New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

NSW Law Reform Commission
Review of Guardianship Act 1987

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NSWCCL is grateful for the invitation to make a submission on the draft proposals of the New South Wales Law Reform Commission's review of the *Guardianship Act 1987* (NSW).

I INTRODUCTION

We acknowledge that persons without decision-making abilities, or a limitation thereof, are vulnerable members of society, and such persons should be supported to make decisions concerning crucial aspects of their lives in order to be afforded an opportunity to live as comfortably and freely as others. Hence, insofar as the draft proposals of the New South Wales Law Reform Commission ('NSWLRC') on its review of the *Guardianship Act 1987* (NSW) promote these individuals' civil liberties in both the public and private domains, we support the proposed changes to the current arrangements existing under the *Guardianship Act 1987* (NSW).

Overall, we strongly endorse the NSWLRC's draft proposals because we believe that the new framework, as contemplated by the *Assisted Decision-Making Act*, better protects and promotes the civil liberties of persons affected than the schemes supported by the *Guardianship Act 1987* (NSW). As a result, this submission will be limited to only those aspects of the NSWLRC's draft proposals which could be improved to better protect civil liberties of the persons affected.

II DISCUSSION AND RECOMMENDATIONS

A *Tribunal And Court Hearings*

An observation that can be made when examining the NSWLRC's draft proposals is an increase in review mechanisms accorded to persons affected by the *Assisted Decision-Making Act*. For example, we support the NSWLRC's contemplation of 'representation orders', which will replace guardianship and financial management orders made under the current framework, as an option of 'last resort', accompanied by adequate review structures supported by, for example, the 'Assisted Decision-Making Division' of the NSW Civil and Administrative Tribunal ('the Tribunal') and, where relevant, the Supreme Court of New South Wales.

This is an improvement when compared to review procedures accorded to persons affected by financial management orders under the *Guardianship Act 1987* (NSW). Furthermore, we agree with the NSWLRC's consideration of advancing the 'presumption of capacity' – that is, the idea that persons who are implicated by the proposed framework have decision-making abilities, including the ability to develop it – and this is advanced by suggesting 'representation orders' as an option of last resort for the Tribunal.

We would like to highlight two concerns with respect to the proposed framework, notwithstanding that strengthening review mechanisms under the proposed framework might have numerous benefits for the persons affected.

1 *Striking A Balance Between Formality And The Purposes Of The Proposed Framework*

First, it is conceivable that strengthening review mechanisms could advance affected persons' rights to reasons and, ultimately, procedural fairness. However, a balance needs to

be struck between the observation of formality and the objects of the proposed framework. Presently, the proposed framework does little to meet this balance.

Specifically, if we consider the purposes of the proposed framework as supporting affected persons' rights to full and active participation in society, including their rights to autonomy and dignity (as per the 'social model' and the principles of the United Nations *Convention on the Rights of Persons with Disabilities*), then it becomes apparent that the concentration of formal procedures, which are propelled by an increase in review mechanisms, might have the inadvertent outcome of subjecting persons affected to regular Tribunal and court hearings. Such hearings for matters of substance (e.g. whether or not the affected person has decision-making ability and whether any changes, upon a review, should be made to their arrangement?) and form (e.g. whether or not the affected person and their representative or supporting person have in place an enduring representative agreement or personal support agreement that is compliant with an approved form?) could paradoxically impair the development of affected persons' decision-making abilities, including their rights to dignity and autonomy.

We consider that persons with limited or no decision-making abilities, and their representatives or supporting persons, should not be made the subjects of possibly needless and demoralising or humiliating hearings when matters, particularly of form, could be resolved more informally. This is, of course, not to suggest that there ought not to be adequate review mechanisms guided by, for example, an increase in the 'search and removal powers' of the Tribunal for impending hearings where there is a real concern for the person affected. Yet, such proposals should not be an implementation of the first resort, as persons with limited or no decision-making abilities, are likely to be under a lot of psychological distress, which could inadvertently be exacerbated through frequent exposure to hearings.

