



Council for  
Intellectual Disability

## **Response to NSWLRC Question Paper 1 – Preconditions for alternative decision-making arrangements**

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### **Contact**

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## Who we are

For 60 years, NSWCID has been the peak advocacy group in NSW for people with intellectual disability. We have a diverse membership of people with intellectual disability, family members, advocates, professionals and advocacy and service provider organisations. Our Board must have a majority of people with intellectual disability and we actively involve people with an intellectual disability in all aspects of our work.

NSWCID has a long history of focusing on supported and substitute decision-making for people with intellectual disability. We were represented on the working parties that developed and implemented the Guardianship Act 1987 and have taken a very active ongoing interest in the legislation, for example taking a leading role in the development of the then Guardianship Tribunal's role in regulation of restrictive practices.

Especially in the last 10 years, we have had a heavy focus on the development of the capacity of people with intellectual disability to not only make their own decisions but also lead our organisation. The NSW government has funded our *My Choice Matters* project which is focused on developing the ability of people with intellectual disability to control their own lives in accordance with the principles of choice and control that are inherent in the National Disability Insurance Scheme.

We have two representatives on the Intellectual Disability Reference Group of the National Disability Insurance Agency which is providing advice to the NDIA on supported and substitute decision making arrangements in the NDIS.

[www.nswcid.org.au](http://www.nswcid.org.au)

[www.mychoicematters.org.au/](http://www.mychoicematters.org.au/)

## Response to NSWLRC questions

### 3. The concept of “capacity”

#### Question 3.1: Elaboration of decision-making capacity

- (1) Should the *Guardianship Act* provide further detail to explain what is involved in having, or not having, decision-making capacity?

Yes, particularly in relation to guardianship orders and triggering an appointment of enduring guardian, the current Act does not have clear and specific focus on capacity as it should.

- (2) If the *Guardianship Act* were to provide further detail to explain what is involved in having, or not having, decision-making capacity, how should this be done?

By defining decision making incapacity in a way that focuses as closely as possible on a person's ability to understand and make particular decisions that the person faces.

We tentatively recommend the following variation on the definition in the Mental Capacity Act 2005(UK):

A person lacks capacity to make their own decision if, despite maximum practicable support and explanation in the form of communication most suited to the individual, they cannot:

- understand the relevant information (including the consequences of making or failing to make the decision)
- retain the information
- use the information or weigh it as part of the decision-making process, or
- communicate the decision.

Optimally, the focus of the tribunal considering making orders should be on capacity for particular decisions facing the person and any order confined in scope to those specific decisions. However, realistically, capacity may need to be considered in a somewhat broader way to encompass eg the range of accommodation and services decisions a person may face over the next year.

### **Question 3.2: Disability and decision-making capacity**

How, if at all, should a person's disability be linked to the question of his or her decision-making capacity?

Disability should not be a prerequisite to a finding of incapacity. This would be discriminatory. Evidence of cognitive or psychosocial disability may be part of the evidence of incapacity but it is the incapacity that is the issue, not whether or not the person has a disability.

For some decades, there has been no need to show a disability to underpin a finding of incapability to manage financial affairs and then consider making a financial management order. We are not aware of any negative consequences flowing from this situation.

### **Question 3.3: Defining disability**

If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?

No firm opinion.

### **Question 3.4: Acknowledging variations in capacity**

- (1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?

This is not necessary but it would be sensible to include it in the Act for educational purposes.

- (2) How should such acknowledgements be made?
- (3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?

- (3) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

No firm opinion.

**Question 3.5: Should the definitions of decision-making capacity be consistent?**

- (1) Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements?

So far as practicable, yes.

- (2) If the definitions of decision-making capacity were to be aligned, how could this be achieved?

By specifying:

- That an alternative decision maker (personal or financial) may only be appointed if the person lacks capacity to make some decisions about his or her life or property that foreseeably arise for the person.
- That an alternative decision maker may only consent to treatment if the person lacks capacity to decide about the particular treatment.
- That an enduring guardian may only make decisions that the person lacks capacity for.
- That an enduring attorney is bound by the instructions of the person unless the person lacks capacity for a specific decision. (This is the current common law position.)

