

FACS submission on Terms of Reference for the Review of the *Guardianship Act 1987* (NSW)

Role of FACS

The Department of Family and Community Services (FACS) cluster welcomes the opportunity to contribute to the review of the *Guardianship Act 1987* (NSW) (“the Act”).

FACS supports vulnerable people and families to participate in social and economic life and build stronger communities. The cluster directly supports people across NSW through its own services and through funding non-government organisations (NGOs) to deliver specialist support services.

FACS works with diverse groups across the state, supporting:

- people with disability, so they can realise their potential
- children and young people, so they have the best possible start to life and are protected from abuse and neglect
- people in vulnerable circumstances, so they have suitable, stable and sustainable accommodation and services that support them to overcome disadvantage
- communities to become more resilient and inclusive
- families, so they are safe from domestic, family and sexual violence
- Aboriginal people, so they have the same social and economic opportunities as other Australians
- seniors, so they experience the benefits of living longer.

FACS, on behalf of the Minister for Disability Services, administers the *Disability Inclusion Act 2014* which establishes the requirements for the NSW Disability Inclusion Plan and for Disability Inclusion Action Planning for public authorities. FACS coordinates these planning regimes to promote inclusive services across the NSW Government.

Relevance of the Review

Many people supported by FACS are affected by the operation of the Act, including:

- people with an intellectual disability accessing services and supports, both now and following transition to the National Disability Insurance Scheme (NDIS)
- tenants in social housing who are subject to a financial management order
- children and young people in the care of the Minister for Family and Community Services, for whom the Minister is the person responsible.

The Secretary of FACS also holds some limited functions under the Act which may be the subject of review, if the provisions regarding substitute decision making are amended¹.

FACS has regular engagement with the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) in the course of proceedings under the Act:

¹ *Guardianship Act 1987* (NSW), s13.

- as the applicant in guardianship and financial management proceedings, where a client with disability is identified as a person in need of a guardian
- as the current or potential service provider of a person who is the subject of a guardianship or financial management order
- in providing information (through FACS officers) to the Tribunal about the nature of a person's disability or the decisions a person needs to make.

In addition, FACS frontline staff provide a range of informal decision supports for people with disability who do not have a guardian, often in an accommodation context.

FACS notes the Terms of Reference are generally concerned with the extent to which the *Guardianship Act* is consistent with other State, Commonwealth and international law in recognising the rights of people with disability or limited decision-making capacity.

The Terms of Reference relating to supported decision making and restrictive practices insofar as they relate to people with intellectual disability, are of particular significance to FACS. Suggestions for additional Terms of Reference are included at the end of this paper.

Policy Context

FACS notes that the current review is taking place following the release of the report titled *Equality, Capacity and Disability in Commonwealth Laws* by the Australian Law Reform Commission in 2014. The "National Decision-Making Principles" proposed in that report provide a useful model for considering supported decision making in NSW.

Given FACS' role in relation to the provision of disability services, the transition to the NDIS represents the most significant reform relevant to the current review. FACS will continue to support people with disability as they transition into the Scheme.

Where a NDIS participant has a guardian under State legislation, this person will generally be the participant's nominee under the NDIS². Therefore, the NSW guardianship and financial management regime will need to be reviewed with reference to service systems and decision making requirements at the Commonwealth level, including the incorporation of the National Decision Making Principles, to the extent these may become reflected in law.

FACS notes the review of the *National Disability Insurance Scheme Act 2013* (Cth) has taken into account the proposed National Decision Making Principles and awaits the outcome of this review and any subsequent amendments to the legislation.

The National Quality and Safeguards Framework, to be finalised in 2016, will detail complaint management requirements and safeguards for people accessing services as part of the NDIS. This will include safeguards around decision making and representation with a view to preventing abuse and neglect.

The *Disability Inclusion Act 2014* (DIA) supersedes the *Disability Services Act 1993*, and incorporates the rights based approach of the United Nations Conventions on the Rights of Persons with Disabilities. For application both in NSW's transition to the NDIS and on an ongoing basis for state jurisdiction thereafter, the DIA provides an overarching context for NSW.

² *National Disability Insurance Scheme Act 2013* (Cth), s88(4).

Discussion of Terms of Reference

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.

FACS suggests this Term be modified to read “employed *with* persons...” consistent with the approach of the National Decision Making Principles to supported decision making.

The NSWLRC should consider both formal and informal decision making models and the relationship between them, recognising that decision making capacity is fluid and may depend on the decision being made. For example, a young person may have capacity that is limited by a developmental stage; or, in the case of an adult, is episodically limited by mental illness. Alternatively, a person may have reduced capacity due to a condition that is likely to be permanent or deteriorate.

A continuum of options should be considered so that any model which is adopted is appropriate to the circumstances of an individual.

2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.

FACS welcomes a review of the current guardianship and financial management regime and the extent to which it promotes positive outcomes for people affected by it. The review presents an opportunity to align a substitute decision making model (where necessary) with a rights based approach to supporting people.

Further, the review could consider some of the procedural aspects of the current system that could be altered to improve accessibility. Anecdotal information from people FACS supports suggests that the process for seeking reviews or revocation of orders is onerous for people with disability.

3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model, including the costs of implementation.

FACS supports the consideration of models of supported decision making as a means to empower people with disability to make decisions about their own lives.

FACS has long acknowledged the importance of supported decision making frameworks, evident in policies such the *Dignity of Risk* policy. However, this policy does not go so far as formalising supported decision making for major lifestyle or financial decisions.