The situation may possibly be worsened through the proposed framework's conception of the presumption of capacity, which could witness a rise in the number of psychologically distressed persons appearing before the Tribunal, even supposing that these persons have the aid of legal representatives. Certainly, we note that Tribunal hearings are generally less formal than court proceedings, however, such an arrangement would do little to promote affected persons' rights to dignity and autonomy. To have stringent legal structures deciding vital aspects of vulnerable persons' lives might be inconsistent with supporting such persons reach their own decisions as freely as possible.

Recommendation 1:

A better balance needs to be struck between the observation of formality and the objects of the proposed framework. Formal review procedures such as hearings should not be the first resort.

2 *Interaction Of The Proposed Framework With Existing Mental Health Legislation*

Second, we are concerned that the underlying purposes of the proposed framework might be undermined by the prevalence of mental health legislation, specifically the *Mental Health Act 2007* (NSW) and the *Mental Health (Forensic Provisions) Act 1990* (NSW), in the

event where the proposed framework and existing mental health legislation intend to cover the same field.

Presently, if an affected person is, or becomes, subject to orders under existing mental health legislation, any arrangement made under the proposed framework will only be effective to the extent it does not conflict with that of the former. This is problematic, for unlike the proposed framework, existing mental health legislation in New South Wales has not been enacted in accordance with the social model, nor the principles of the United Nations *Convention on the Rights of Persons with Disabilities*. Consequently, unless existing mental health legislation is amended to reflect the purposes of the proposed framework as, for example, is considered by proposal 14.5(2), the proposed framework is arguably limited in its operation and effect.

In contrast, it is arguable that the existing mental health legislation and the bodies constituted thereunder, such as the Mental Health Review Tribunal ('MHRT'), are more apposite for dealing with persons with no or limited decision-making abilities. Yet, the contemporary example of *DGM v NSW Trustee and Guardian* [2017] NSWCATAP 220 (29 November 2017) reveals just how out of touch these review bodies really are with respect to ensuring the civil liberties of the persons affected. In this example, DGM ('the applicant') successfully appealed, to the Tribunal, the MHRT's refusal to revoke a financial management order. Remarkably, the applicant was deprived of the fundamental right to procedural fairness as she was 'cut short at the [MHRT's] hearing': at [29]. Besides, it is apparent that the applicant felt 'humiliated and demoralised' by the process: at [94], which adversely affected her sense of 'dignity and self-esteem': at [95]. Persons affected should be treated with dignity by decision makers and tribunals.

Clearly, then, if specialist review bodies are failing to foster the rights of vulnerable persons, what guarantee is there that an increase in review mechanisms, piloted by an expansion in the powers of the Tribunal for matters of both substance and form, is going to support the persons affected with their decision-making abilities, including the progression thereof. In reality, such hearings can have an enduring negative impact on the decision-making abilities of the persons affected.

B *A Charter of Rights*

Accordingly, we support the NSWLRC's proposal 1.14, which requires decision-makers of the Tribunal to have regard to a number of considerations – many of which reflect the principles of the United Nations *Convention on the Rights of Persons with Disabilities* – when assessing affected persons' decision-making abilities. However, we argue that the consideration of such principles ought not to be limited to Tribunal decision-makers, nor in the sole instance of 1.14. Rather, decision-makers and judges of all respective Tribunal and court proceedings involving affected persons should always have explicit consideration of these principles when making determinations in order to truly promote affected persons' civil liberties. In view of that, we endorse the enactment of a national Charter of Rights or, as a minimum, a Charter of Rights for New South Wales, to ensure that public servants, such as the Tribunal's decision-makers and judges of the courts, make decisions that are consistent with human rights standards.

