

NSW DISABILITY NETWORK FORUM

Review of the *Guardianship Act 1987*:

Response to Question Paper 6

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Contact the **NSW Disability Network Forum** through the NCOSS secretariat
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About the NSW Disability Network Forum

The NSW Disability Network Forum comprises non-government, non-provider peak representative, advocacy and information groups whose primary purpose is to promote the interests of people with disability. The aim of the DNF is to build capacity so that the interests of people with disability are advanced through policy and systemic advocacy.

NSW Disability Network Forum Member Organisations:

- Being Mental Health and Wellbeing Consumer Advisory Group
- Blind Citizens NSW
- Deaf Australia NSW
- DeafBlind Association NSW
- Deafness Council (NSW)
- First Peoples Disability Network
- Information on Disability and Education Awareness Services (IDEAS) NSW
- Institute for Family Advocacy
- Intellectual Disability Rights Service
- Multicultural Disability Advocacy Association of NSW
- NSW Council for Intellectual Disability
- NSW Council of Social Service (NCOSS)
- NSW Disability Advocacy Network
- People with Disability Australia
- Physical Disability Council of NSW
- Positive Life NSW
- Side by Side Advocacy Incorporated
- Self Advocacy Sydney
- Synapse (Brain Injury Association NSW)

This submission was developed by NCOSS in consultation with the DNF members and approved by NCOSS Deputy CEO.

Introduction

The DNF welcomes the opportunity to respond to the sixth Question Paper of the review of the *Guardianship Act 1987 (NSW) (Guardianship Act)*.

Building on our responses to earlier Question Papers, we focus on the importance of the *Guardianship Act* reflecting and promoting an empowered view of people with disability in its language and principles. The *Disability Inclusion Act 2014 (NSW) (Disability Inclusion Act)* provides a good model of legislation embodying a rights-based approach consistent with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and we endorse the *Guardianship Act* incorporating the principles of this Act.

Question 2.1: Statutory objects

What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

The DNF believes that the objects in the *Disability Inclusion Act* provide a useful model for the *Guardianship Act*. The objects as identified below emphasise the importance of the UNCRPD, as well as enabling people with disability to exercise choice and control.

(a) to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights,

(b) to promote the independence and social and economic inclusion of people

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*with disability,
(c) to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports and services,
(d) to provide safeguards in relation to the delivery of supports and services for people with disability,
(e) to support, to the extent reasonably practicable, the purposes and principles of the United Nations Convention on the Rights of Persons with Disabilities.¹*

In addition, we recommend a further object recognising that people with disability have the right to support in making decisions, which would highlight the focus on supported decision-making in the revised *Guardianship Act*.

Question 2.2: General principles

- (1) What should be included in a list of general principles to guide those who do anything under guardianship law?**
- (2) 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?**

The DNF believes that changes are required to the General Principles to reflect a rights-based approach and to replace consideration of “welfare and interests being given paramount consideration” to reflect “will and preferences”. In addition, we believe additional principles are required that highlight the importance of:

- choice and control;
- supported decision-making; and
- building a person’s capacity to make decisions.

The principles in the *Disability Inclusion Act* could serve as a useful model.

Question 2.3: Accommodating multicultural communities

How should multicultural communities be accommodated in guardianship law?

The DNF strongly supports the revised *Guardianship Act* containing increased recognition of the importance of a person’s cultural context. This cultural context will affect the way a person and their supporters view the guardianship system, and their roles within it.

General principles are an important first step to recognising cultural context, and we support the inclusion of the specific principles in the *Disability Inclusion Act* relating to multicultural communities, namely:

Supports and services provided to people with disability from culturally and linguistically diverse backgrounds are to be provided in a way that:

¹ *Disability Inclusion Act 2014 (NSW) s 4.*

- (a) *recognises that cultural, language and other differences may create barriers to providing the supports and services, and*
- (b) *addresses those barriers and the needs of those people with disability, and*
- (c) *is informed by consultation with their communities.*²

We also agree that the phrase “cultural and linguistic environments” currently used in the Guardianship Act should be replaced with the expression “culturally and linguistically diverse backgrounds” in order to achieve consistency with other legislation.

In our response to Question 1, the DNF expressed that when deciding whether to make an order, the Tribunal should consider the “views of family members where the relationship is close and continuing.”³ This would be more responsive to a diversity of relationships than the current Act, which considers the views of a person’s ‘spouse’.

