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NSW Law Reform Commission Review of the Guardianship Act 1987 Question Paper 3: The role of guardians and financial managers

People with Disability Australia (PWDA)

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[redacted]

About People with Disability Australia (PWDA)

1. PWDA is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are a NSW and national, cross-disability peak representative organisation and member of Disabled Peoples Organisations Australia (DPO Australia). We represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation. PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. We have a vision of a socially just, accessible and inclusive community, in which the human rights, belonging, contribution, potential and diversity of all people with disability are recognised, respected and celebrated with pride.

Introduction

2. As we have outlined in our response to question papers 1 and 2, we strongly urge the Law Reform Commission to reformulate the legal structure around decision-making in NSW, to genuinely facilitate a CRPD compliant legal capacity framework.
3. Under this framework, decision-making support is one of a number of different forms of support an individual may access. For example, a person may access support around personal aspects such as dressing and cooking, another may access Auslan for work, and another person may access support to make decisions. All of these supports contribute in different ways to a person going about their everyday lives.
4. As we acknowledge in question paper 2, supported decision making already occurs, often informally, through advocates, family and friends, and support workers. However, the current legal capacity framework does not recognise supported decision-making as a form of support that should be actively pursued, assessed for adequacy, and provided when needed.
5. Under a reformulated Guardianship Act, and a CRPD legal capacity framework, there will be a place for representative decision makers. Some people will reach a point in their lives when there is no support available to enable them to express their will and preference. At this point, someone will need to act as a representative, to make decisions based on their previously expressed will and preference and balancing of rights.
6. Within the current guardianship framework, these representative decision makers take different forms – Enduring Guardian, Financial Manager, Power of Attorney etc. However, the important point is that they are all expressing the decisions of someone else, whether personal or financial.
7. Whether or not these representative decision makers have been appointed by an individual themselves, or appointed by a tribunal after a person can no longer be supported to make a decision themselves, ultimately the framework around how they function is the same.
8. It is not possible for a person to make a decision based on the 'best interest' of another individual, just as it is not possible for someone else to know the exact decision someone might make. The role of representative decision makers is to give effect to what a person with disability would likely want (their will and preference), based on all information available, including consulting with the persons formal, and informal supporters and a balancing exercise of their human rights in the given situation.

9. We reiterate that a representative arrangement should, on all occasions be a last resort. Within a CRPD legal capacity framework, all potential avenues for support are sought and provided (including decision making support), before a representative takes on that role.

10. It should not be the role of doctors, courts, tribunals or other agencies to decide whether a person is or is not able to exercise legal agency. In part this is because an assessment of the quality of support arrangements a person has is far beyond the scope of the training and experience of these professionals. They simply are not in a position that would qualify them to be making these judgments.

11. Before any steps are taken to appoint a representative decision maker, a full assessment should be made of their supports to ensure that there are no other options that could support a person to make the decision themselves. As we suggest, an independent body, or an arm of the tribunal could do this. Only after all other options have been exhausted would a representative arrangement be acceptable.

12. PWDA broadly agrees with the National Decision Making Principles outlined in the Australian Law Reform Commission (ALRC) report Equality, Capacity and Disability in Commonwealth Laws[1]. These principles provide a framework through which supported and representative decision-making should be implemented in NSW.

13. However, as an addition to these overarching principles, a CPRD compliant framework must make it clear that it is the capacity of support that is the deciding factor, not the capacity of the person.

14. We note that the language of the Act is to be covered in a future paper. However, whilst there are different roles within the current guardianship structure, we consider all of these roles as 'representatives', i.e. they are a person, whether self-appointed or appointed by a third party, who represents another in a decision making process.

Question 2: Who can be a guardian or a financial manager?

- **Question 2.1: Who can be an enduring guardian?**
  - **Who should be eligible to be appointed as an enduring guardian?**
  - **Who should be ineligible to be appointed as an enduring guardian?**

Personal appointments

15. It is the right of any individual to choose whomever they wish to act as their representative, once they cannot be supported to express their will and preferences themselves.

