Mental Health Commission of New South Wales

Review of the *Guardianship Act 1987 (NSW)*

Submission to the NSW Law Reform Commission on Question Paper One Preconditions for alternative decision-making arrangements by the Mental Health Commission of New South Wales

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Submission to the NSW Law Reform Commission's review of the *Guardianship Act 1987 (NSW)*
Question Paper One Preconditions for alternative decision-making arrangements

http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx

The Mental Health Commission of NSW

The Mental Health Commission of New South Wales (NSW) is an independent statutory agency responsible for monitoring, reviewing and improving the mental health system and the mental health and wellbeing of the people of NSW. The Commission works with government and the community to achieve this goal.

In all its work, the Commission is guided by the lived experience of people with mental illness, and their families and carers. The Commission promotes policies and practices that recognise the autonomy of people who experience mental illness and support their recovery, emphasising their personal and social needs and preferences.

Throughout this submission the term 'disability' is used broadly to encompass people who experience psychosocial disability.

The relationship between mental illness and capacity

The number of people affected by the guardianship system who experience mental illness has grown substantially over recent years.[1]

Since the introduction of the *Guardianship Act 1987 (NSW)* (the Act), there has been a significant shift in the way the community views mental illness and disability. Advances in medical science have led to a far more nuanced understanding of the impacts of mental illness and disability on people's abilities. There is now also a greater range of supports and assistance to overcome barriers to participation. Alongside this, there has been a societal shift towards greater recognition of the rights of people with a disability as set out in the United Nations Convention on the Rights of Persons with Disability (UNCRPD) and reflected in domestic legislation.

> *"People with disability have the same rights as other members of the community to make decisions that affect their lives (including decisions involving risk) to the full extent of their capacity to do so and to be supported in making those decisions if they want or require support."*[2]

Given these developments it is timely to consider the desirability of changes to the Act and in particular its relevance to the population groups most commonly affected by it. Given the remit of the Mental Health Commission, this submission deals primarily with the application of the Act in the case of people who experience mental illness.

Stigma and discrimination

People who experience mental illness regularly face stigma and discrimination. It is not uncommon for people in the community, including medical professionals, to assume that a person lacks the capacity to make decisions for themselves simply because of their diagnosis. Similarly, many people who experience mental illness report that their views are often dismissed as symptoms of their illness. This has had a significant impact on the way in which policy and legislation is drafted.

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[1] NSW Law Reform Commission, *Review of the Guardianship Act 1987 Question Paper 1: Preconditions for alternative decision-making arrangements* (2016)

[2] *Disability Inclusion Act 2014 (NSW)* s 4(5)

However, the framing of legislation and policy can be a powerful tool to correct these misperceptions.

The UNCRPD prohibits discrimination on the grounds of disability and requires signatories to take all reasonable steps to eliminate discrimination. There have been previous inquiries into what is required to ensure that domestic legislation conforms with the requirements of the UNCRPD, most relevantly, the NSW Legislative Council Standing Committee on Social Issues (Standing Committee on Social Issues) inquired into substitute decision-making for people lacking capacity in NSW.[3] The matter was also considered by the Australian Law Reform Commission in their report *Equality, Capacity and Disability in Commonwealth Laws*.[4] Both of these inquiries made recommendations to amend existing legislation to remove discriminatory practices. In particular, it was recommended that:

1. the definition of capacity should not be linked to disability[5]
2. there should be a statutory presumption of capacity.[6]

These recommendations are considered in more detail below.

Recovery

The framing of capacity in the current Act is contrary to the principles of recovery, which are central to contemporary mental health service delivery. Recovery is a highly individualised concept, but is commonly understood to mean "being able to create and live a meaningful and contributing life in a community of choice with or without the presence of mental health issues."[7] In 2013, the Australian Health Ministers' Advisory Council endorsed the *National framework for recovery-oriented mental health services*[8], this supports autonomy and self-determination through focusing on an individual's strengths, resilience and capacity for personal responsibility.[9] However, as noted in the NSW Government's *Living Well: A Strategic Plan for Mental Health in NSW 2014 – 2024:*

"putting people, not processes, at the heart of service delivery goes beyond service design and practices. Legislation and policy need to support the autonomy of the individual receiving care and their journey towards recovery."[10]

The current review of the Act represents an opportunity to make the necessary legislative changes to support the reform of the mental health system towards recovery-oriented service provision. This can be achieved through:

[3] *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010)
[4] Report 124 (2014)
[5] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014), Rec 3-2; NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) Rec 1
[6] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014), Rec 3-2; NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) Rec 2
[7] Commonwealth Department of Health (2013), *A national framework for recovery-oriented services: Guide for practitioners and providers*, p 11
[8] Commonwealth Department of Health (2013)
[9] Ibid
[10] NSW Mental Health Commission (2014), *Living Well: A Strategic Plan for Mental Health in NSW*, p 49

1. Amending the act to recognise that capacity sits along a continuum and can vary from time to time, or from decision to decision.
2. Accommodating the fluctuating nature of capacity by allowing for a range of supported decision-making models.

These recommendations are discussed in further detail below.

Disability and decision-making capacity

A person's disability should not be linked to the question of his or her decision-making capacity.

The shift from the medical to the social model of disability that has occurred over recent years (and which is embodied in the UNCRPD) starts from the position that people with disabilities have the same rights as everyone, albeit sometimes requiring supports to recognise this potential. Linking disability and decision-making capacity subverts this notion by suggesting there is something inherent in disability that inhibits a person's capacity to make decisions for themselves.

The UNCRPD includes a clear prohibition against discrimination on the grounds of disability. As addressed by the Standing Committee on Social Issues, retaining disability as a threshold test for the making of guardianship orders is contrary to Article 5 of the UNCRPD.[11]

When determining whether an order should be made under the Act, the relevant consideration should be based on a proper inquiry into the person's capacity to make relevant decisions.

