

NSW DISABILITY NETWORK FORUM

Review of the *Guardianship Act 1987*

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About the NSW Disability Network Forum

Initiated in June 2011, the NSW Disability Network Forum (DNF) comprises non-government, non-provider peak representative, advocacy and information groups whose primary aim is to promote the interests of people with disability. The aim of the NSW Disability Network Forum is to build capacity within and across all organisations and groups so that the interests of people with disability are advanced through policy and systemic advocacy. The Council of Social Service of NSW (NCOSS) provides secretariat support to the DNF.

NSW Disability Network Forum Member Organisations:

Aboriginal Disability Network NSW	Multicultural Disability Advocacy Association of NSW
Association of Blind Citizens of NSW	Being Mental Health & Wellbeing Consumer Advisory Group
Synapse (Brain Injury Association NSW))	NSW Council for Intellectual Disability
Deaf Australia NSW	NSW Disability Advocacy Network
Deaf Society of NSW	People with Disability Australia
DeafBlind Association NSW	Physical Disability Council of NSW
Deafness Council (NSW)	Positive Life NSW
Information on Disability and Education Awareness Services (IDEAS) NSW	Self Advocacy Sydney
Institute For Family Advocacy	Side By Side Advocacy Incorporated
Intellectual Disability Rights Service	Council of Social Service of NSW

This submission was developed by NCOSS in consultation with the DNF members and approved by NCOSS Deputy CEO.

Introduction

The DNF welcomes the opportunity to provide input into the NSW Law Reform Commission's review of the *Guardianship Act 1987 (NSW) (Guardianship Act)*. We believe the review presents an important opportunity to align NSW guardianship legislation with person centered, rights-based developments occurring in relation to people with disability at the international, Commonwealth and State levels.

The *UN Convention on the Rights of Persons with Disabilities (UNCRPD)* marked a paradigm shift in the way people with disability were viewed in law. A central element of this shift is the assumption of decision-making capacity, which is outlined in Article 12 of the UNCRPD. Article 12 shifts the focus from decisions being made in the objective "best interests" of people with disability, to decisions being made in accordance with the person's subjective "will and preference".

In 2014, the Australian Law Reform Commission (ALRC) recommended National Decision-Making Principles and Guidelines to align Commonwealth laws with Article 12 of the UNCRPD.¹ The full text of Article 12 of the UNCRPD and the National Decision-Making Principles recommended by the ALRC are found in an Appendix to this submission.

Both the *National Disability Insurance Scheme Act 2013* (Cth) and the *Disability Inclusion Act 2014* (NSW) refer to the right of people with disability to make decisions. Importantly for NSW, s. 4 of the *Disability Inclusion Act 2014* (NSW) contains the principle that:

“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.

The assumption of capacity will guide our comments on some of the considerations put forward by the Law Reform Commission as parameters for its reform of the *Guardianship Act*.

Article 12 UNCRPD: the principles

Article 12 of the UNCRPD is based on the premise that that all people have legal agency, but that some people may require support in order to exercise it. Under Article 12, the question shifts from whether legal capacity exists to how adequate support can be provided so that a person’s will and preference (legal agency) can be expressed, and recognised as decisions before the law.

The following principles can be ascertained from Article 12:

- Legal agency is exercised when will and preference is expressed.
- Every person has the right to support to express their will and preference if required. For some people, this may include decision-making support.
- The State is obliged to provide the support necessary for a person to express their will and preference.
- Restrictions on the exercise of legal capacity must be in accordance with strict safeguards.

The basis and parameters for decisions made pursuant to a substitute decision-making model

Although supported decision-making should operate as the default position in all areas, the DNF recognises that substitute decision-making will still need to be implemented in some cases. For example, in situations where people with disability are being abused or exploited, and unable to identify breaches of their rights, a substitute or representative decision-maker should be appointed for them.

In accordance with Article 12 of the UNCRPD, the following parameters should be applied to substitute decision-making:

- Before a substitute decision-making model is applied, extensive attempts should be made to assist the person to exercise their will and preference;

¹Australian Law Reform Commission (2014) [Equality, Capacity and Disability in Commonwealth Laws](#) Report

- A representative should give effect to a person’s will and preference, or likely will and preference (based on the experience of the representative and/or significant others in the person’s life) rather than what is perceived to be in the person’s best interest.
- If the person’s will and preference cannot be determined, a representative should act in accordance with human rights principles, with the least restriction possible. For example, decisions about living in the community should be made in accordance with Article 19 of the UNCRPD.
- Substitute decision-making should be based on the balancing of conflicting rights relevant to that person’s situation. This balancing act should be limited and issue specific, apply for the shortest time possible, and be governed by the principles of proportionality.
- Decisions of representatives should be subject to regular review to ensure these parameters are upheld.

It is crucial that representative decision-makers are provided with regular information and training on these principles and support to implement them.