16. However, we do believe that prior to a personal appointment of a representative decision maker, individuals must be provided with the support they require, including decision making support, in order to determine who they wish to appoint, in what capacity, and for what areas of their lives. This may involve more than one representative. The independent body we suggest could play a role in this assessment and provision of support.

17. A person must enter into this arrangement without influence or coercion, and it should be made clear in legislation that the representative they appoint should be fully aware of their

[1] Australian Law Reform Commission Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124) https://www.alrc.gov.au/publications/equality-capacity-disability-report-124

responsibilities when taking on this role. As with personally appointed supported decision makers, representatives should commitment to the social model of disability and a clear understanding of Article 12 of the CRPD including the rights, will and preference standards. It should also be made clear in law that a person can revoke a representative decision making arrangement at any time.

18. As with supported decision makers, we believe that it would be inappropriate for direct service providers to act in a representative role due to the potential for conflict of interest. We also agree with the current legislation that the spouse, parent, children and siblings of service providers cannot act in this role.

19. Regardless of whom a person appoints to be their representative, arrangements should be subject to ongoing monitoring and review. This review would include an active, ongoing assessment of alternatives or additional support that may be available to enable to representative arrangement to be reviewed in whole, or in part.

Question 2.2: Who can be a tribunal-appointed guardian?

- **What should the Tribunal consider when deciding whether to appoint a particular person as a guardian?**

20. When it becomes apparent that there is no suitable support available to enable a person to make their own decision, a representative may be appointed to make decisions on their behalf. No appointment should be made in this regard until it is clear that a full assessment of supports has been done.

21. We note that an order for the appointment of a representative (whether guardian/financial manager etc.) should not be put in place based on a perceived level of disability (as per paragraph 2.9 of this question paper), or an individuals 'lack of capacity'. The CPRD makes no provision of a person's legal agency to be restricted based on disability, and all references in this regard should be removed from the Act. Rather, the legislation should be implicit in that a representative order is only put in place because of the failure of support.

- **Who should be ineligible to act as a guardian?**

22. We generally support the current criteria for Guardians as outlined in the current Act, however note that the legislation should further elaborate what may constitute conflict of interest, as could occur with a service provider.

Question 2.3: When should the Public Guardian be appointed?

- **Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?**
- **Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?**

23. We acknowledge that some people may not have individuals in their lives that could act as their representative. The public guardian should be appointed as a last resort.

24. However, this arrangement should be subject to continued review, including ongoing assessment of the capacity of the support available. As with all representative orders, this should be revoked should it be identified that support can be provided for the individual to personally express their will and preference.

Question 2.4: Should community volunteers be able to act as guardians?

- **What could be the benefits and disadvantages of a community guardianship program?**

25. As we suggest in question paper 2, there may be a role for members of the community to play in acting as decision-making supporters to individuals who do not have the personal connections to take on this role. This could potentially expand to include representative decision-making.

26. A 'community decision-making program' in NSW could encompass both decision-making support and representative decision-making, with volunteers that are trained in the full decision making spectrum in line with the CRPD.

27. A person who has acted as a supporter for decision-making, may have developed a strong understand of a person's beliefs, likes, dislikes and principles.

28. If it is found that the support that they are providing is no longer appropriate and adequate for the person to express their own will and preference, then there may be a subsequent role for them to play as a representative, particularly if there is no other suitable person to act in this regard.

29. A community program of such kind would reduce the requirement of the public guardian to act as a representative. However there are a number of important considerations and reservations:

    - the arrangement would need to be under constant review to guard against the potential for exploitation and abuse.
    - the program would need to include rigorous training, monitoring and evaluation
    - the community volunteers would need ongoing support from an independent body skilled in the assessment and provision of supports. This would ensure that there is ongoing consideration as to whether new and better support can be found to remove the need for representative decision making.

Question 2.5: Who can be a private manager?