Recommendation 2:

Decision makers and tribunals should be directed to treat affected persons with dignity and in accordance with the UN Convention on the Rights of Persons with Disabilities. Further protection of the rights of affected persons would be afforded by the enactment of a Charter of Rights to ensure decisions are made consistently with human rights standards.

C *A Two-Tier Framework*

A less favourable approach to a Charter of Rights could be to augment the proposed framework with a more informal structure that jointly progresses the objects of the proposed framework.

In view of the NSWLRC's draft proposals on its review of the *Guardianship Act 1987* (NSW), we consider that a balance needs to be struck between the formality of review mechanisms and the purposes of the proposed framework. We appreciate that it is imperative to have adequate review structures strengthened through, for example, an increase in the powers of the Tribunal. However, this need not be an option of the first resort regarding matters of form, which could be resolved more informally, thereby promoting affected persons' decision-making abilities, including their rights to dignity and autonomy. Precisely, in lieu of requiring all the stages of arrangements under the proposed framework to be determined through the Tribunal and/or court hearings, perhaps a department akin to Centrelink at the State level should be established to complement the proposed framework. This theoretical two-tier arrangement is advantageous for a number of reasons, three of which are underscored below.

First, a special department consisting of professionals who specialise in those areas of the law and health which attract the persons affected could facilitate the purposes of the proposed framework by, for instance, rendering support services to assist the persons affected make decisions regarding vital aspects of their lives. Indeed, this seems to be consistent with the presumption of capacity. Such a department could develop expertise over time to better support the persons affected in accordance with the purposes of the proposed framework.

Second, if we visualise one's decision-making ability as being fluid – the concept that it could improve or deteriorate over time – then, it is conceivable that persons without decision-making abilities, or with severe limitation thereof, could eventually develop decision-making abilities and, therefore, these persons might desire to be assisted more informally (and, indeed, rightly should be) than be exposed to the Tribunal and/or court hearings which, as exemplified earlier, can have a conflicting implication upon the development of their decision-making abilities.

Perhaps, then, the envisaged department could monitor the persons affected and determine whether they need to be supported internally or, as a last resort, through the Tribunal and/or court hearings. Where, in its informed opinion, the persons affected have not yet developed the requisite degree of decision-making ability, or in circumstances where it would be unreasonable for the department to render internal assistance, there would be a need for a quasi-judicial body and/or a judicial body to make determinations in respect of matters of form which would otherwise be conducted by the department. Suitably, the review mechanisms contemplated by the proposed framework could act as a

second ground of appeal – that is, an initial internal and informal ground of review could be afforded by the department as, for example, appears to be existent within Centrelink. The concern for privacy may well be offset by the increase in support for the persons affected.

Third, we recognise that the Tribunal and/or court hearings can not only leave a demoralising and humiliating impression upon a party, but they also can occasionally be quite expensive and cause significant delays. On the other hand, the instigation of a special department for resolving matters of form may possibly promote efficient and effective outcomes through, for example, reducing the amount of time spent for making determinations and, ultimately, by relieving the number of applications lodged for the commencement of proceedings at the Tribunal and/or the courts.

Recommendation 3:

Instead of requiring all the stages of arrangements under the proposed framework to be determined through the Tribunal and/or court hearings, a two tier structure could be established by creating a department akin to Centrelink at the State level to complement the proposed framework.

III CONCLUSION

The NSWCCL recognises the importance of safeguarding the rights of vulnerable members of society, such as those who are challenged with decision-making abilities, regarding vital aspects of life. We strongly support the NSWLRC's draft proposals as the proposed framework better ensures the civil liberties of the persons affected than existing schemes under the *Guardianship Act 1987* (NSW). However, the objects of the NSWLRC's proposed framework could be strengthened by enacting a Charter of Rights and/or by instituting a special department to support with matters of form that ensue from the proposed framework.

This submission was prepared by Sarfraz Khan and Stephen Blanks on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Law Reform Commission.

Yours sincerely,

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