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NSW Law Reform Commission
Preliminary submission: Review *Guardianship Act 1987* (NSW)

The Mental Health Coordinating Council (MHCC) is the peak body representing community managed organisations (CMOs) in NSW. Our members deliver a range of psychosocial disability support programs and services including housing, employment and social inclusion activities, as well as clinical and peer supported services with a focus on recovery oriented practice. MHCC members also include organisations that provide advocacy, education, training and professional development and information services. We work in partnership with both state and Commonwealth governments to promote recovery and social inclusion for people affected by mental health conditions, and participate extensively in policy and sector development and facilitate linkages between government, community and private sectors in order to effect systemic change. MHCC manage and conduct collaborative research and sector development projects on behalf of the sector and is a registered training organisation (MHCC Learning & Development) delivering nationally accredited mental health training and professional development. MHCC is a founding member of Community Mental Health Australia (CMHA) the alliance of all eight state and territory community sector mental health peak bodies. Together we represent more than 800 CMOs delivering mental health and related services nationally.

MHCC thanks the NSW Law Reform Commission (NSWLRC) for inviting us to comment on this review made public on 17 January 2016. The Commission has been asked to "review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) "having regard to a number of broad based questions. Please note that hereafter we refer to the Guardianship Act as the GA.

MHCC provide comment as follows:

1. The relationship between the Guardianship Act 1987 (NSW) and other related legislation

- MHCC suggest that review of the GA consider the development of laws with a stronger human rights focus. Particularly in the US and Canada new adult guardianship laws have emerged to protect the rights of people with decision-making disabilities, including those with psychiatric impairment. These examples of legislation assert autonomy rights even more strongly than mental health legislation, by limiting the scope and duration of legal interventions, providing substitute decision-makers independent of medical authorities, and

establishing independent public agencies (typically 'public advocates') as a watchdog over the operations of the legislation.[1]

- MHCC suggest that some of the language in the GA is unnecessarily convoluted. MHCC provide an example of where the language could be simplified. In respect to the relationship between the GA and s3(C) Relationship with *Mental Health Act 2007*

  (3) However:

  (a) a guardianship order made, or

  (b) an instrument appointing an enduring guardian, in respect of a person who is, or becomes, a patient within the meaning of the Mental Health Act 2007 is effective only to the extent that the terms of the order or instrument are consistent with any determination or order made under the Mental Health Act 2007 in respect of the patient.

  We suggest that this could be reworded to indicate that where a person under Guardianship comes under the MHA, that the MHA prevails.

- With regards to temporary orders or adjournments (15(2); 16 (1) (b); 17 (3) (4); & 18(2) (3), we understand that adjournments are more likely when a person is in hospital. Under the MHA when someone is in hospital it may be considered that there is a less urgent need to make a temporary order since the medical superintendent or delegate can consent to what may be required. However, we propose that greater clarity is necessary as to role of the medical superintendent in this context, since he/she can only consent to mental health treatment. Therefore a temporary order for a guardian to be appointed specifying particular functions may still be appropriate.

- Section 34 Application of Part

  (1) This Part applies to a patient:

  (a) who is of or above the age of 16 years, and

  (b) who is incapable of giving consent to the carrying out of medical or dental treatment.

  (2) In the event of an inconsistency between the provisions of this Part and the provisions of the Mental Health Act 2007 or the Mental Health (Forensic Provisions) Act 1990, the provisions of the Mental Health Act 2007 or the Mental Health (Forensic Provisions) Act 1990 prevail.

We suggest that it would be helpful to identify those inconsistencies across the three instruments, or at the very least identify the sections to which this refers in the *Mental Health Act 2007* or the *Mental Health (Forensic Provisions) Act 1990*.

[1] Carney, T Tait, D & Beaupert, F 2008, 'Pushing the Boundaries: Realising Rights Through Mental Health Tribunal Processes? Sydney Law Review 17; (2008) 30(2) 329.

Division 3 - Consents given by persons responsible for patients

> *s40 Consents given by persons responsible for patients* would benefit from description surrounding the interface between the GA and the MHA. Particularly in the light of the decision *Sarah White v The Local Health Authority & Anor [2015] NSWSC 417*.

MHCC also propose that there needs to be a clear statement in this section about treatments that a guardian cannot consent to, such as ECT even though it has been stated earlier that the MHA prevails.

Section 101 Disclosure of information

> *A person shall not disclose any information obtained in connection with the administration or execution of this Act unless the disclosure is made:*
> *(d) in accordance with a requirement imposed under the Ombudsman Act 1974*

We suggest that more explanation is required to explain the role of a guardian in supporting claims of negligence or progressing complaints either initiated by themselves or on behalf of the person subject to the order.