Recommendation 1

That parameters applied to the substitute decision-making model ensures that the model operates in accordance with Article 12 of the UNCRPD.

Recommendation 2

That representative decision-makers are provided with regular information and training on human rights principles; and support to implement them.

The basis and parameters for decisions made under a supported decision-making model, if adopted, and the relationship and boundaries between this and a substituted decision-making model including the costs of implementation

By requiring State parties to provide people with disability with support to exercise their legal capacity, Article 12(3) of the UNCRPD suggests the default position should be supported decision-making, rather than substitute decision-making.

Under a supported decision-making model, a person’s decision-making ability would be considered in the context of available supports, and could vary between types of decisions. Likewise, a person’s level of participation in decisions which affect them will vary according to the type of decision, and the person’s skills and previous experiences. A person can make their own decisions, or share decisions with others.

Communication support is a central element of decision-making making. For example, if a person’s preferred language is not English, information, interpretation and support provided in their first

language (which could include Auslan) will be decisive in enabling them to exercise their legal agency. A person may also need communication support because of an intellectual disability, such as someone to assist them to interpret concepts.

A crucial component of supported decision-making involves a person being supported to develop their decision-making capacity. For this to occur, decision-making supporters should provide opportunities for the person to access and understand information about the decision, possible constraints and consequences and widen their experiences of what might be possible. For some people, and in some situations, decisions will become self-generating as their skills and experiences develop.

It is equally important for supporters to be trained in the variety of strategies they can use to support a person to develop capacity, including:

- providing access to information and or opportunities to widen experiences of what might be possible;
- breaking decisions into smaller components;
- enabling, ascertaining or interpreting a person's preferences; and
- helping the person to understand constraints and consequences of decisions.

Training is important because supported decision-making requires an expertise and understanding of human rights that people who are currently eligible to be guardians do not necessarily have. The central role of guidance and training on supported decision-making to both supporters and people receiving support was recognised by the ALRC.²

The DNF emphasises legislation should not attempt to diminish people's rights because of a desire to reduce expenditure. It is important that the appropriate resources are available for practices to align with the legislation. In some cases, the cost of providing the appropriate support for people to communicate their will and preference may be quite high, but this is the standard required by the UNCRPD.

Recommendation 3

That decision-making supporters be provided with tools to assist in the development of decision-making capacity.

Recommendation 4

That the guardianship system recognises the crucial role of communication support by making information and interpreters available in community languages, Auslan and providing disability-related communication support.

²Australian Law Reform Commission (2014) [Equality, Capacity and Disability in Commonwealth Laws](#) Report, recommendation 4.11.

The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level; comments on the interrelationship between guardianship legislation and the *National Disability Insurance Scheme Act 2013*

When commenting on this consideration, it is important to keep in mind that the frameworks surrounding the NDIS have not yet been finalised or operationalised. As such, it is difficult to give an informed view of how they will work and the level of resources dedicated to them. This is especially the case for the Quality and Safeguards framework which is likely to be highly relevant in the context of guardianship legislation.

To address this issue, the Commission may wish to request a briefing from the NDIS Transition team at FACS to better understand how the *Guardianship Act 1987* interacts with current structures of NDIS implementation in NSW and what will happen in the future.

The *NDIS Act* focuses on maximizing choice and control of participants and guardianship law in NSW needs to reflect this. To reflect choice, control and the UNCRPD, the *Guardianship Act 1987* should:

- establish a presumption of capacity;
- mandate, and provide for, supported decision-making arrangements; and
- provide for the effective oversight of supported decision-making arrangements (through regular review) to prevent against abuse, neglect and exploitation.

Guardianship legislation and the *National Disability Insurance Scheme Act 2013* (Cth) intersect in terms of nominee provisions. Currently, Part 5 of the *National Disability Insurance Scheme Act 2013* (Cth) provides for the CEO of the NDIA to appoint nominees (representatives) to make choices for the participant where the participant is perceived to lack capacity. Many decisions made under the *National Disability Insurance Scheme Act 2013* (Cth) fall outside the scope of guardianship. In the context of guardianship, the person with disability should instead be supported to make their own decisions.

The DNF concurs with the recommended amendments to the *National Disability Insurance Scheme Act 2013* (Cth) put forward by the ALRC that:

- the CEO of the NDIA can apply to a Guardianship Tribunal to appoint a nominee for an NDIS participant before exercising this power themselves (rec 5.5); and
- to be consistent with Commonwealth decision-making framework, provisions should make it clear that the CEO's powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed, and with particular regard to the participant's will, preferences and support networks (recs 5.2-5.4).³

The level of access to legal support for NDIS participants and people with disability more broadly is not yet clear and it should not be assumed that people with disability and/or those who are eligible for the NDIS will be able to fund this in their NDIS plans or through other frameworks such as the NDIS Information, Linkages and Capacity (ILC) Framework.

³ Ibid, recommendation 5-2-5.5.

