



Review of the Guardianship Act 1987:

Submission for Question Paper 4 to the
Law Reform Commission of NSW

30 May 2017

Being

Being is the independent, state-wide peak organisation for people with a lived experience of mental illness (consumers). We work with consumers to achieve and support systemic change.

Being's vision is for all people with a lived experience of mental illness to participate as valued citizens in the communities they choose. Participation is a fundamental human right as enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). We work from the premise that the participation of consumers results in more effective public policy and facilitates individual recovery.

Our work is guided by eight principles:

- Principles of recovery underpin all our work
- Recognition of the importance of a holistic approach
- Collaboration and team work
- Flexibility, responsiveness and innovation
- Consultative and participatory processes that have consumers at the centre
- Promoting equity and positive images to address discrimination and prejudice
- Accessible and approachable for all
- Promotion of professionalism and quality practice

Being is an independent non-government organisation that receives core and project funding from the Mental Health Commission of NSW.

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Introduction

Being would like to thank the NSW Law Reform Commission (the Commission) for the opportunity to comment on Question Paper 4 for the Review of the Guardianship Act 1987 NSW (the Guardianship Act). We have responded to specific sections of Question Paper 4¹:

Safeguards for formal supported decision-making

6.1. If NSW introduces a formal supported decision-making model, what safeguards should this model include?

Preventative safeguards

Being recognises the need for safeguards to prevent abuse, however the same safeguards designed to protect a person can also come with a reduction to their autonomy. The best safeguards that can be provided under the Guardianship Act are those that create a strong and informed relationship between supporter and decision-maker, and stop abuse from happening in the first place. The most important of these are:

- Appropriate training for supporters
- Easily available resources for decision-makers and supporters. For example a helpline they can call for advice and guides outlining the process
- Clear instructions for supporters from decision-makers. For example through wellness plans
- A range of supporters available, so a decision maker is not forced to have a supporter who they do not have a good relationship with.

Statement of duties and responsibilities

The key to a well-functioning supported decision-making relationship is for a supporter to have a thorough knowledge of the wills and preferences of the person they are supporting, and the type of support desired by the decision-maker. One way

¹ Please note throughout this submission we use the terms “consumer” and “person with a mental illness” interchangeably to refer to people living with mental illness. We refer to people receiving assistance with decision-making as “consumers” or “decision-makers” and refer to those providing support as “supporters” or “co-decision-makers”.

of achieving this is by requiring supporters and decision-makers to co-create a statement of duties and responsibilities. This should be a collaborative agreement that clearly defines the parameters of the relationship (including types of decisions a supporter will assist with and duties a supporter will undertake).

There are some elements of the supported decision-making relationship that are universally applicable. We suggest these should be captured in a statement of principles that supporters and decision-makers also sign. This should include:

- The will and preference of the decision-maker is the basis of all decisions
- Supporter is not to coerce, intimidate or unduly influence the supported person
- Supporter is not to make a decision on their behalf
- Supporter is not to act without the knowledge or consent of the decision-maker
- Supporter to notify the NSW Civil and Administrative Tribunal (NCAT) if the decision-maker no longer consents to the arrangement
- Allow the person to make a decision without support when that is their preference.

Terms of relationship

The relationship between a supporter and decision-maker is entirely voluntary on the part of both parties, and as such, both should be able to revoke the arrangement at any time. To force a person to continue to have a supporter would be a violation of their right to autonomy.

Harry is a person with a lived experience of mental illness who currently has a family member who is his carer and offers support with decision-making. He has been in and out of hospital, and over that time has felt the family member has made decisions for him that did not represent Harry's preferences. He also found out that information about his health has been hidden from him by this family member. He would like to nominate a friend to help him make decisions, but is not able to do this.

Monitors

The system of monitors appears to have worked well in other jurisdictions, such as the ACT, and we recommend it be implemented in NSW. Each relationship should have a monitor who is available to advise decision-makers and supporters and checks in with each party on a regular basis. Monitors should develop an ongoing relationship with the decision-maker and supporter and be able to provide advice and

mediation, if necessary. We would suggest this role should not be called a monitor, as this implies the supporter and decision-maker need to be supervised. Instead, we would suggest calling this role a coordinator, guide or adviser.

The monitor role should be a paid position and the person undertaking it should have appropriate training in supported decision-making and relevant skills. Their role would be to assist decision-makers and supporters in navigating this relationship, and ensure that the supporter is not coercing or influencing the decision-maker.

Review of arrangements

An ongoing relationship with a monitor would also allow regular review of the supported decision-making arrangement, without some of the trauma that may be associated with a review from an unknown party. We propose this more formal review process should take place every three years.

In the case of co-decision-making agreements (if instituted), they must be reviewed more frequently as they constitute a greater restriction in the autonomy of the decision-maker. We recommend a review of this relationship at least once a year.

If other parties (such as friends or health professionals) suspect there is coercion taking place on the part of the supporter, we recommend they be allowed to request a review. This review should be undertaken by an independent person who consults with the decision-maker, supporter and monitor. It should ultimately rest with the decision-maker about whether an arrangement is revoked. However, NCAT could make recommendations, offer training or offer the option of a different supporter.

Recommendations:

1. The Guardianship Act to include obligations to provide training and resources for supporters
2. The Guardianship Act to give people the right to a supporter they choose (with consent of the supporter)
3. Include the requirement to have a statement of duties and responsibilities for formal supported decision-making arrangements
4. The Guardianship Office to provide resources to help supporters and decision-makers create duties and responsibilities statements
5. The Guardianship Act to allow both decision-makers and supporters to revoke a decision-making arrangement at any time

6. The Guardianship Act to include the role of monitors, who can develop an ongoing relationship with the decision-maker and supporter. This should be a paid position
7. The Guardianship Act to include provisions for regular reviews of decision-making arrangements every three years, and more frequently in the case of co-decision-making arrangements.