The DNF emphasises that more than statutory principles are required to ensure the guardianship system is responsive to multicultural communities. For example, it is important that:

- Information relevant to decisions should be provided in community languages and Auslan; and
- people are provided with culturally appropriate decision-making supports, including interpreters.

As mentioned in our response to Question Paper 2,⁴ training for supporters and community education are an important part of ensuring that the *Guardianship Act* is implemented as intended. This training and education should be tailored to the needs of multicultural communities and facilitated by culturally appropriate community organisations. The training should be provided on an ongoing basis.

Question 2.4: Accommodating Aboriginal people and Torres Strait Islanders

How should Aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

It is important that the *Guardianship Act* be responsive to Aboriginal and Torres Strait Islander people both in its general principles and its application. The DNF supports the principles in *Disability Inclusion Act*, namely:

Supports and services provided to Aboriginal and Torres Strait Islander people with disability are to be provided in a way that:

- (a) *recognises that Aboriginal and Torres Strait Islander people have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters, and*

² *Disability Inclusion Act 2014* (NSW) s 5(3).

³ *Disability Network Forum, [Response to Question Paper 1](#).*

⁴ *Disability Network Forum, [Response to Question Paper 2](#).*

- (b) recognises that many Aboriginal and Torres Strait Islander people with disability may face multiple disadvantage, and
- (c) addresses that disadvantage and the needs of Aboriginal and Torres Strait Islander people with disability, and
- (d) is informed by working in partnership with Aboriginal and Torres Strait Islander people with disability to enhance their lives.⁵

Training for supporters and community education should be tailored to the needs of Aboriginal people and Torres Strait Islanders and facilitated by culturally appropriate community organisations. This training should be regularly available.

Question 2.5: Language of disability

- (1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?
- (2) What conceptual language should replace it?

In its preliminary submission to this review, the DNF expressed the view that, in accordance with Article 12 of the UNCRPD (appended to this submission), disability should not have a direct link to a person's decision-making capacity.⁶ Article 12 of the UNCRPD requires that guardianship legislation is disability neutral, albeit disability responsive.

We recommend that the term "disability" be replaced with "decision-making impairment".

Question 2.6: Language of guardianship

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

The DNF believes that the *Guardianship Act* should use the terms:

- "supporter" and "decision-maker" for decision-making supporters and those they help, and
- "representative" and "represented person" for substitute decision-makers and those they make decisions for.

These terms will help reflect an empowered view of people requiring decision-making support, consistent with the empowered rights based approach of the UNCRPD.

Question 2.7: Aboriginal and Torres Strait Island concepts of family

How could relationships be defined in the *Guardianship Act 1987 (NSW)* to take into account Aboriginal and Torres Strait Island concepts of family?

The DNF supports recognition of the *Guardianship Act* of Aboriginal and Torres Strait Islander concepts of family. We endorse the definition of "relative" used in the *Mental Health Act 2007 NSW* namely:

⁵ *Disability Inclusion Act 2014 (NSW)* s 5(2).

⁶ [DNF Preliminary Submission](#)

relative of a patient who is an Aboriginal person or a Torres Strait Islander includes a person who is part of the extended family or kin of the patient according to the indigenous kinship system of the patient's culture.⁷

Question 3.1: Relationship between Commonwealth and NSW laws

What should be done to ensure an effective interrelationship between Commonwealth nominee or representative provisions and state-based arrangements for managing a person's financial and personal affairs?

The DNF agrees with the preliminary submission of our member NSW Council on Intellectual Disability that there should be a presumption that where there is an existing NSW appointed decision-maker with comparable powers and responsibilities, that person should be appointed as an NDIS representative.⁸

Question 7.1: A single order for guardianship and financial management

(1) Should there continue to be separate orders for guardianship and financial management?

The DNF believes they should continue to be separate orders for guardianship and financial management. The need to make separate orders would provide the Tribunal an additional safeguard to ensure that orders were made proportionally to the support a person required.

This is consistent with our response to Question Paper 3, in which the DNF expressed the view that the roles of Tribunal appointed guardians and financial managers should remain separate due to the different (but overlapping) skills required for each role. As observed in this Question Paper, a single order would work most effectively if the same person fulfilled each role.

⁷.Mental Health Act 2007 (NSW) s 71(2).

⁸.NSW Council for Intellectual Disability, *Preliminary Submission PGA18*, 5–6