Recommendation 5

That the Commission seeks a briefing from the NDIS Transition team at FaCS to better understand how the *Guardianship Act 1987* interacts with current structures being developed in preparation for the full implementation of the NDIS in NSW including oversight of restrictive practices.

‘Decision-making capacity’ is more appropriate conceptual language for the guardianship and financial management regime than ‘disability’.

The DNF believes that in the context of the *Guardianship Act 1987* “decision-making capacity” is a more appropriate term than ‘disability.’ The term more accurately assesses what is being judged, decreasing the risk of a person’s autonomy being restricted on the basis of a blanket label of ‘disability’. We stress that there is no homogenous level of capacity within any cohort of consumers. Moreover, the ALRC Guidelines specifically recognise that a person must not be assumed to lack decision-making ability on the basis of having a disability.⁴

The term ‘decision-making capacity’:

- is strengths-based;
- appropriately aligns with the right to legal capacity in Article 12 of the UNCRPD and the person-centred approach of the *National Disability Insurance Scheme Act 2013* (Cth and *Disability Inclusion Act 2014* (NSW));
- recognises that a person can have varying decision-making capacity at different times (as is the case with people with psychosocial disability), so that different levels of support would be needed to enable the person to make decisions; and
- allows a person’s view of their own capacity to be taken into consideration, for example in the form of a Wellness Recovery Action Plan⁵.

Recommendation 6

That the term ‘decision-making capacity’ be used instead of ‘disability’ in guardianship legislation.

Guardianship legislation and restrictive practices

Instead of being authorised by legislative criteria, the DNF recommends that the use of restrictive practices should be considered on a case-by case basis. The DNF are concerned about instances where services employ restrictive practices as a first, rather than last resort. For example, a person may be secluded following a ‘challenging behavior’ without any attempt to understand the causes of this behaviour or help the person overcome it.

Accordingly, it is crucial that any application to apply a restrictive practice must be coupled with an outline of what has been done to respond to the underlying cause of challenging behaviour. It is also important that a plan to address these underlying issues is in place for the period after any

⁴ Australian Law Reform Commission (2014) Supported Decision-Making Guidelines; Proposal 3:7

⁵ Wellness Recovery Action Plan, and WRAP, are the registered trademarks for a recovery model authored and designed by Mary Ellen Copeland. See <http://mentalhealthrecovery.com/wrap-is/>

restrictive practice has been instituted. Explicit criteria within the *Guardianship Act* would allow the service to be 'within law' without considering alternatives to restrictive practices which uphold Article 12 UNCRPD to a greater extent. As a severe restriction on capacity, Article 12 UNCRPD mandates that restrictive practices must be applied with proportionality, for the shortest time possible, and be regularly reviewed.

In a NSW context, it is important to maintain the Office of the Senior Practitioner, an independent, statutory office which regulates the use of restrictive practices in NSW. This office currently sits within the Department of Ageing, Disability and Home Care, and it is presently unclear where it will transition to post NDIS implementation. There is no mention of the Senior Practitioner in the Bilateral Agreement between NSW and the Commonwealth, only that existing State safeguarding systems will operate throughout the transition to the NDIS (until 2018).

The Operational Plan Commitment between the National Disability Insurance Agency (NDIA), New South Wales Government and Commonwealth Government for Transition to Full Implementation of the NDIS notes that working arrangements to manage the transition to a national Quality and Safeguards Framework will be completed in the third quarter of 2015/2016. The DNF recommends that the Commission raise the issue of oversight of the use of restrictive practices in their meeting with the FaCS NDIS transition team to understand how shifts to a national system will have a bearing on Guardianship legislation in the future.

The Senior Practitioner ought to have the explicit role of protecting and promoting the human rights of persons with cognitive impairment subject to, or at risk of, restrictive practices.

Recommendation 7

That each instance of a restrictive practice be used as a last resort in consultation with the person with disability.

Recommendation 8

That any application to instil a restrictive practice is coupled with an outline of what has been done to respond to the underlying cause of challenging behaviour and evidence that a plan to work with the person to resolve unaddressed issues is in place for the period after any restrictive practice has been instituted.

Recommendation 9

That the Office of the Senior Practitioner is maintained to regulate the use of restrictive practices in NSW.

The *Guardianship Act 1987* should provide for the regular review of financial management orders.

The DNF believes that the *Guardianship Act 1987* should provide for the regular review of financial management orders. This is consistent with Article 12(4) of the UNCRPD which provides that restrictions in the exercise of capacity:

- respect the rights, will and preferences of the person;
- are free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;

- apply for the shortest time possible; and;
- are subject to regular review by a competent, independent and impartial authority or judicial body.

Recommendation 10:

That the *Guardianship Act 1987* provides for the regular review of financial management orders.

Appendix

Article 12 UNCRPD

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

ALRC NATIONAL DECISION-MAKING PRINCIPLES

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.