4 February 2018

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NSW Law Reform Commission
Submission: Review of the *Guardianship Act 1987* (NSW): Draft Proposals

The Mental Health Coordinating Council (MHCC) is the peak body representing mental health community managed organisations (CMOs) in NSW. The MHCC is also a founding member of Community Mental Health Australia (CMHA) the alliance of eight state and territory community sector mental health peak bodies. Together we represent more than 800 CMOs delivering mental health and related services nationally. Since March 2016, we have provided a number of submissions to this review, including a preliminary submission; second and third submissions in August and December 2016 respectively, and submissions to Question Papers 4; 5 & 6 in February 2017.

MHCC wish to congratulate the NSW LRC for undertaking this work with such rigour. The review has provided the mental health sector with the detail necessary to consider every aspect of the legislation, and sufficient time to respond to the questions asked. We are pleased to see that the draft proposals reflect many of the amendments that MHCC mentioned in their submissions, and that these reforms align with recovery orientation. Likewise we are encouraged to see that supported decision-making is proposed as a means of promoting self-determination and maximising independence.

MHCC sincerely hope that the NSW Government will approve the LRC's recommendations, because by giving effect to a person's will and preferences wherever possible, approval would represent a 'real win' for people living with psychosocial disability in exercising choice and control.

For the purposes of those reading this submission who are unfamiliar with earlier discussions, we have included the NSW LRC's Summary of Key Draft Proposals in Appendix 1, so as to provide context to our comments. These mainly relate to the tightening up of some of the proposals and in some instances suggesting additional clarity.

- The Terms of Reference include items for consideration under item 6 (p. xi) which ask "whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity." MHCC are concerned that this aspect of the review has not been adequately addressed in the Draft Proposals (DP) under DP1.7 (p.8) and DP8.1 (pp.59-60).

  We agree that quality and safeguarding regulation needs to be consistent across all service delivery contexts. However, the regulations operating under the NDIS with regards to behaviour support are under review, and in our opinion inadequately give thought to the issues that frequently arise when working with people living with mental health conditions and

psychosocial disability inside and outside of the NDIS. We understand that the regulation and approval of restrictive practices under the NDIS is being monitored, but it is unclear as to how NSW requirements and approval will sit alongside the Commonwealth mechanisms.

The regulations need to be comprehensive and processes for approval clarified. CMHA (the alliance of the eight state and territory mental health peak bodies) have jointly expressed their concern that the Commonwealth Quality and Safeguarding Framework may inadequately address the workforce skills needed to assess and work with people with psychosocial disability. It is important to ensure that those undertaking this work are skilled and guided by a trauma-informed recovery-oriented approach. The National Standards for Disability Services (which the NDIS currently use) in our view do not reflect these principles and a best practice approach. Likewise, the Act does not describe appeals or complaints processes or mechanisms, it just speaks to breaking civil law, and penalties or criminal offence. There needs to be greater clarity as to how consumers and carers can address these issues other than via the police.

- MHCC highlight the recent changes to the way people with lived experience are accessing services. This is largely as a consequence of NSW mental health reform processes, the establishment of PHNs and the broad-based roll-out of the NDIS. These circumstances are producing gaps in service monitoring, and without appropriate mechanisms to monitor and safeguard rights and to ensure proper access to complaints processes, these gaps will result in significant systems risks. With little transparency or ability to ensure detection, these risks have the potential to allow a range of harms and rights violations to occur with little accountability and advocacy processes in place.

  MHCC totally endorse the proposal to establish a Public Advocate to respond to matters of abuse, neglect and exploitation of vulnerable people in the community engaging with a range of support services. They will also play an important role in ensuring that there is an appropriate agency stepping-up in the case of an emergency where a person may need to be removed from a particular environment. Nevertheless, this does not provide a substitute for the vital role community advocates play in addressing a raft of important issues, working closely with individuals and minimising the need for matters to be brought to the Public Advocate.

