



# Review of the Guardianship Act 1987: Preliminary Submission to the Law Reform Commission of NSW

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# Being | Mental Health & Wellbeing Consumer Advisory Group

**Being | Mental Health & Wellbeing Consumer Advisory Group (BEING) is the independent, state-wide peak organisation for people with a lived experience of mental illness (consumers). We work with consumers to achieve and support systemic change.**

BEING's vision is for all people with a lived experience of mental illness to participate as valued citizens in the communities they choose. Participation is a fundamental human right as enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). We work from the premise that the participation of consumers results in more effective public policy and facilitates individual recovery.

Our work is guided by eight principles:

- Principles of recovery underpin all our work
- Recognition of the importance of a holistic approach
- Collaboration and team work
- Flexibility, responsiveness and innovation
- Consultative and participatory processes that have consumers at the centre
- Promoting equity and positive images to address discrimination and prejudice
- Accessible and approachable for all
- Promotion of professionalism and quality practice

BEING is an independent non-government organisation that receives core and project funding from the Mental Health Commission of NSW.

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## **Acknowledgements**

BEING would like to thank the people who have generously shared with us their experiences and views.

# Introduction

BEING is pleased to provide input into the Review of the Guardianship Act 1987 (the Guardianship Act) by the NSW Law Reform Commission (the Commission). We note that this preliminary process of the review is an opportunity to discuss any broad issues we think are relevant to the terms of reference, we may raise other issues as the review progresses. We look forward to participating in further opportunities to address issues in more detail.

Our preliminary submission focuses on and makes recommendations in relation to:

- Shifting the focus from substituted decision-making to strength-based approach, recovery-orientation and supported decision-making
- Safeguards and accountability measures for supported-decision making
- Fluctuating capacity of mental health consumers
- Considering the person's own definitions of capacity

These issues are relevant to items 1-4 in the terms of reference for this Review.

We thank the Law Reform Commission for considering our preliminary submission and we look forward to opportunities to further inform the review process.

## 1. Supported decision-making

Supported decision-making can help address barriers that people with mental illness may face in exercising choice and control. Supported decision-making is a central principle of the United Nations Convention on the Rights of Persons with Disabilities, particularly Article 12, "Equal Recognition Before the Law". The disability sector in Australia has been paying more attention to supported decision-making. The principles in recent legislation around the NDIS cover supported decision-making.<sup>1</sup> Also, people in Victoria can now make supportive attorney appointments.<sup>2</sup> The role of a supportive attorney is to provide support to a person to make and give effect to some or all of their decisions. We recommend that the Commission consider how the guardianship system can prioritise supported decision-making, and ensure substitute decision-making is a last resort.

Supported decision-making also better aligns with the mental health sector's consistent emphasis on 'recovery-oriented approaches'.<sup>3</sup> There is no single description of recovery, however, recovery has been defined in the *National Framework for Recovery-Oriented Mental Health Services* as "being able to create and

<sup>1</sup> *Disability Inclusion Act 2014* (NSW), s4(5); *National Disability Insurance Scheme Act 2013* (Cth) s17A.

<sup>2</sup> *Powers of Attorney Act (No.57 of 2014)* (VIC), Part 7.

<sup>3</sup> Australian Department of Health, *A National Framework for Recovery-Oriented Mental Health Services: Policy and Theory*. 2013; Australian Department of Health, *National Standards for Mental Health Services*, 2010; Australian Department of Health, *Fourth National Mental Health Plan*, 2010, pp. 24-29.

live a meaningful and contributing life in a community of choice with or without the presence of mental health issues.”<sup>4</sup> In line with recovery-oriented approaches, services should support the self-determination and autonomy of mental health consumers, and recognise that recovery outcomes are personal for each individual.<sup>5</sup> The push towards recovery-oriented approaches influenced the changes in 2014 to include principles in the Mental Health Act to promote people’s recovery. The Guardianship Act should consider the role of supported decision-making in promoting the individual’s self-determination and autonomy in their recovery.

If the NSW Guardianship Act adopted a supported decision-making model, there will need to be safeguards and accountability measures to ensure the support person is genuinely supportive. For example, the support person would need to effectively communicate to the person the information they would need to make the decision. The Commission would need to consider the extent that the support person should be held accountable for the decision made. There is a risk that support persons, for fear of being held accountable for decisions, would prevent individuals from making ‘bad’ decisions – even if the individual is genuinely exercising their choice and control. The NDIS Quality and Safeguards Framework, once complete, could help inform these safeguards and measures around supported decision-making. The Commission should also seek input from people with disability and their families and carers on appropriate safeguards and accountability measures.

### **Recommendation 1**

The Guardianship Act to prioritise supported decision-making, with substitute decision-making being a last resort.

### **Recommendation 2**

The Commission to seek further feedback about supported decision-making, particularly safeguards and accountability measures around this, from mental health consumers, carers and others who work with them. BEING could help the Commission with this.

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<sup>4</sup> Australian Department of Health, *A National Framework for Recovery-Oriented Mental Health Services*, 2013, p. 4.

<sup>5</sup> Australian Department of Health, *National Standards for Mental Health Services*, 2010. pp. 21, 42.