Family members often support people with disability to make decisions, but FACS staff also play a significant role as “supporters”. A formal framework to manage these relationships (and potential or perceived conflicts) may benefit not only FACS staff, but all disability service providers.

Further, it has been FACS’s experience that the Guardianship Division will not make a guardianship order where there are adequate informal arrangements in place. While this approach represents the least restrictive option, there may be circumstances where more formalised supported decision making arrangements would provide greater protection and consistency for the person with disability and their supporters.

The National Decision Making Principles provide a useful framework for considering these issues.

The NSWLRC may also wish to consider the timeframe required to establish and implement such a regime, and the level of capacity building that may need to take place to ensure that all stakeholders can perform their role effectively.

FACS has provided further comments on financial impacts below.

4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.

The intersection between State and federal guardianship requirements is of particular interest to the people FACS supports and is essential to a review of the Act.

In circumstances where a person needs to access State services, such as existing disability services (until June 2018) or health services, along with federal services such as the NDIS, Centrelink and Medicare, it is important that any regime for substitute or supported decision making is reflected across jurisdictions. The National Decision Making Principles present a useful starting point.

This is particularly relevant in the transition to the NDIS and the extent to which the NDIS reflects the ALRC recommendations.

The current review also presents an opportunity to consider potential legal policy gaps in safeguards and in the monitoring for people with disability during transition to the NDIS. The right type of supports for decision making will reduce the risk of abuse, neglect, fraudulent activity and consumer complaints.

5. Whether the language of “disability” is the appropriate conceptual language for the guardianship and financial regime and to what extent “decision making capacity” is more appropriate.

The Commission may wish to reconsider this Term to read:

“To what extent the vocabulary and language of the guardianship and financial management system appropriately reflects the people it represents”.

6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with decision making incapacity.

FACS notes the work being done at the federal level in development of a National Quality and Safeguarding Framework and awaits completion of this Framework . Any approach to the use of restrictive practices will need to be consistent with the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*.

FACS understands the term “restrictive practices” in the current context to refer to restrictions on a person’s freedom in order to achieve outcomes in managing challenging behaviour. In FACS, these types of restrictions are managed under the *Behaviour Support Policy* and is subject to numerous controls requiring acknowledgement of the rights of the individual, such as the requirement for the consent of the person to such a practice

(generally through a representative). The policy is then applied in the NGO sector through the FACS Funding Agreement with disability service providers.

During transition to the NDIS, the NDIA is using existing state, territory and Commonwealth quality and safeguarding systems in making decisions about the registration and regulation of support providers. The NSWLRC may wish to consider how the Act may be used to guide the use of restrictive practices outside disability service settings, including in the health sector and in services for children.

Consideration should be given to the type of guardianship functions that are relevant to consent for restrictive practices. For example, the use of psychotropic medication will be subject to different consent requirements when used in a “medical” context as opposed to a “behaviour support” context.

7. In light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

FACS supports the inclusion of this Term.

In considering the operation of financial management orders, FACS requests that the NSWLRC note the circumstances of the following client groups:

- people with intellectual disability who are increasing and developing their skills to manage their personal finances
- young people who have been in the care of the Minister for Family and Community Services and who are transitioning to adult guardianship.

In each of these instances, a person’s need for a financial manager may reflect a lack of opportunity/experience in managing their personal finances, rather than the incapacity to do so. With appropriate skill development, the need for a financial management may decrease over time and should be the subject of regular review.

FACS understands that any framework for supported decision making will also include financial management.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.

FACS supports this Term, particularly in considering appropriate safeguards.

Other Comments

Implementation, including costs

Item 3 refers to the costs of implementation for a supported decision making model, should this be adopted.

It can be expected that all matters under review will have a cost implication, particularly in relation to any requirement for periodic reviews of financial management orders and a regulatory scheme for restrictive practices. FACS considers it appropriate to include a separate Term of Reference relating to implementation issues, including the costs of implementing various decision making models.

Determination of Capacity

FACS considers it would be prudent to develop standards and procedural requirements for determining an individual's capacity to make informed decisions. For example, what level of assessment would be required, to what standard, by whom, and how would the individual be involved in this?

Assessment of suitability of guardians and financial managers

The NSWLRC may wish to consider whether a standard process should be developed to determine whether a person is suitable and appropriate to be appointed as a guardian (with reference to specific functions) or financial manager. This may include consideration of skills, knowledge, relationship and potential conflict of interest.

Objects and Principles

The NSWLRC may wish to consider whether the Act should contain objects and principles to guide decision making in relation to the rights of people whose capacity is at issue. This would help provide guidance to the bodies acting under the legislation in carrying out their functions.

Young people entering the adult guardianship system

FACS notes there are longstanding issues for young people who have been in the care of the Minister for Family and Community Services at the time they transition to adult guardianship. The current review may provide an opportunity to consider this group and whether substituted or supported decision making regimes may reflect their specific needs.

Advocacy

The role of advocacy presents particular implementation issues in relation to guardianship legislation. Individual and systemic advocacy have the potential to make informal decision making models possible and formal decision making models more effective. Consideration of advocacy in this regard might also include a role for a Public Advocate or similar in NSW.

Conduct of the Tribunal

The NSWLRC may wish to consider how the manner in which the Tribunal conducts guardianship proceedings reflects a rights-based approach to disability/incapacity. This might include a review of the language and style of hearings and the manner in which the views of the person whose capacity is at issue are obtained.