- The Bilateral Agreement between the Commonwealth and NSW: transition to the NDIS states that the agreement is also to be considered in conjunction with the following NSW legislation:
  - National Disability Insurance Scheme (NSW Enabling) Act 2013;
  - Disability Inclusion Act 2014;
  - Guardianship Act 1987;
  - Children and Young Persons (Care and Protection) Act 1998;
  - Community Services (Complaints, Reviews and Monitoring) Act 1993;
  - Privacy and Personal Information Protection Act 1998; and
  - Health Records and Information Privacy Act 2002.

MHCC suggest that there is a gap in understanding and the need for guidelines to assist understanding as to how state and Commonwealth NDIS legislation interface with other state legislation and the implications of where the central concept of choice and control under the NDIS sits in relation to people with guardians appointed in NSW.

2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas [for example, the National Disability Insurance Scheme and associated legislation]

- In the effort to develop mechanisms for sharing information, we express our concerns about matters of information sharing as has been reflected for example in the development of legislation in NSW: in the *NSW Disability Services Act 1993* which was replaced by the *NSW Disability Inclusion Act 2014.* In this Act, we suggest that privacy and confidentiality are less than adequately protected.

  Similarly in the GA, s4 General Principles (7) - Privacy and confidentially are inadequately dealt with. We suggest that this is well articulated in the *NSW Mental Health Act 2007* (MHA), Section 189, Disclosure of information: 1 (a) – (e).

3. The report of the 2014 Australian Law Reform Commission (the ALRC) "Equality, Capacity and Disability in Commonwealth Laws"

- MHCC provided comments to the ALRC "Equality, Capacity and Disability in Commonwealth Laws: Issues paper 44 " in 2013, and the Discussion Paper 81 in 2014. We supported the way in which the ALRC took into account contemporary thinking with regards to people with disability maximising their autonomy and incorporating “recovery” principles by adopting a strengths-based approach.

  MHCC strongly believe that the interpretive declarations lodged by the Australian Government under the UNCRPD should not be in place, and should be rescinded immediately. It is our view that the interpretative declaration evokes a ‘deficits’ model of disability incompatible with a rights based model of disability which is the objective of the CRPD .

  Decision-making is about expressing choice and preference and being able to act upon that choice. For people with disability this particularly relates to being able to choose the supports they need to enable them to lead the lifestyle of their choosing. MHCC endorse the four general principles that reflect the key ideas and values upon which the ALRC’s approach in relation to legal capacity is based. We understand that they were distinct from the framing principles for the inquiry as a whole (dignity, equality, autonomy, inclusion and participation, and accountability), but reflect and are informed by those principles and act as an overlay for general application.

  Whilst we agree that there needs to be a consistent approach to the assessment of capacity in the context of representative decision-making, promoting individual autonomy as circumstances require, it is important that the process does not become too proscriptive and therefore run the risk of leading to for example, harm or neglect. At the end of the day the legislation must have an underpinning code of practice that provides the key framework and principles of best practice.[2]

- MHCC agreed in principle with the ALRC’s Recommendation 3-3 (2) (p.20) with regards to Representative Decision-Making. However, we propose that advance directives should also be included in the guidelines, with particular reference to medical treatment. This would allow people to make decisions when well as to what treatment they would or would not like to have in circumstances when they lose capacity due to mental illness or other disability. The review of the GA might also include reference to Advance Directives as important directions to inform all guardians’ decisions.

[2] Information, Mental Health Capacity Act 2005, United Kingdom, Available: http://www.mentalhealth.org.uk/help-information/mental-health-a-z/M/mental-capacity-act-2005/

4. **The United Nations Convention on the Rights of Persons with Disabilities (the UNCRPD)**

- MHCC propose that the GA include the UNCRPD's 'Article 1 Purpose' in which the definition of people with disability is provided as follows: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

- Likewise the GA could include concepts that are articulated in other instruments which have relationship to the GA. For example; many people who come before the Guardianship Division (GD) of NCAT have lived experience of mental illness, therefore their matters coming before the Tribunal should be considered within a recovery as well as a disability framework. The concept of 'Recovery' defined in the Australian National Framework for Recovery-Oriented Mental Health Services defines personal recovery as: "being able to create and live a meaningful and contributing life in a community of choice with or without the presence of mental health issues." This is at odds with General Principle s4(a) in the GA which describes the "welfare and interests of such persons should be given paramount consideration."

