



Review of the Guardianship Act 1987:

Submission for Question Paper 6 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 is pleased to comment on Question Paper 6 for the Review of the Guardianship Act 1987 NSW (the Guardianship Act) by the NSW Law Reform Commission (the Commission).

Question 2.2: General Principles

What should be included in a list of general principles to guide those who do anything under guardianship law?

Being believes that the language of the general principles should be aligned with concepts of recovery, and focused on people, rather than single characteristics of their identity, diagnoses or difficulties.

Being believes that the general principles included in the Guardianship Act should reflect a rights-based approach, with an emphasis on a person's will and preferences.

Recommendation:

1. That the language of the general principles be aligned with the recovery model, and focused on the whole person.
2. That the Guardianship Act should reflect a rights-based approach, with an emphasis on a person's will and preferences.

Should there be multiple statements of principles that are tailored to particular decision-making situations? What are those situations and what principles should be included?

Alongside this, in our Question Paper 2 Submission, we noted that the current "one-size-fits-all" approach does not maximise the ability of a person to shape their own lives, and does not align with the fluctuating decision-making capacities of some people who experience mental illness. Therefore, *Being* also supports the development of multiple statements of principles which specifically differentiate between supported decision-making, co-decision-making, and substitute decision-making. For this reason we reaffirm our support for the continuum of decision-making options recommended in the Victorian Law Reform Commission Report.

Recommendation:

3. That multiple statements of principles be developed, which differentiate between supported decision-making, co-decision-making, and substitute decision-making.

Question 2.5: Language of disability

Is the language of disability the appropriate conceptual language for the guardianship and financial management system?

The Guardianship Act should include an acknowledgement of the wide variety of language that is used to refer to people with disability. As discussed in our Question Paper 2 submission, *Being* generally uses the terms “consumer” and “person with lived experience of mental illness” to refer to people living with mental illness. Acknowledging these and other sector and demographic specific terminologies would contribute to the overall inclusiveness of the Guardianship Act.

Recommendation:

4. That the Guardianship Act acknowledge the wide variety of terminologies used to refer to people with disability across different sectors and demographics.

What conceptual language should replace it?

As we highlighted in our preliminary submission, the Guardianship Act currently defines a person in need of a guardian as “a person, who, because of a disability is totally or partially incapable of managing his or her affairs”. This is inconsistent with the strengths-based approach of the National Disability Insurance Scheme (NDIS). It also clashes with the mental health sector’s recovery-oriented approach, which affirms the self-determination of individuals with mental illness.

The conceptual language of the Guardianship Act should change to focus on people’s decision-making capacity. It is important to rely on concepts, such as capacity when making decisions about guardianship, as having a disability does not automatically imply the need for a guardian. ‘Decision-making capacity’ better aligns with the principles and language of the NDIS.

The change would also distinguish people’s decision-making capacity from their capacity to communicate the decision or wishes. The Guardianship Act could clarify that a person’s capacity to communicate does not determine their need for a guardian. The person may need support to communicate their decision or wishes, rather than someone to make the decision for them. For example, section 17(2) of the NDIS Act states that “People with disability will be supported in their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised.”

Recommendations:

5. That the language of the Guardianship Act focus on people's decision-making capacity, rather than on disability.
6. That the language of the Guardianship Act acknowledge that people's decision-making capacity is not determined by their ability to communicate their wishes.

Question 2.6 Language of Guardianship

What terms should be used to describe participants in substitute and supported decision-making schemes?

While we believe that alternative terminologies should be acknowledged by the Guardianship Act, as discussed in 2.5.1, we accept that the Act itself is required to reflect general use. In the main text of the Guardianship Act, *Being* recommends the use of the terms "decision-maker" to refer to the individual; and "supporter," "co-decision-maker" or "substitute decision-maker" dependent on the level of support that will be provided.

Recommendation:

7. That the terms "decision maker," "supporter," "co-decision-maker" or "substitute decision-maker" be used to describe participants in substitute and supported decision-making schemes.

Question 8.1 Search and Removal Powers

What changes, if any, should be made to these provisions?

Being is concerned about the potential for these search and removal powers to facilitate people's mistreatment. The current phrasing "likely to suffer serious damage to his or her physical, emotional or mental health or well-being" must be more clearly defined, and should specifically include steps to prevent the punishment of non-normative behaviours.

People have spoken to us about their experiences of trauma relating to both the forensic and healthcare systems. Experiencing search and removal, interacting with police, or being removed to hospital or another medical setting may negatively impact a person's recovery and contribute to re-traumatisation. Regulations must be implemented that ensure search and removal powers are only used where all other options have failed, or in immediately life-threatening situations.

Recommendation:

8. That search and removal powers be better defined and used minimally
9. That the Guardianship Act includes steps to prevent the punishment of non-normative behaviours through search and removal
10. That the Guardianship Act acknowledges that search and removal may be traumatising and negatively impact a person's recovery.

Question 9.1 Enforcing guardians' decisions

What limits should be place on any part of an order that permits such enforcement?

Being emphasises our strong support of the elimination of seclusion and restraint in accordance with the Convention of the Rights of Persons with Disabilities. We support the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the disability service sector, and its goal of using restrictive practices in "very limited and specific circumstances, as a last resort and utilising the least restrictive practice ", as a step towards eliminating restrictive practices. *Being* believes that a guardian's power to permit restrictive practices should be limited, and any use of restrictive practices should be reviewed within the shortest period possible. We recommend a shorter time-period than the 42 days suggested in the Question Paper.

We also note that many circumstances that may appear to warrant this enforcement could be avoided through the implementation of wellness plans. These plans, such as NSW Health's Mental Health Consumer Wellness Plan, allow consumers to participate in their own future care, and formalise strategies for addressing their fluctuating capacity and wellness over time. We believe that the Guardianship process should include the development of wellness plans, and that these should be frequently updated and reviewed by the consumer to ensure consumer's wishes are followed in times of severe illness or distress.

Recommendations:

11. That a Guardian's power to use restrictive practices be limited, and a review to take place within a short time-frame after any use of restrictive practice.
12. That wellness plans be incorporated into the Guardianship Act, with enforcement in the event a wellness plan is not followed.

Summary of Recommendations

1. That the language of the general principles be aligned with the recovery model, and focused on the whole person.
2. That the Guardianship Act should reflect a rights-based approach, with an emphasis on a person's will and preferences.
3. That multiple statements of principles be developed, which differentiate between supported decision-making, co-decision-making, and substitute decision-making.
4. That the Guardianship Act acknowledge the wide variety of terminologies used to refer to people with disability across different sectors and demographics.
5. That the language of the Guardianship Act focus on people's decision-making capacity, rather than on disability.
6. That the language of the Guardianship Act acknowledge that people's decision-making capacity is not determined by their ability to communicate their wishes.
7. That the terms "decision maker," supporter," "co-decision-maker" or "substitute decision-maker" be used to describe participants in substitute and supported decision-making schemes.
8. That search and removal powers be better defined and used minimally
9. That the Guardianship Act includes steps to prevent the punishment of non-normative behaviours through search and removal
10. That the Guardianship Act acknowledges that search and removal may be traumatising and negatively impact a person's recovery.
11. That a Guardian's power to use restrictive practices be limited, and a review to take place within a short time-frame after any use of restrictive practice.
12. That wellness plans be incorporated into the Guardianship Act, with enforcement in the event a wellness plan is not followed.