In stating this position, the Commission is, however, aware that there is considerable concern among the consumer and carer communities that removing the link between disability and decision-making capacity would unacceptably broaden the scope of the Act so that anyone regarded as unconventional could come within its remit. Therefore, there would need to be close consultation with consumers and carers about the wording of the change. In addition, safeguards should be built into the Act to ensure that the focus of the test is on decision-making capacity, rather than on the decision itself. The following measures would support this aim.

General principles

The operation of the Act should be underpinned by an expanded statement of general principles.

Given the recommendation to remove the link between disability and decision-making capacity these should apply in all situations where a person is exercising functions under the Act regardless of whether it is in respect of a person with disability as is the case with the current s 4.[12]

The general principles should align with the UNCRPD and include

1. presumption of capacity
2. acknowledgement of the fluctuating nature of capacity
3. the right to make unwise decisions
4. the right to receive any support necessary to enable a person to make or participate in decisions about their life.

[11] NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [5.132] – [5.139], Rec 6
[12] Guardianship Act 1987 (NSW) s 4

These are all considered in more detail below.

Statutory presumption of capacity

The Act could benefit from a statutory presumption of capacity. While noting that a common law presumption of capacity already exists, in recognition of community fears about broadening the scope of the Act by removing the link between disability and decision-making capacity, a statutory presumption is an important safeguard. Further, this is consistent with the provisions of the UNCRPD.[13]

What should not lead to a finding of incapacity

The Act could include a statement about what should not lead to a finding of incapacity. This will help ensure that the emphasis is on the person's decision-making capacity, rather than the decision itself. There is always a risk that by listing what should not lead to a finding of incapacity the list could be taken to be exhaustive. The wording should make it very clear that this is not the case. The *Mental Health Act 2007 (NSW)* provides a helpful example, both of the wording that could be used and the types of matters to be addressed. At s 16 the Mental Health Act states

"A person is not a mentally ill person or a mentally disordered person merely because of any one or more of the following…"

The list of matters not to be taken to demonstrate mental illness includes political or religious belief, philosophy, sexual preference, political, religious or sexual activity, immoral conduct, illegal conduct, use of alcohol or drugs, anti-social behaviour, belonging to a particular socio-economic, cultural or racial group. The Commission would recommend adding disability to this group to ensure that a person is not deemed to have decision-making incapacity merely because of disability.

Acknowledging variations in capacity

The law should acknowledge that decision-making capacity can vary over time and depends on the subject matter of the decision.

It is now common ground that decision-making capacity is fluid and can vary from time to time, depending on the nature of the decision to be made or the circumstances in which it is being made.[14] In order for the law to be flexible enough to allow for consideration of decision-making capacity on a case by case basis the definition of capacity in the Act needs to reflect this reality. This needs to be further supported by a full and diverse range of decision-making supports to allow for a genuinely person-centred and individualised response.

The Standing Committee on Social Issues recommended that there be a legislative definition of capacity, which includes reference to the ability to understand, retain, utilise and communicate information relating to the particular decision that has to be made, at the particular time the

[13] United Nations Convention on the Rights of Persons with a Disability Art 12

decision is required to be made, to foresee the consequences of making or not making the decision.[15] The Commission is supportive of this approach.

Relevance of support and assistance

The availability of support and assistance is relevant to a decision as to what orders, if any, should be made. However this is separate to the question of whether or not a person has decision-making capacity. In relation to financial management orders the Act separates these two issues by requiring the Tribunal to consider whether the person is capable of managing their own affairs, whether there is a need for another person to manage those affairs on the person's behalf and whether it is in the person's best interests that the order be made.[16]

The Commission would be reluctant to see the two questions dealt with as one as there are foreseeable scenarios where the support a person requires to exercise decision-making capacity would require there to have first been a finding that they do not, independently, have that capacity. However, the Commission is in favour of the recognition of the right to receive any support necessary to enable a person to make or participate in decisions about their life. This could form part of an expanded statement of general principles.

The need for an order

There should be a precondition before an order is made that that the Tribunal be satisfied that the person is in need of an order. This should be supported by a requirement to

1. consider the availability of support and assistance
2. consider the practicability of services being provided to the person without such an order[17]
3. consider whether making the order would promote the person's personal and social wellbeing.[18]

Best interests provisions

The Commission supports the position put forward by the Victorian Law Reform Commission that substitute decisions should promote the person's personal and social wellbeing.[19]

Whilst the approach preferred in the UNCRPD is focused on the express will and preference of the individual, as noted in our preliminary submission, there will be times where this is not possible. In

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[14] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014), Rec 3-2; Victorian Law Reform Commission, *Guardianship Final Report*, 24 (2012), [30] – [33]; Queensland Law Reform Commission, Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010), [7.60]; NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010), Rec 1

[15] NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) Rec 1

[16] *Guardianship Act 1987 (NSW)* s 25G

[17] *Guardianship Act 1987 (NSW)* s 14(2)(d)

[18] Victorian Law Reform Commission, *Guardianship Final Report,* Report 24 (2014), [17.100]

[19] Victorian Law Reform Commission, *Guardianship Final Report,* Report 24 (2014), [17.100]

such circumstances, the Mental Health Commission understands the reluctance of many people in the community to apply 'best interests' provisions given the paternalistic connotations.

Consistent definitions of decision-making capacity

Any legislative definition of capacity must be flexible enough to keep up-to-date with advances in medical science and changing societal norms. Over the past approximately 30 years since the Act was introduced, both the medical and community understanding of disability has changed dramatically. As advances in medical science make it possible to break down barriers that inhibit the participation of people with disability we need to ensure that the legislation promotes rather than hinders such developments.