



## **Submission:**

### **Response to the Inquiry into the *Guardianship and Management of Property Act 1991* (ACT)**

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## **Response to the Inquiry into the *Guardianship and Management of Property Act 1991 (ACT)***

This submission has been prepared by the ACT Mental Health Consumer Network in response to the current review by the ACT Law Reform Advisory Council of guardianship arrangements for adult people with disabilities in our community.

The ACT Mental Health Consumer Network is a consumer-led peak organisation representing the interests of mental health consumers in the ACT in policy and decision-making forums. The Network is committed to social justice and the inclusion of people with experience of mental illness. Run by consumers for consumers, our aim is to advocate for services and supports for mental health consumers which better enable them to live fuller, healthier and more valued lives in the community.

The Network has held a forum for members to discuss the response booklet prepared by the ACT Law Reform Advisory Council. This submission also draws on the experiences of our members in recent years.

This submission discusses issues raised under the topic areas specified in the response booklet. It addresses some, but not all, of the questions as relevant to mental health consumers.

### **General Comments**

Many mental health consumers are among the most disadvantaged in our society, often without stable or safe accommodation and living on very low incomes. They are vulnerable to discrimination on a range of bases, and have high levels of interaction with the health system, too often involuntarily. Consumers with impaired decision-making capacity are even more vulnerable as their health or welfare and/or financial affairs are left in the hands of their guardians or managers. We are therefore pleased with the approach taken by the ACT Law Reform Advisory Council and of the move towards greater consistency in legislation concerning people with impaired decision-making ability. The Network commends the introduction of supported decision-making provisions in regard to the *Guardianship and Management of Property Act 1991 (ACT)*.

#### **1. Experiences with the current Guardianship arrangements in the ACT**

The Network would like to highlight that the needs of people living with a mental illness may be very different to those living with other forms of disability. Therefore although the role of guardians for mental health consumers is very important, unfortunately the most common view from our members is that guardians don't take the view or best will and preference of the consumer. Furthermore, many mental health consumers consider guardians to be either too much, both overbearing and controlling, or not enough, in that they don't communicate at all.

There is no real recourse for consumers with impaired decision-making who have been considered by the ACT Administrative Tribunal as needing a guardian. This is primarily because the pool from which a family member/social member (friend, mentor) guardian can be chosen is limited as a result of the social isolation that many consumers face. In-fact, in cases where ACAT cannot find a guardian, the

public trustee would most likely become the appointed guardian.

Our members are concerned that there are currently no clear ramifications for guardians who might be acting in a discriminatory manner. We acknowledge that the Discrimination Act primarily relies on individuals taking action to make a complaint about discrimination they have experienced. We believe this places too high a responsibility on vulnerable individuals who may not have the resources to pursue a complaint.

Lastly, our members strongly feel that guardians have a lot of control over many areas, especially with regards to finances, resulting in some consumers feeling that their interests are not listened to nor are they protected.

## **2. Experiences relating to Powers of Attorney**

The Network would like to highlight that there is a real need for better education regarding the role and function of attorneys with powers of attorney. We regularly come across consumers who are surprised to learn that they can appoint somebody to be their future decision-maker for some or all areas of their lives. For those who wish to appoint a future decision maker - we have found that as some consumers are often socially isolated they therefore find it difficult to find someone they are comfortable with and trust to appoint as their future decision-maker.

## **3. Proposed National Decision-Making**

It is widely acknowledged that the decision-making capacity of a person experiencing mental illness can be reliably assessed, and that a range of assessment tools are available. It is therefore important that these specific tools are utilised when assessing the decision-making capacity of mental health consumers. Given that for many mental health consumers their level of decision-making ability may vary considerably depending on their illness and/or with respect to the type of decision, it is therefore important to reassess their decision-making capacity on a regular basis. The proposed Mental Health Act sets out the criteria and principles for assessing capacity, and a code of practice will be developed to work alongside the Act.

The Network supports the proposed principles of decision-making. However, we think the principles need to emphasise that people make decisions in different ways and all decisions are important. Additionally, we feel it is important to ensure that the necessary supports are in place for the person making the decision. We agree that *“there must be appropriate and effective safeguards for people who may require decision-making support, including to prevent abuse and undue influence.”* This not being met is one of our members most common complaint when it comes to supported decision-making. Likewise, without an agreed approach to monitor and evaluate the principles, we are concerned the proposal may result in lip-service. Currently there is no policy to meet UN measures relating to exercise of legal capacity, point 5: subject to regular, independent, external review.

## **4. Proposed guidelines for decision-making support**

We consider the guidelines to be good, however, we caution that people need to be given sufficient time to make a decision with support.

## **5. Proposed guidelines for giving effect to will, preferences and rights**

We strongly agree that people requiring decision-making support must direct decisions that affect their lives. Therefore, we cannot emphasise enough the importance of supported decision-making for those who might need some support to be able to make a decision. As many mental health consumers have fluctuating and/or differential levels of decision-making ability, we feel it is important to note that they might need support for some periods and/or for some but not all areas of their lives.

