

25 January 2017 JQ:kb

GPO Box 31  
Sydney NSW 2001

Dear Sir/Madam

**RE: NSW Law Reform Commission - Guardianship Act Review Update**

I am a senior specialist in Rehabilitation Medicine working in the Illawarra.

Thank you for the opportunity to make some representations with regards your review of the NSW Guardianship Act.

**Question Paper 2 – Decision Making Models**

– my opinion is that the current Guardianship Act of 1987 has some areas of concern.

You have noted some of these concerns in your document, but briefly:

- The standard and method of capacity assessment in medical and legal settings are quite different. For example, a person who has had numerous assessments by medical consultants, allied health, nursing, family, community health workers, general practitioners, etc over a number of months, can have their decision “over-ruled” by a solicitor visiting the patient without any reference to the above practitioners, and deem the person to have/not have capacity for a particular question.
- A legal practitioner is also able to assess whether a person, who health professional have concluded does not have capacity to change an ‘activated’ enduring guardianship (which has not previously raised any concerns about due diligence of the enduring guardian), can change /rescind the enduring guardianship order. While legal oversight is necessary, there is a concern that a person with significant impairment (lack of capacity) could be prone to accept assurances of certain benefits of others, if the current enduring guardianship is rescinded. My understanding is that the whole idea of appointing an enduring guardian (to become active if and when needed) is that the person (s) that they trust with this important role, will become the enduring guardian. If there are concerns about the diligence of the appointed enduring guardian, this can be referred to the Tribunal for review.
- The strength of the ‘legal assessment’, in effect, makes the “*NSW Guardianship Application process for adult inpatients in NSW Health facilities*”, (document number GL2016-026, publication date 4/11/2016) redundant. This document lists the responsibilities of health workers in ‘NSW Health’ facilities. In Section 2.3, the document outlines responsibilities of different medical teams, in Section 2.4 it outlines the roles of social workers, in Section 2.5 it outlines the roles of other health professionals, in Section 2.6 it outlines the roles of nurses and midwives. Often in the assessment of capacity, the team may request evidence from General Practitioners, family, community health care workers, etc.

The information in this letter can only be released if the Author has given authorisation to do so.

- With regard to 'capacity assessment' by the legal profession, I am unaware of any obligatory training to enable expertise in this area. The Law Society has expressed concern about this in the document 'When a client's mental capacity is in doubt (see attached).
- On a related matter, the current Guardianship legislation includes the right to appeal to the Supreme Court of NSW. I understand this can be an expensive, lengthy, and difficult process, possibly at times become impractical.

## Section 2 What is a solicitor's role in mental capacity assessment?

A solicitor can be involved in carrying out a "legal" assessment of capacity. There is no single definition of legal capacity in New South Wales.

A solicitor may or may not have had any experience or training in what is involved in assessment capacity for a person to make a particular decision.

The position with regards the requirements for legal capacity assessment, I think, need to be clarified. The NSW Health guidelines (document number GL2016-026, publication date 4/11/2016) provide a rigorous framework in which capacity should be assessed in public hospitals. I have not been able to find a similar document with guidelines for the legal profession.

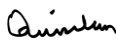
A practical concern is assessment of risk. NSW Health seems to be extremely risk averse –my area of work, rehabilitation, often involves people caring for people with dementia, brain injury, language impairment, frailty, etc. In NSW, there is a lack of guidance with regards 'risk' or 'acceptable risk', and vulnerability. For example, people who tend to fall are often advised, sometimes strongly, that nursing home level of care is the preferred (or even the 'only') option – at least some of these patients may have capacity to make such a decision.

There are a number of people kept in NSW public hospitals, despite requests to return home (bearing in mind the patient may have no concept of what or where 'home' is), because of a concern of risk and 'duty of care' to patients. In some circumstances, some of these patients may fall under the information provided in the *NCAT guardianship division factsheet on restrictive practices and guardianship* (attached). The application for an NCAT guardianship division hearing may take some time (months) during which time the legal status of the patient, and the hospital, are, I think, uncertain.

I would ask that some mechanism could be discussed, where people in this situation have more legal oversight/protection in a more efficient manner.

As in your introductory discussion, Article 12 of the Convention on the Rights of Persons with Disabilities should address this concern when implemented in Australia - the advancement of supported decision making represents excellent progress.

Yours faithfully

Dr John Quinlan FAFRM

**Specialist in Rehabilitation Medicine**

Provider Number 0438165L

CC: MR

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Attached:

***Law Society of NSW document "When a client's mental capacity is in doubt" the practical guide for solicitors (2016).***

***NCAT Fact Sheet Guardianship Division - Restrictive practices and guardianship***

*References*

***Have your say: The role of guardians and financial managers***

[http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc\\_current\\_projects/Guardianship/Have-your-say-the-role-of-guardians-and-financial-managers.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Have-your-say-the-role-of-guardians-and-financial-managers.aspx)

***Guardianship Act Review – Question Paper 2 and 3***

<http://being.org.au/2016/12/law-reform-of-guardianship-act-1987/>