## 2. Conceptual framework – ‘Disability’ vs ‘decision-making capacity’

The Guardianship Act should shift its focus from a person's disability to their decision-making capacity.

Currently, the Guardianship Act defines a person in need of a guardian as “a person, who, because of a disability is totally or partially incapable of managing his or her affairs”.<sup>6</sup> This is inconsistent with the strengths-based approach of the National Disability Insurance Scheme (NDIS).<sup>7</sup> It also clashes with the mental health sector's recovery-oriented approach, which affirms the self-determination of individuals with mental illness.<sup>8</sup>

The conceptual framework in the Guardianship Act should change to focus on people's decision-making capacity. It is important to rely on concepts such as capacity, when making decisions about guardianship, as having a disability does not automatically imply the need for a guardian. ‘Decision-making capacity’ better aligns with the principles and language of the NDIS.

The change would also distinguish people's decision-making capacity from their capacity to communicate the decision or wishes. The Guardianship Act could clarify that a person's capacity to communicate does not determine their need for a guardian. The person may need support to communicate their decision or wishes, rather than someone to make the decision for them. For example, section 17(2) of the NDIS Act states that “People with disability will be supported in their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised.”<sup>9</sup>

### Recommendation 3

Align the Guardianship Act with the ‘strengths-based’ and ‘recovery-oriented’ approaches in the disability and mental health sectors, by adopting a conceptual framework around ‘decision-making capacity’ rather than ‘disability’.

<sup>6</sup> *Guardianship Act 1987* (NSW) ss3(1), 3(2).

<sup>7</sup> For example, see *National Disability Insurance Scheme Act 2013* (No. 20, 2013) (Cth), s17A.

<sup>8</sup> Australian Department of Health, *A national framework for recovery-oriented mental health services: Guide for practitioners and providers*, 2013, p. 3.

<sup>9</sup> *National Disability Insurance Scheme Act 2013* (No. 20, 2013) (Cth), s17A.

## 3. Managing fluctuating capacity

People with mental health issues may have fluctuating capacity to make decisions. People need options to plan for periods when they aren't able to make some decisions.

People currently have options to get an Enduring Guardian to make decisions around housing, health and services when they lose capacity. People can only do this if they have someone who is willing and able to be their guardian. There are people with mental health issues who do not have anyone they can appoint as their enduring guardian, they also cannot appoint NSW Trustee & Guardian as their enduring guardian. This presents a barrier to mental health consumers to manage fluctuating capacity.

### **Jamie's experience:**

'Jamie' has bipolar disorder. When she is feeling unwell, she makes decisions she would not normally make. She would like to have a guardian in advance to make sure that she doesn't lose her housing when she is feeling unwell. She asked the NSW Trustee & Guardian but they said that she can only get a public guardian when she is actually unwell. The only person she could ask to be her guardian is her elderly mother. She thinks it would be too stressful for her mother to be her guardian because of the bureaucracy and Jamie's behaviour when she's unwell.

### **Recommendation 4**

The Commission to look into improving people's ability to manage fluctuating capacity. In particular, the Commission to address the barriers for people with mental illness to access advance planning options, such as enduring guardianship.

## 4. Considering what capacity means to the person

It can be difficult to determine when a person has lost capacity and regained capacity. Individuals can have different views about when they have lost or regained 'capacity'. For example, a person might take up gambling to the extent that it may adversely affect their life when they are experiencing depression. The person may consider that they have lost capacity. Others may argue that the person hasn't lost their decision-making capacity, and that the person has decided to gamble.

There are mental health consumers who have fluctuating capacity and are able to monitor their mental health and capacity levels. People can, and do, draw on their

lived experience of their mental health issues to recognise early warning signs that indicate they are losing capacity. People can also recognise signs that indicate they are regaining capacity.

We recommend the Commission consider how the Guardianship Act can give greater consideration to the person's views about what capacity means to them. The person could give guidance to their guardian about what warning signs indicate that they are losing capacity. This could be similar to a written relapse prevention plan or a Wellness Recovery Action Plan<sup>10</sup> that people use to monitor their mental health and addictions. The plans can include signs that let others know that they need to take over responsibility for the person's care and decision-making. They could attach the document to any guardianship forms or advance care directives. The NSW Trustee & Guardian could encourage people to complete these plans to guide guardians and services to determine when they have lost capacity and regained capacity.

### **Recommendation 5**

The Guardianship Act to consider the person's views about their capacity, including fluctuating capacity, in determining when they have lost and regained capacity.

## Summary of recommendations

1. The Guardianship Act to prioritise supported decision-making, with substitute decision-making being a last resort.
2. The Commission to seek further feedback about supported decision-making, particularly on safeguards and accountability measures, from mental health consumers, carers and others who work with them. BEING could help the Commission with this.
3. Align the Guardianship Act with the 'strengths-based' and 'recovery-oriented' approaches in the disability and mental health sectors. Using a conceptual framework around 'decision-making capacity' rather than 'disability' could help do this.
4. The Commission to look into improving people's ability to manage fluctuating capacity. In particular, the Commission to address the barriers for people with mental illness to access advance planning options, such as enduring guardianship.
5. The Guardianship Act to consider the person's views about their capacity, including fluctuating capacity, in determining when they have lost and regained capacity.

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<sup>10</sup> 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/>