  The role of community advocates and the Public Advocate is complementary and whilst there is a need for a body to exist that looks at systemic issues as well as individuals' matters, this in no way duplicates the role community advocates play in offering support to individuals and helping them navigate a complex and difficult terrain, as well as supporting them at hearings for guardianship, financial or legal matters.

  MHCC have raised these issues in numerous submissions to the NSW Law Reform Commission, *Review of the Guardianship Act1987* (NSW) and supports a role for a Public Advocate as the authority setting standards, guidelines and accreditation of support facilitators and enduring representatives, and undertaking review of complaints and consideration of ethical practice.

  In our view the Public Advocate should have the three-fold functions of advocacy, support and representation as well as investigative responsibilities and setting of standards and guidelines. These functions should operate through two separate divisions. Our preference is that the Public Advocate will also absorb the existing role of the Public Guardian as substitute decision-maker as well as providing the oversight of decision-making supporters or representatives across the spectrum of need.

  MHCC are keen to emphasise the need for both the Public Advocate and community advocacy services and are hopeful that the NSW Government will commit to ensuring that a

range of community managed services that undertake this work across many contexts are sustainably supported.

- Under the **New framework** section DP1.4 (p.6) we ask that the term used "Personal decisions" and the definition be considered further. The definition suggests that personal decisions refer to 'everyday decisions' which makes them sound trivial. However, we propose that these decisions are significant, and often dramatically affect people living with psychosocial disabilities, and should not be dismissed as minor. Hence, we emphasise the importance of maximising 'will and preference' and upholding the **General Principles** DP1.9 (p.8).

- In the **New Guidance** section on **Assessing decision-making ability** (p.6) the LRC comments that "stakeholder submissions generally agreed that it is important for the law to acknowledge that decision-making ability is decision and time specific, and that it should be clear what factors do not result in a finding of a lack of decision-making ability." However, this does not seem to have been adequately addressed in DP1.14 (p.10).

  We also alert the LRC to an aspect of 'decision-making ability' that particularly affects people living with mental health conditions. Whilst DP 1.14 (2) in (2b, p.10) refers to "the inability to make a decision may be temporary or permanent," greater consideration must be paid to episodic and fluctuating periods of mental ill-health which are not the same as a temporary or permanent inability to make a decision.

- In the **New Guidance** section on **Financial decisions** DP1.5 (p.7) we recommend that making wills or approving who might be the beneficiaries of insurance policies should be included.

- Under the **Personal support agreements** section DP2.3 (b, p.13) we recommend that neither bankruptcy nor guilt of an offence involving dishonesty recorded in a support agreement is adequate or acceptable. Whilst not wanting to limit the options available for people to appoint support persons or enduring representatives of their own choice in relation to financial matters, it is unclear what protection recording bankruptcy or an offence really provides, and what risks may still be present for the individual being supported or represented. Nevertheless, we see no reason why these supporters and representatives should not be eligible to support a person with regards to for example, personal, health and general living related matters.

- Under the **Personal support agreements** section DP2.16 **Protection from liability for supporters and third parties** (p.18) we suggest that the language is somewhat unclear and would benefit from a plainer English rewrite.

- Under **Tribunal support orders** section DP3 preamble (p.18) we raise an issue of concern which relates to how this facilitation of formal supported decision-making might be operationalised. As we mentioned in earlier submissions, we have safety concerns, particularly in relation to volunteers and their access to appropriate training and supervision.

- MHCC support adopting safeguards with regards to financial management orders that currently apply only to guardianship orders. Under the **Representation orders** section in DP5.6 **When a representation order has effect** ((3) & (4) p.36) propose that Financial Management Orders will now come under regular statutory review. This is a really important reform.

- Under the **Representation orders** section DP5.7 **Emergency orders** ((5), p.37) we recommend that the term 'custody' be rephrased as it may be unfamiliar to most lay readers except in the context of the custody of children, and instead to read as 'the extent to which the representative has decision-making authority,' or another non-legal term.

- Under the **Representation orders** section DP5.12 **Responsibilities of representatives** ((2)(a) p.39) we recommend the wording "develop a person's decision-making ability" be rephrased as 'develop a person's decision-making skills', and that this should be reflected in the Principles.