NCAT would need flexible jurisdiction to rule on any disputes in relation to these issues.

**Question 3.6: Statutory presumption of capacity**

Should there be a statutory presumption of capacity?

Yes, as an educational tool.

**Question 3.7: What should not lead to a finding that a person lacks capacity**

- (1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?

Perhaps, as an educational tool.

- (2) If capacity assessment principles were to include such statements, how should they be expressed?

No firm opinion.

**Question 3.8: The relevance of support and assistance to assessing capacity**

- (1) Should the availability of appropriate support and assistance be relevant to assessing capacity?

Yes, see 3.1 (2) above.

- (2) If the availability of such support and assistance were to be relevant, how should this be reflected in the law?

See 3.1 (2) above

**Question 3.9: Professional assistance in assessing capacity**

- (1) Should special provision be made in NSW law for professional assistance to be available for those who must assess a person's decision-making capacity?  
(2) How should such a provision be framed?

No firm view. However, there is certainly a need to enhance the quality and availability of capacity assessments.

**Question 3.10: Any other issues?**

Are there any other issues you want to raise about decision-making capacity?

No

**4. Other preconditions that must be satisfied**

**Question 4.1: The need for an order**

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the person is "in need" of an order?

Yes.

- (2) If such a precondition were required, how should it be expressed?

That an order may only be made where it is needed to promote and protect the person's personal, social and/or financial wellbeing.

Section 14(2) of the Guardianship Act 1987 as interpreted by the Appeals Division of the ADT diverts from the important principle that a person's rights should not be taken away unless necessary. (Ms A v Public Guardian [2006] NSWADTAP 55 at 10-17.)

**Question 4.2: A best interests precondition**

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person's "best interests"?

No. While a best interests requirement allows flexible consideration of an individual's circumstances, it has an unduly paternalistic history and connotation. We prefer the formulation we have suggested in 4.1(2) above.

- (2) If such a precondition were required, how should it be expressed?  
(3) What other precondition could be adopted in place of the "best interests" standard?

See 4.1(2) above.

### **Question 4.3: Should the preconditions be more closely aligned?**

- (1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?

Yes.-

- (2) If so, in relation to what orders or appointments and in what way?

See 4.1(2) above in relation to guardianship and financial management orders. We are inclined not to see the need for this precondition to trigger appointments of enduring guardians or enduring powers of attorneys.

### **Question 4.4: Any other issues?**

Are there any other issues you want to raise about the preconditions for alternative decision-making arrangements?

No

## **5. Other factors that should be taken into account**

### **Question 5.1: What factors should be taken into account?**

- (1) What considerations should the Tribunal take into account when making a decision in relation to:

- (a) a guardianship order
- (b) a financial management order?

- (2) Should they be the same for all orders?

In deciding whether there is a need for a guardianship or financial management order, there should be a non-exclusive list of factors that the Tribunal should consider including:

- Whether the person's capacity can be enhanced over time due to skill building, provision of support for decisions or improved health, and whether decisions are needed prior to such enhancement.
- The person's current and historic views and preferences so far as they can be ascertained.
- The views of close family members and any unpaid carer so far as they can be ascertained.
- The person's family relationships
- The person's cultural and linguistic heritage, customs and environment.
- The person's human rights.
- The person's freedom of decision and action being restricted as little as possible.
- The person being encouraged, as far as possible, to be self reliant and fully included in the life of the community.
- The person being protected from neglect, abuse and exploitation.

- (3) Are there any other issues you want to raise about the factors to be taken into account when making an order?

The reformed legislation should avoid a possible interpretation of the above list of factors which requires a comprehensive analysis of the factors and a reasoning process of balancing them up (as the ADT has interpreted the current section 14(2) as requiring – Ms A v Public Guardian [2006] NSWADTAP 55 at 10-17.)