

Submission to NSW Law Reform Commission –
‘Review of the Guardianship Act 1987:
preconditions for alternative decision making
arrangements’

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CPSA is a non-profit, non-party-political membership association founded in 1931 which serves pensioners of all ages, superannuants and low-income retirees. CPSA has 108 branches and affiliated organisations with a combined membership of 22,000 people living throughout NSW. CPSA's aim is to improve the standard of living and well-being of its members and constituents.

CPSA welcomes the opportunity to comment on the NSW Law Reform Commission's Review of the *Guardianship Act 1987* (NSW). This submission responds specifically to the preconditions for alternative decision making arrangements, with a focus on capacity. It is critical that legal provisions are put in place to ensure that individuals with a limited capacity to make decisions are supported to make their own decisions, as opposed to current practice in NSW which tends towards a substitute decision maker if questions of capacity arise.

In a free and democratic society like Australia, the ability to make decisions about your life is a fundamental right. However, many older people and people with disability are not given the same opportunities to make their own decisions due to questions about their capacity to make decisions. CPSA views it as imperative that capacity and disability are uncoupled under the *1987 Guardianship Act* (NSW) as this link is discriminatory, unfounded and can serve to limit the autonomy of people with disability.

Capacity and Decision Making

Those who are unable to make decisions for themselves are particularly vulnerable to exploitation and abuse. Thus it is critical that the legal frameworks for determining one's capacity to make decisions are rigorous, with sufficient checks and balances where a substitute decision is required. The NSW Capacity Toolkit¹, developed in 2008, advocates a human rights based approach to decision making. CPSA endorses the principles of the NSW Capacity Toolkit and would like to see these given legislative status.

CPSA broadly supports the definition of capacity put forward by the Australian Law Reform Commission (ALRC) in its final report on Equality, Capacity and Disability in Commonwealth Laws. The definition is similar to that put forward in the NSW Capacity Toolkit and states that a person should only be classified as *not* having decision making capacity if they cannot be *supported* to:

- a) Understand the information relevant to the decision
- b) Retain the information to the extent necessary to make the decision
- c) Use or weigh that information as part of the process of making the decision
- d) Communicate the decision in some way².

¹ NSW Attorney General's Department (2008) 'Capacity Toolkit' [Accessed 14/10/2016] Available at: http://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf

² Recs 7.1, 7.3, 7.12, 11.3: Australian Law Reform Commission (2014) 'Equality, Capacity and Disability in Commonwealth Laws' ALRC Report 124. [Accessed 11/10/2016] Available at: https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf

CPSA notes that the *1987 Guardianship Act* (NSW) contains provisions enabling the NSW Civil and Administrative Tribunal to make a guardianship order in instances where a ‘person who, because of a disability, is totally or partially incapable of managing his or her person’³. The Act goes on to define disability as a person:

- a) who is intellectually, physically, psychologically or sensorily disabled,
- b) who is of advanced age
- c) who is a mentally ill person within the meaning of the Mental Health Act 2007, or,
- d) who is otherwise disabled and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation⁴

CPSA is concerned that this definition is too vague and overly focused on the perceived limit a person’s disability places on their capacity to make decisions for themselves. The current legal framework is too rigid and accordingly cannot account for the fact that many people with a disability, illness or impairment can meet the ALRC conditions for decision making capacity with some support. CPSA views it as critical that the *1987 Guardianship Act* (NSW) is amended so that a person is always assumed to have capacity unless it is determined otherwise. CPSA notes that this principle is a key tenet of the NSW Capacity Toolkit and its formal recognition would better facilitate a human rights approach to decision making in NSW.

- **Recommendation 1:** That the link between capacity and disability embedded in the *1987 Guardianship Act* (NSW) be removed.
- **Recommendation 2:** That the *1987 Guardianship Act* (NSW) be amended to include a statutory presumption of capacity as default.

Supported Decision Making

CPSA notes that in NSW general practice is to appoint a substitute decision maker where questions arise over an individual’s capacity, rather than to investigate the provisions that could be made to support an individual to make their own decision. CPSA echoes the position of the Victorian Law Reform Commission (VLRC) in that ‘a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support’⁵ and would like to see this principle embedded in the *1987 Guardianship Act* (NSW). This recognises the fact that decision making capacity varies based on the nature of the decision

³ Guardianship Act 1987 (NSW) s 3(1)

⁴ Guardianship Act 1987 (NSW) s 3(2)

⁵ Recommendation 27(e): Victorian Law Reform Commission (2012) ‘Guardianship: Final Report 24’ [Accessed 7/10/2016] Available at:

http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf

in terms of its complexity, impact on the person's life and relationship to other decisions. It also provides space to recognise that the context in which the decision is made also impacts on one's decision making capacity. For example, the time of the day, levels of stress, the timeframe for making the decision and the parties involved in making the decision all affect a person's capacity to make a decision. It is critical for NSW to move away from a model of substitute decision making, towards a system that promotes supported decision making.

- **Recommendation 3:** That the *1987 Guardianship Act (NSW)* be amended to incorporate the VLRC's recommendation that 'a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support'.
- **Recommendation 4:** That NSW implements a supported decision making model to minimise reliance on substitute decision making provisions.