30. There should be consistent criteria around who can act as a representative, whichever capacity this is. This should include a requirement for safeguards to protect against exploitation and abuse, and the Act should legislate that the arrangement should be subject to ongoing review, including a review of available supports at a given time.

31. Currently private managers are not subject to the same criteria as private guardians under the Act. This being that they 'must satisfy criteria relating to their compatibility with the person under guardianship, the absence of undue conflicts of interest, and their willingness and ability to exercise guardianship functions'. We believe that the Act should provide for safeguards around all representative decision makers, particularly in regards to undue conflict of interest. A paid service provider for example should not act as a financial manager, as this provides opportunity for exploitation and abuse.

32. As detailed in question paper 3, the Supreme Court has suggested a range of factors to be considered when appointing a 'suitable person' to the position of manager[2]. Above all, the

[2] Question paper 3, page 12, paragraphs 2.38 – 2.47

Supreme Court has emphasised that the welfare and best interests of the person is the "dominant consideration".

33. As we have previously stated, it is not possible for a representative to determine the 'best interests' of another individual. All references in this regard should be removed from the Act.

34. An overarching criteria for representatives could include aspects relevant for financial decisions, as recommended by the the Standing Committee[3], including:

    - the personality of the proposed financial manager is generally compatible with that of the person under the financial management order
    - there is no undue conflict between the interests (particularly, the financial interests) of the proposed financial manager and those of the person under the financial management order and
    - the proposed financial manager is both willing and able to exercise the functions conferred or imposed by the proposed financial management order.[4]

Question 2.6: Should the NSW Trustee be appointed only as a last resort

35. As with guardianship, public appointments as trustee should be considered as a last resort on all occasions. In order to appoint the NSW Trustee, there must be clear evidence that all alternatives have been pursued and been proven to be unsuitable or ineffective. The Act should specifically state that the NSW Trustee should not be appointed until all other options have been pursued and found to be unsuitable. The independent body that we suggest should have oversight of this review and make recommendations in this regard.

36. We believe that this should also be the case for private corporations being appointed to act on a person's behalf.

37. As with all representative agreements this would be under continual review.

Question 2.7: Should the Act include a succession planning mechanism?

38. We support the view of the Victorian Law Reform Commission that succession planning should be an option, and that evidence informing this process should include succession documents from relevant third parties, including family and friends. We acknowledge that many family and friends would be concerned about the care of their loved ones once they are no longer around.

39. However, at the time that a succession plan would take effect, it must be a requirement that an assessment is completed of available supports, to ensure that at that time, no other less restrictive arrangement can be put in place.

3. What powers and functions should guardians and financial managers have?

Question 3.1: What powers and functions should enduring guardians have?

[3] A detailed in the question paper 3, page 14, paragraph 2.48 - NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) rec 13

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- **Should the *Guardianship Act* contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian? If so, what should be included on this list?**
- **Should the *Guardianship Act* contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so, what should be included on this list?**

40. If an 'appointer' has specified the powers and functions that they wish their representative to undertake on their behalf, then this should be respected and upheld. However, on the drafting of a 'document of appointment' it should be specified in legislation that the 'appointer' should be provided with all required support in order to make that appointment (including decision making support). The independent body we propose would perform this assessment and ensure that all available supports are in place.

41. The following text should be removed from the Act 'The enduring guardian can exercise these functions once the appointer becomes "a person in need of a guardian".[5] That is, they become a "person who, because of a disability, is totally or partially incapable of managing his or her person".[6]

42. As we have previously outlined, all references to a person's 'capacity' should be removed from the Act. In addition, there is no provision in the CPRD for a person to be denied of legal capacity based on perceived disability. A representative arrangement would only come into effect when it has been determined, by the tribunal, on recommendation from the independent body we propose, that there are no suitable supports at that time to enable the individual to express their will and preference.

43. As recommended by the Victorian Law Reform Commission, we agree that an 'appointer' can authorise their guardian to act on 'personal matters', and that a non –exhaustive list of matters be specified in the Act to provide for personal preferences.