The proposed guidelines make mention of instances that a representative might override the person's will and preferences specifically in point (d). This point is very broadly stated, and we would like to caution that more clarity is required as to when and how the representative will reach the conclusion that they should override the person's will and preference. Lastly, the Network would like to see mention of the right to dignity of risk for all as we feel this is necessary and important in the context of giving effect to will, preferences and rights.

### **Supported Decision-making**

*Evidence that a supporter & representative should be required to keep*

First and foremost, we propose that the person receiving support should have a say on what decisions require evidence. We recommend that perhaps a standardised form illustrating what the minimum levels of evidence required as guided by the consumer receive could be implemented

*How will a representative work out what the person would likely want when the person is unconscious or otherwise unable to communicate their wishes and preferences?*

In this instance, we would propose that a "circle of friends" can guide the representative. However, in our experience many mental health consumers do not usually have a circle of friends, or a circle of friends who can make these types of decisions. Therefore, it is imperative that the will, preferences and rights of persons who may be unable to communicate their wishes should be given special considerations.

### **Representative Decision-Making**

*What if the people consulted by a representative do not agree about what the person would want? Should a representative's decision be able to be challenged – how and by whom?*

We agree that decisions should be able to be challenged when necessary by anybody who has a reason to believe a poor decision has been made. However, as this may lead to conflict we would recommend conflict resolution as a possible pathway for resolving disputes or through the human rights commission. We recommend that clear processes need to be in place to mitigate the risks to the protected person, first and foremost, and to the representative. In doing so, we expect that these processes ,being subject to regular, independent and external review, will ensure that the UN measure relating to exercise of legal capacity is met.

## **6. Proposed guidelines for safeguards**

The Network accepts that the Proposed Guidelines for Safeguards are good, our concern is how the theory will translate into practice and how it will be enforced.

## **7. Other Approaches for supported decision-making**

We accept that there are many ways that support can be provided that do not rely on the law, the examples given are decent and practical. We are pleased to see that it has been noted that the need for support can vary depending on the areas of a person's life and at different times in a person's life according to their health. For some mental health consumers, it is important to have individual advocates at all levels and throughout the processes from recognising that a decision needs to be made, through to gathering information, to making the decision and following it up.

We are however, aware that organisations providing individual advocacy are currently underfunded and their capacities are maximised. Therefore, at the local level there is a real need for more funding for such organisations.

## **8. When and how to give support for decision-making**

The Network agrees that changing from substitute decision-making to supported decision-making will require an enormous culture change for families, carers and within advocacy organisations, government and private organisations.

However, one thing is unclear to us - what are the threshold levels governing when one moves from needing substitute decision-making to supported decision-making? This needs to be very clear so that those who have the ability to make decisions with support are given every chance to do so.

*How can a person's need for support be balanced with the person's right to independent decision-making?*

We think that a person's need for support can be balanced with their right to independent decision-making by using a clear set of guidelines for when the person has capacity and strong evidence to show when they no longer have capacity. This is very important in mental health as consumers can transition from requiring limited, if any, support, to requiring total support with their decision-making, and then back again. This is different to other members of society and needs to be built into the legislation.

*How can we know what level of support a person needs, and when they need it?*

Advance Agreements will have full legal force when the new Mental Health Act 2015 comes into existence; we therefore recommend that they should be the first option to investigate to ascertain the level of support and the timing that is required.

## **9. Experience with supported decision-making**

Our members propose that a more formalised system will help people needing support to make a decision. They also propose that a navigator might help mitigate the need for formal decision-making.

## **10. Stages in supported decision-making**

While we are aware and promote the web-site developed by the ACT Disability, Aged and Carer Advocacy Service, we haven't received a lot of feedback from our members. We are also aware that Advocacy for Inclusion from the ACT has developed the world's first Supported Decision-making App. The App, specifically built for people with disabilities, is designed to assist people to make their own decisions and control their own lives. Both of these are timely tools, however not many people are aware of their existence.

For many years we have advocated for peer workers to work more closely with consumers within the inpatient units and in the community organisations. It would be no surprise then that we also see real value in peer workers providing support to consumers who need support in decision-making.

## **11. Issues raised by supported decision-making**

Trials of supported decision-making have raised some issues about how supported decision-making works in practice, such as training and skills, risk of exploitation, timing of support, burdensome regulation, and lack of resources. As previously stated, the Network recommends organisations providing individual advocacy need more funding to better meet the needs of the community at large. Additionally, there are many systemic issues of how supports are provided; our members have found that a lot of the time supports aren't holistic.

## **Conclusion**

Overall we are pleased with approach taken by the ACT Law Reform Advisory Council and of the move towards greater consistency in legislation concerning people with impaired decision-making ability. We are also happy to see that there is a strong move towards supporting all adults to exercise their right to make decisions, that affect their lives and to have those decisions respected. As stated in the booklet, changing from substitute decision-making to supported decision-making has wide implications for the law in many areas other than guardianship. However, we feel a cultural change is vital and requires a whole of community approach including government and non-government organisations to ensure that people with impaired decision-making ability are given the necessary supports to participate in and contribute to all aspects of life.