



Mental Health Commission
of New South Wales

Review of the *Guardianship Act 1987 (NSW)*

***Submission to the NSW Law Reform Commission on
Question Paper Three: The role of guardians and financial
managers by the Mental Health Commission of New South
Wales***

February 2017



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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 Three: 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

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.

The Commission has provided submissions on the background paper and question papers one and two. The current submission builds on the arguments put forward in those papers.

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

Who can be a guardian or a financial manager and what powers and functions should they have?

As set out in the Commission's responses to earlier question papers, substitute decision making should be an option of last resort.

The Commission broadly agrees with the eligibility criteria, powers and functions set out in the current *Guardianship Act 1987 (NSW)* (the Act). However, some changes may be required to bring the Act into line with the United Nations Convention on the Rights of Persons with Disabilities. Accordingly, in all sections of the Act preference should be given to the least restrictive option, for the shortest period of time and as far as possible (and in the context of the following discussion) the actions of anyone exercising functions under the Act should seek to give effect to the will and preference of the person.

What decision making principles should guardians and financial managers observe?

The current general principles set out in the Act are comprehensive. However, the Commission would support including the requirements to:

- provide the person with support to make, or participate in, decisions that affect them
- consider the importance of maintaining (or creating) support networks and supportive relationships.

As stated in the Commission's preliminary submission, the Victoria Law Reform Commission's recommendation to replace best interest provisions with "personal and social wellbeing' is preferred¹. In respect of the current Act, the Commission would support s 4(a) being replaced with

¹ The Mental Health Commission of NSW (2016), *Review of the Guardianship Act 1987 (NSW): Preliminary Submission*, accessible via <http://nswmentalhealthcommission.com.au/publications/review-of-guardianship-act-1987-nsw>

an overarching responsibility to act in a way that promotes the personal and social wellbeing of the represented person. This provides direction in those cases where the person's will and preferences are impossible to establish or enact. However, 'personal and social wellbeing' should be defined to include giving effect to the represented person's will and preferences, where possible and subject to the caveat discussed below.

The question paper proposes two models for substituted decision making – substituted judgment and structured will and preferences model. On the information provided in the question paper, the Commission prefers the structured will and preferences model, which provides a hierarchy of considerations for substitute decision making based on the *My Health Records Act 2012 (Cth)*:

- Duty to ascertain and give effect to the person's will and preferences²
- If a person's will and preferences cannot be determined, ascertain their likely will and preferences by reference to the agreement appointing the representative or, where possible consulting people who may be aware of the person's will and preferences. Then give effect to the person's likely will and preferences³.
- If a person's will and preferences or likely will and preferences cannot be ascertained, the representative must act in a manner that promotes the personal and social wellbeing of the person⁴.

In adopting this model provision for advance care directives could help greatly with ascertaining a person's likely will and preferences.

My Health Records Act 2012 (Cth) contains the following provision

"However, if to [give effect to the person's will and preferences] would pose a serious risk to the healthcare recipient's personal and social wellbeing, the representative must instead act in a manner that promotes the personal and social wellbeing of the healthcare recipient."⁵

The Commission agrees that such a provision is necessary, however, it should be made clear in the legislation that it is only to be applied in extraordinary circumstances with risk clearly defined and amounting to more than an 'unwise' decision.

² *My Health Record Act 2012 (Cth)* s 7A(1) and s7A(4)

³ *Ibid* ss 7A(2), (3) and (4)

⁴ *Ibid* s 7A(6)

⁵ *Ibid* s 7A(5)