  Personal recovery differs from clinical recovery, in that it seeks to empower and connect with the person rather than focus, as clinical recovery does, on the absence of symptoms. A demonstration of 'recovery's' broader acceptance is reflected in the amendments to the *Mental Health Act 2007* (NSW) proclaimed in September 2015. The Act now includes 'recovery' as an approach, for example in the Principles of care and treatment in the Objects of the Act (s.62).

- The 'flavour' of the language used in the GA is somewhat reflective of a more paternalistic era. We suggest that the General Principles outlined in s4 should be reworded to mirror a commitment to align guardianship laws and practices with the UNCRPD. The tone of the principles as they exist is outdated and primarily demonstrates a deficits perspective. General Principle s4(c) proposes that "such persons should be encouraged, as far as possible, to live a normal life in the community" – 'normal' is a highly subjective concept which should be reviewed.

  General Principle 4(f) proposes that "such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs". MHCC propose that the concept of supported or shared decision-making (SDM) could be introduced and embedded into the GA. Thus reflecting the contemporary view that people be supported appropriately to make decisions about all aspects of their lives rather than assessed as to whether they can be self-reliant or not.

  Most people would agree that in almost all areas of life they seek information and advice from various quarters (i.e., legal, medical, financial) and that this is considered sound practice. Nevertheless, we accept that SDM may be better placed under best-practice state policy and practice directives or guidelines.

SDM is a model or approach designed to support people with disabilities make significant decisions and exercise their legal capacity as well as make day-to-day decisions. Specific decisions are addressed, weighed and concluded by the person with disability, while drawing on the support of a network of people or an individual. These supporters may help the person to gather, understand and consider relevant information about the decision in question, assist the person to weigh pros and cons, predict likely outcomes and consequences or evaluate the available options. With this support, the person is far more likely to be able to make the decision themselves. MHCC note that in several other jurisdictions legislation exists that supports similar reform initiatives to the NDIS. We refer here to the *Social Care* (Self-directed Support) (Scotland) *Act 2013.*[3]

The Mental Disability Advocacy Council, an influential human rights organisation that has undertaken considerable work in the area of guardianship and human rights in Europe defines SDM thus: "The alternative to guardianship is premised on the fact that with proper support, a person would otherwise be deemed to lack capacity is, in fact able to make personal decision".[4] In 2014, Victoria introduced two pieces of legislation to give effect to part of the VLRC proposals to provide for both supported decision-making and co-decision making as reflected in some Canadian provinces.[5] MHCC propose that the NSWLRC consider these matters in their review.

5. The demographics of NSW and in particular the increasing ageing population.

- MHCC propose that others are better placed to comment on this issue. Nevertheless, we ask that this review consider the evidence suggesting that older people's dignity and autonomy is often being undermined in health care settings, and that a sizable cross section of healthcare professionals hold stereotypical, negative attitudes towards older people. Mental illness among older people is often not identified by relatives, health care professionals and older people themselves who may attribute symptoms of to the effects of ageing or to physical and environmental changes. Often service providers make assumptions about older people, and important in this context is communicating the respect and supporting choice and autonomy whatever difficulties a person may be having. Importantly, assuming capacity as a first principle.

MHCC also offer some general comments about the *Guardianship Act 1987* (NSW) in reference to particular sections:

- Under General Principle s4(g) which refers to the *protection from neglect, abuse and exploitation,* some reference should also be made to the need for people to be encouraged and empowered to exercise self-advocacy with regard to safety and complaints mechanisms.

[3] *Social Care (Self-directed Support) (Scotland) Act 2013*, Available: http://www.legislation.gov.uk/asp/2013/1/contents/enacted

[4] Office of the Public Advocate 2009, 'Supported decision-making: Background and Discussion Paper', Melbourne, Victoria.

[5] Carney, T 2014, 'Supported decision-making for people with cognitive impairments: An Australian perspective? Open Access laws 2015, 4, 37-59.

- Often the role children and young people play is ignored when considering whose views should be taken into consideration at hearings. MHCC suggest that under s3(F) *persons who are "parties" to proceedings under the Act,* that under subsection 3, 5 and 7 that children under 18 who are effectively primary carers should also be invited/included in hearings .

- Under Part 2 – Appointment of Enduring Guardians, MHCC propose that this section needs to address the question of appeal. We assume that instances may arise where a person is deemed to require an enduring guardian and one was appointed but they disagree that this appointment should take effect. Also where eligibility for appointment is considered, the question of primary carers over 16 might be considered with whatever caveats might be appropriate to ensure that the primary carer is supported in such a role.

- Under, Functions of enduring guardians s6(F)(c), the language of 'personal services' needs to be considered in the context of a person being eligible for a NDIS package, in which case, decisions may encompass a much greater range of support services than the term 'personal services' suggests.