44. However, as mentioned above, the 'appointer' must have access to all possible supports at the time they are drawing up the agreement, and this be under constant review, to ensure that where there is opportunity for a personal matter to be taken out of an agreement it is done so.

45. We also support the VLRC recommendation that a non-exhaustive list of powers that an enduring personal guardian cannot exercise be included. However, we are deeply concerned by the suggested wording contained in the VLRC report around 'a decision to detain or compulsorily treat the person for reasons other than the personal and social wellbeing of the person'.

46. Currently some people, particularly those with psychosocial, cognitive and intellectual disability, are subject to restrictive practices and unauthorised treatment that are deemed suitable for their 'personal and social well-being'. We understand that medical treatment under the Act is to be covered in a separate paper, so we will further elaborate on our concerns at that time.

Question 3.2: Should the Tribunal be able to make plenary orders?

[5] *Guardianship Act 1987* (NSW) s 6A.
[6] *Guardianship Act 1987* (NSW) s 3(1) definition of "person in need of a guardian"

47. We do not believe that there should be provision in the Act for plenary orders. Given that the list of powers for a guardian is non-exhaustive, we believe that due consideration for any additional decision that falls outside those specified in the order can be made. However, the tribunal must take advice from the independent body, and ensure that any additional decision to be made is least restrictive of an individuals rights, and it has been determined that there are no available supports in order for the individual to make that decision themselves.

Question 3.3: What powers and functions should tribunal-appointed guardians have?

Question 3.4: Are there any powers and functions that guardians should not be able to have?

Question 3.5: What powers and functions should financial managers have?

48. We believe that the powers and functions of representative decision makers appointed by the tribunal (whether they be guardians or financial managers) should be consistent.

Question 3.6: Should the roles of guardians and financial managers remain separate?

49. Representative decision makers are appointed for different roles, some are personal decisions and some financial. Some people will want the same representative to act on their behalf for all of their decisions. Others may want these decisions separated. Where representatives are appointed on a person's behalf by a tribunal, it may be that different representatives are appointed due to having different decision making skills (i.e. a previous supporter may be appropriate to be a representative decision maker for personal matters, but someone with more financial expertise may be appointed to manage finances.

50. What is important is that the representative decision making arrangement put in place focuses on the individual for whom they are acting, and these specific decisions to be made.

Question 4.1: What decision-making principles should guardians and financial managers observe?

51. The Guardianship Act specifies that guardians and financial managers must give "paramount consideration" to the person's "welfare and interests".[7] As we have outlined above, this is inconsistent with the CRPD, and all text in this regard should be removed.

52. Recommendation 3.3 (2) of the ALRC report provides principles under which a representative decision maker should act. This framework should be adopted in NSW, but must also specifically identify that representatives should be committed to actively pursuing all alternative support to enable to person to make the decision themselves.

Question 4.3: Should NSW adopt a "substituted judgment" model?

53. It is not possible for a representative decision maker to implement 'the decision that the person "would have made if they did not have impaired capacity"[8]. This implies that the representative knows exactly what the person would want, at that point in time, and this will always be subjective.

54. As such we do not believe that 'substituted judgement' is a model that conforms to a CPRD compliant legal capacity framework.

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[7] *Guardianship Act 1987* (NSW) s 4(a); *NSW Trustee and Guardianship Act 2009* (NSW) s 39(a).

[8] As suggested in question paper 3, page 43, paragraph 4.32

Question 4.4: Should NSW adopt a "structured will and preferences" model?

NSW should adopt a CRPD compliant legal capacity framework, which encompasses the full spectrum of ways that a person can be supported to make a decision. National Decision Making principles, as recommended by the ALRC outline the structure under which this framework could function, with the caveat that to be genuinely CRPD compliant, this framework must emphasise the important of support, and that it is the capacity of support that is to be measured, not the capacity of the person. Under this framework there would be no need for a 'structured will and preference' model, as this would be implicit under the guiding principles.