocacy on behalf of mental health carers to improve their recognition and support in mental health and related social services.

Thank you for providing the opportunity to comment on the review of the *Guardianship Act 1987* (NSW), hereafter referred to as the GA.

The following are some brief observations/matters of interest as related to Arafmi by mental health carers, regarding:

1. The relationship between the *Guardianship Act 1987* (NSW) and

- **The NSW Trustee and Guardian Act 2009 (NSW)**
- **The Powers of Attorney Act 2003 (NSW)**
- **The Mental Health Act 2007 (NSW)**
- **other relevant legislation.**

Relation to Other State Acts and Objects of Guardianship

The objects of guardianship (other than the preservation of assets) and the intersection of the GA with other acts and in particular the *NSW Trustee and Guardian Act 2009* (NSW) should be clarified. Financial asset preservation should not override consideration the standard of living when considering authorisation of expenditure, as a person's enjoyment of their financial assets involves more than passively owning a lot of money in an institution. A number of other acts deal more explicitly with such issues and their relationship to this one is ambiguous. More specifically, the distinction between guardianship and financial management is important and needs to be upheld, however, one Act should not take precedence over the other.

Support for independent decision making and the reasonable use of one's own income to maintain an acceptable standard of living (or the best that a meagre pension will allow) should be encouraged, as the Act so rightly states 'persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs' (S4(f)).

A guardian, or carer, may be acting as that support to assist the development of self-sufficiency and fulfilment and yet thwarted when unreasonable controls are put on their loved one without acknowledging that capacity, or lack of, is not a fixed state.

For instance, the following example provided to us by a Carer concerning their loved one (the consumer). The consumer is in receipt of the Disability Support Pension (DSP) with her finances managed by the NSW Trustee. A small amount of this income is reserved fortnightly as 'savings', without any clarification of what these 'savings' may be used for. The consumer requested access to this money for reasonable, not frivolous, purposes- for the purchase of a replacement for a broken white-

good, but was denied. The consumer's financial management plan prevented the development of self-supporting skills (needs assessment) and self-determination encouraged by the GA.

Another example is of a case where a person under guardianship in another jurisdiction wished to use some of their assets to pay for home nursing to avoid having to live in a public psychiatric facility. The Public Trustee in that case was reluctant to authorise this expenditure; however the Mental Health Act in that state, (as in NSW) has a requirement that care be provided to people in the least restrictive environment possible. Allowing this person to spend their assets facilitated less restrictive care, even if only for a period of 18 months. Her request in that case was upheld by the Mental Health Tribunal on that basis.

It is not clear how the important objectives of other Acts of parliament like this actually work with the Guardianship Act in NSW. There is little guidance in the Act as to the objectives of guardianship other than the preservation of financial assets. This is inadequate and needs to be reviewed.

A particularly relevant example is that the functions of the GA and the NSW Trustee and Guardian Act 2009 need to be considered in tandem, and the varying capacity of a person acknowledged by implementing the provision for the regular (rather than only requested) review of financial management orders as suggested in point 7 of the particulars.

The review of the GA should consider including a reference regarding Advance Directives and their use in informing the direction of decisions made by the appointed guardian.

2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.

We also recommend clarification and clear guidelines as to how state legislation, the GA, will interact with the Commonwealth legislation including that setting up the NDIS.

General Comments

Parts of the GA use unnecessarily complex and circuitous language which serves to confuse rather than clarify. Section 6N is one such example -

6N Evidence as to appointor's capacity

In any proceedings in which the question of whether, on a particular day or during a particular period, the appointor of an enduring guardian was a person in need of a guardian is in issue, the certificate of a medical practitioner to the effect that the appointor was, on that day or during that period, totally or partially incapable of managing his or her person because of a disability is evidence of the fact that the appointor was a person in need of a guardian.

We believe it may prove easiest to redraft the entire Act rather than amend it in a piecemeal fashion, which would also allow implementation of recovery oriented language.

Consider these two sections and ask, is one of these things just like the other?

21 Relationship of guardians to persons under guardianship

(1) Subject to any conditions specified in the order, the guardian of a person the subject of a plenary guardianship order:

- (a) has custody of the person to the exclusion of any other person, and
- (b) has all the functions of a guardian of that person that a guardian has at law or in equity.

(2) Subject to any conditions specified in the order, the guardian of a person the subject of a limited guardianship order:

- (a) has custody of the person, to the exclusion of any other person, to such extent (if any) as the order provides, and
- (b) has such of the functions of a guardian of that person's person, to the exclusion of any other person, as the order provides.