- Under the **Representation orders** section DP5.16 ((1)(c) p.40) we recommend the term 'force' be defined, e.g. does this include chemical and mechanical restraints? We also think that a 21 day limit may be difficult to operationalise, but support the notion of a short time-frame.

- Under the **Healthcare decision** section DP6.1 (p.44) MHCC particularly like this change that takes power away from the practitioner and gives it to the Tribunal. This is a much more satisfactory solution to ensure that the Tribunal can authorise a representative to make a decision that is manifestly in a person's best interest in emergency circumstances.

- Under the **Provisions of general application** section DP10 in **No registrations required** DP10.2 (p.64) MHCC comment that despite suggestions in earlier submissions regarding this matter, we now concede that whilst there would be many advantages in having a registration system in place, the issue of accuracy and currency presents difficulties that would be hard to overcome.

- Under the **Tribunal procedures and composition** section DP11(p.66) in **Notice and service requirements** DP11.4 ((b)p.67) MHCC propose that whilst this is a good step forward, it is not broad enough to encompass the complex dynamics around mental illness, lived experience of trauma in addition to the confusion that sometimes arises with regards to a person's presenting symptomology. People living with 'positive symptoms' of mental illness such as delusions, hallucinations and paranoia are often treated dismissively when they relate their past experiences and current safety concerns. This section item (b) needs to reflect a more nuanced approach to the attention professionals pay to what individuals express that may superficially seem to be related to the manifest symptoms.

MHCC thank the NSW Law Reform Commission for providing us with this opportunity to comment on The Review of the *Guardianship Act 1987* (NSW): Draft Proposals, and appreciate having been a part of the entire consultative process.

We express our willingness to be further consulted on any matters related to this review and this submission. We look forward with interest to reading the final legislative reforms presented to Government and in due course their response.

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4 February 2018

Appendix 1

Summary of key draft proposals

Key draft proposals are:

- NSW should have a new Act called the *Assisted Decision-Making Act* that provides a formal framework for both supported decision-making and (as a last resort) substitute decision-making.
- New general principles should reflect the UN Convention. These should include recognising the right to autonomy and the importance of giving effect to a person's will and preferences wherever possible.
- The term "decision-making ability" should be adopted (instead of "capacity").
- The term "disability" should be removed as a precondition for a Tribunal order and from the legislation altogether.
- The new Act should provide guidance on assessing a person's decision-making ability.
- The new Act should provide for two types of formal supported decision-making arrangements: personal support agreements and tribunal support orders.
- The new Act should provide for two types of formal substitute decision-making arrangements as a last resort: enduring representation agreements (to replace the current arrangements for enduring guardians and enduring powers of attorney) and representation orders (to replace the current arrangements for guardians and financial managers).
- The new Act should not allow the Tribunal to make plenary (or unlimited) orders (as it currently can for guardianship). Rather, the new Act should require all agreements and orders to specify the particular personal, healthcare, financial and/or restrictive practices functions for a supporter or representative.
- New decision-making principles should require representatives to give effect to a person's will and preferences wherever possible rather than a person's "best interests".
- The new Act should strengthen the safeguards that apply to enduring representation agreements and representation orders.
- The new Act should introduce review periods for representation orders where the representative has a financial function.
- The new Act should introduce new advocacy and investigative functions, to be performed by a Public Advocate.
- The new Act should set out specific considerations relevant to Aboriginal people and Torres Strait Islanders.
- The new Act should be internally consistent and be drafted using simple and accessible language and structure.

The proposals assume the existence of the following key entities: the NSW Trustee (currently titled the NSW Trustee and Guardian), the Public Representative (currently titled the Public Guardian), the Assisted Decision-Making Division (currently titled the Guardianship Division of the NSW Civil and Administrative Tribunal), and the Public Advocate (a proposed new entity). We propose that the roles of the Public Representative and Public Advocate should be combined; however, we have distinguished these entities within the proposals in case different administrative arrangements are adopted, to make clear which agency should undertake which function.