Office of Public Advocate

7.1. Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

Having an advocate has the potential to make a huge difference in a person's life. The stigma a person with a mental illness faces impacts the treatment they are able to access and the attitudes they encounter among health professionals and others in their life. In addition, the mental health, financial and housing systems can be complex and difficult to navigate.

Having an advocate can help a person get the treatment and services they need, provide additional safeguards against abuse, and provide justice for people whose rights are violated or who are let down by services. We often hear from people whose rights have been violated but feel they have no path for recourse. We would recommend that the public guardian or advocate be able to assist people who require help in this area.

Being recognises the valuable role played by organisations who already provide individual advocacy for people with a mental illness. We see the benefit of having this individual advocacy remain independent of government, as it reduces the conflict of interest for an advocate who may be challenging government services. An independent organisation may be more trusted by people who have had negative experiences with government services. However, we also recognise that a public advocate would have more authority to hold government services accountable.

For these reasons we would recommend that a public advocate be established, but funding be maintained for individual advocacy through external organisations as well. The public advocate should operate independently of the government.

Recommendations:

8. The Guardianship Act to empower a public advocate to assist people with a disability who are not under guardianship.
9. The Guardianship Act to also recognise the important role of external advocates.

7.2. What, if any, forms of systemic advocacy should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to undertake?

We frequently hear about people with a mental illness who have had their autonomy disregarded by services or received disrespectful and inappropriate treatment. A public advocate or public guardian would have insight into the scope of the issues faced by people with a mental illness in NSW, particularly those under guardianship. *Being* believes they would be ideally placed to provide systemic advocacy, in the same way public advocates do in other states. The goal of this advocacy should be to maximise the autonomy of people with disabilities and recognise their human rights within services and legislation.

In Victoria, the public advocate also fulfils the following systemic and educational functions:

- Promote the development of services for people with disabilities
- Support establishment of organisations to provide advocacy programs and education
- Promote public awareness of the acts and other rights of people with disability.

We recommend a public advocate in NSW be empowered to fulfil the same functions.

Recommendation:

10. The public advocate should have systemic advocacy as part of its role, including advocacy for the rights of people with disabilities.

7.3. Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

Being often hears from people who want additional support or advocacy. We also recognise that on some occasions people may require a guardian. However, we are concerned about autonomy being taken away from people because they are behaving in a way that a friend, family member or health professional considers inappropriate. Investigations by a public guardian must not become a way to police or control the

behaviour of people with disabilities. We would tentatively support a public guardian investigating the need for a guardian, under the condition that the autonomy and decision-making rights of the person with disability are always the first consideration, and any reduction in autonomy is a last resort only.

Recommendation:

11. If a public advocate is given the authority to investigate the need for a guardian, or investigate cases of abuse, any decisions made about a person's situation must be made based on their will and preferences.

7.4. Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

Similarly to above, we are concerned about reductions in autonomy from people with disabilities. Every person has the right to make decisions that others consider 'bad' as long as they are able to understand the decisions they are making. The following story we heard from Greg illustrates the risks of this system:

Greg was living with a friend. His friend had agreed to take care of him but was often out and left the house very messy. Greg understood that his friend was not fulfilling their agreement but preferred to live with his friend than to be in hospital. He liked the freedom he had at the house and was able to visit his other friends. His mental health worker reported that his friend was not taking appropriate care of Greg, and as a result Greg was taken to a residential facility in a different town. Greg's preferences were not taken into account in this move, and his support network were not consulted. He is now very unhappy to be away from his friends and living in a facility.

7.8. Should NSW establish a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

Being would recommend establishing a separate office of Public Advocate with the functions of individual and systemic advocacy discussed above. We believe it is important to separate the functions of advocate and guardian and maintain independence between these. This will allow the public advocate to act as a check for the public guardian, and provide advocacy for people who have a public guardian. We have heard from people who are unable to get hold of their public guardian or who are unhappy with decisions their guardian made for them. In these situations, it is important to have an independent advocate.

We would also be concerned about a replication of the situation in Victoria, where the Office of the Public Advocate spends most of its time on guardianship. Guardianship and advocacy are both important functions and one should not be sacrificed for the other.

Summary of Recommendations

1. The Guardianship Act to include obligations to provide training and resources for supporters
2. The Guardianship Act to give people the right to a supporter they choose (with consent of the supporter)
3. Include the requirement to have a statement of duties and responsibilities for formal supported decision-making arrangements
4. The Guardianship Office to provide resources to help supporters and decision-makers create duties and responsibilities statements
5. The Guardianship Act to allow both decision-makers and supporters to revoke a decision-making arrangement at any time
6. The Guardianship Act to include the role of monitors, who can develop an ongoing relationship with the decision-maker and supporter. This should be a paid position
7. The Guardianship Act to include provisions for regular reviews of decision-making arrangements every three years, and more frequently in the case of co-decision-making arrangements.
8. The Guardianship Act to empower a public advocate to assist people with a disability who are not under guardianship.
9. The Guardianship Act to also recognise the important role of external advocates.
10. The public advocate should have systemic advocacy as part of its role, including advocacy for the rights of people with disabilities.
12. If a public advocate is given the authority to investigate the need for a guardian, or investigate cases of abuse, any decisions made about a person's situation must be made based on their will and preferences.