- The wording is very unclear with regards to the: Automatic revocation of appointment by marriage of appointor under s6HA. We therefore ask whether this new person (deemed automatically suitable because of marriage) to replace the previously appointed enduring guardian, might need to be assessed?

- Similarly, in our opinion s6(I) both subsections (1) and (2) are also unclear and need to be reworded. Might the word 'vitiate' that occurs throughout the GA be reworded as invalidate; 'plenary' as unlimited; 'equity' as impartiality, fair and just; and 'concurrence' as agreement?

- Whilst appreciating that the legislation is primarily used by lawyers, the GA would nevertheless benefit from greater accessibility to lay users and more importantly to those directly affected by the legislation. Under s6(M) the reference to an order and an appointment is extremely confusing and would benefit from clarification. Similarly s6(O) subsection (4) is poorly explained.

- Whilst the definition of spouse includes de facto partner, common usage of both terms would suggest that both be used throughout the GA.

- Under s16 Guardianship Orders subsection (2) (a) refers to a guardian having "custody" which we understand as 'legal custody'. However, since this actually means 'decision-making' powers or 'responsibility' for a person, we propose that it would be more in the spirit of contemporary thinking and better expressed as such.

- Section 17(1) Guardians states that a person appointed as a guardian must demonstrate certain characteristics to be deemed suitable for the role. However, subsection (2) which deals with the appointment of a Public Guardian states that these conditions do not apply to

them. We ask that subsection (a) regarding compatibility needs to be likewise applicable to whoever undertakes the role.

- Section 18 Term of guardianship orders (1B) (3) states that a temporary guardianship order may only be renewed once. We query here whether based on the temporary order not exceeding 30 days that this could be reconsidered, bearing in mind that some people require longer stays in hospital?

- Section 21A Power to enforce guardianship orders (1) (c) refers to a person authorised by the guardian ("the authorised person"). It is unclear as to who might take on this role as the definition is for an "authorised officer" which refers to an employee. This subsection suggests that the guardian can appoint anyone deemed fit in their view. This needs clarification.

- Section 25 Review of guardianship orders subsection 3(b) states that Despite subsection

  (2): that *The Tribunal must review each guardianship order:*

  (a) at the request of any person entitled to request a review of the order, and
  (b) at the expiration of the period for which the order has effect.

  The Tribunal is not required to review a guardianship order under that paragraph if the order contains a statement (referred to in section 16 (2A)) to the effect that the order will not be reviewed at the expiration of the period for which it has effect.

  This section and 16(2A) need to be described alongside each other in one section. The two being placed in different sections in the Act is unnecessarily confusing. Ideally the section should also refer to whatever appeals processes are possible if the GD decides it will not review under (16(2A). Our understanding is that NCAT has no powers to review its own practices, and therefore appeals would need to the go to the Supreme Court. If this is correct, this should be stated in s25.

- Section 25H Interim financial management orders in our view needs to describe what may happen if a person is unwell in a mental health facility and that the "authorised medical officer" may take responsibility for interim financial decision-making, if we understand that position to be the correct interpretation of the facts. We note s25K (2) Tribunal cannot make financial management order in certain circumstances:

  (2) The Tribunal does not have jurisdiction to make any financial management order (including an interim financial management order) in respect of a person if an order made under the NSW Trustee and Guardian Act 2009 or the Mental Health Act 2007 is in force in respect of any part of the person's estate.

However, we propose that the issue of interim orders and across these two sections is unclear.

- Section 30 Limitation of liability speaks to the question of no proceedings 'lie' (standing) against a guardian if he/she has acted in good faith. We ask here that some detail be addressed regarding how a person could bring proceedings if they disagree with the assessment of the Tribunal that the guardian has acted in good faith.

- Part 5 Medical and dental treatment describes the various treatments: "major", "minor" and "special", but these terms do not seem to cover matters of prevention and safety that may arise around for example, sexual health and terminations. We suggest that it would be useful to clarify what role the guardian has in deciding such matters.

- Section 107 procedural matters throughout uses the word 'averment'. We propose that if this French/English term dating back to c1450 needs to be used, that a definition be provided that describes it as a: *formal statement by a party in a case of a fact or circumstance which the party offers to prove or substantiate,* or some other more accessible definition.

MHCC thank the NSWLRC for undertaking this review and we express our willingness to be consulted further regarding any matters raised in this submission.

Please feel free to contact Corinne Henderson, Senior Policy Advisor, corinne@mhcc.org.au or T: 9555 8388 # 101 to discuss the contents of this paper or the review in general.

Yours sincerely,

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