

30 January 2017

Mr Alan Cameron, AO
Chairperson
NSW Law Reform Commission
By email: nsw_lrc@justice.nsw.gov.au



To whom it may concern

Thank you for the opportunity to respond to the third Question Paper of the review of the *Guardianship Act 1987 (NSW) (Guardianship Act)*, which deals with the role of guardians and financial managers.

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities. When rates of poverty and inequality are low, everyone in NSW benefits. With 80 years of knowledge and experience informing our vision, NCOSS is uniquely placed to bring together civil society to work with government and business to ensure communities in NSW are strong for everyone. As the peak body for health and community services in NSW we support the sector to deliver innovative services that grow and evolve as needs and circumstances evolve.

NCOSS provides secretariat support to the NSW Disability Network Forum (DNF), which comprises non-government, non-provider peak representative, advocacy and information groups whose primary aim is to promote the interests of people with disability. In this capacity, NCOSS has provided significant input into the DNF's response to the Question Paper. [This response can be accessed via this link.](#)

In addition to endorsing the DNF's response, we highlight key points relevant to the powers and functions of substitute decision-makers, and the principles they should apply.

Substitute decision-making should be the option of last resort

In accordance with Article 12 of the United Nations Convention on the Rights of Persons With Disabilities (UNCRPD), substitute decision-making should be used only as a last resort, after the person has been provided with the maximum possible support to make decisions. Before making an order for a substitute decision-maker to be appointed, the Tribunal should be satisfied that all less intrusive and restrictive methods – including supported decision-making – have been considered and are unlikely to be effective.

Powers of substitute decision-makers should be tailored to individual circumstances

We believe that powers of substitute decision-makers should be specified in each order, taken into account the principles outlined in the *Guardianship Act*. This approach, recommended by the Law Reform Commission, strikes the appropriate balance between:

- informing decision-makers about the extent and limitations of their powers; and
- ensuring these powers are exercised proportionately, according to the individual's specific needs at that time.

Importance of personal compatibility and minimal conflict of interest

It is important that the Tribunal ensure that the proposed substitute decision-maker has a compatible personality with the person to whom they will provide support, as well as minimal conflict of interest. These criteria increase the likelihood that decisions will be made in accordance with a person's will and preferences.

In relation to financial managers, we contend that the required level of financial competence should be commensurate with the size of finances to be managed. When considering the management small personal finances, a Tribunal should prefer a family member's personal touch and knowledge of a person's preferences over a high level of financial acumen.

Principles to be applied by substitute decision-makers

In accordance with Article 12 of the UNCRPD, the *Guardianship Act* should provide that substitute decision-makers act in accordance with a person's will and preferences.

However, taking into account the limited choice and life experience available to many people with disability to date, we consider that the paramount consideration for substitute decision-makers should be the personal and social wellbeing of the person they are supporting.

We consider that a "structured will and preferences" model similar to that in the *My Health Records 2012 (Cth) Act* is appropriate, so that the *Guardianship Act* directs substitute decision-makers to:

1. Give effect to a person's will and preferences;
2. If a person's will and preferences cannot be determined, give effect to their likely will and preferences, where possible consulting people who may be aware of these preferences. A person's previous will and preferences, as well as their values and beliefs, should be considered when determining their likely will and preferences;
3. If a person's likely will and preferences cannot be determined, acting in a way that promotes their personal and social well-being.

Ultimately, decision-makers should be able to override a person's will and preferences if they would pose a serious risk to the person's personal and social well-being.

If you have any questions about points raised above, please email Ya'el Frisch (NCOSS Policy Officer) at yael@ncoss.org.au.

Yours sincerely

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Melanie Fernandez
Deputy Chief Executive Officer