

12 May 2017

Mr Alan Cameron, AO
Chairperson
NSW Law Reform Commission
By email: nsw_lrc@justice.nsw.gov.au



Dear Mr Cameron

Thank you for the opportunity to respond to the final Question Papers of the review of the *Guardianship Act 1987 (NSW) (Guardianship Act)*.

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities. When rates of poverty and inequality are low, everyone in NSW benefits. With 80 years of knowledge and experience informing our vision, NCOSS is uniquely placed to bring together civil society to work with government and business to ensure communities in NSW are strong for everyone. As the peak body for health and community services in NSW we support the sector to deliver innovative services that grow and evolve as needs and circumstances evolve.

NCOSS provides secretariat support to the NSW Disability Network Forum (DNF), which comprises non-government, non-provider peak, representative, advocacy and information groups whose primary aim is to promote the interests of people with disability. In this capacity, NCOSS has provided significant input into the DNF's response to the Question Papers 4, 5, and 6. These submissions can be accessed below.

[DNF response to Question Paper 4](#)

[DNF response to Question Paper 5](#)

[DNF response to Question Paper 6](#)

In addition to endorsing the DNF's response, NCOSS takes this opportunity to highlight key points raised in the Question Papers as they relate to older people.

Role of the Public Advocate in preventing elder abuse

NCOSS supports the establishment of an Office of the Public Advocate, with powers to investigate cases of abuse, neglect and exploitation. We note that this has been recommended by the NSW Legislative Council General Purpose Standing Committee in its report on elder abuse¹ and was also proposed in the Australian Law Reform Commission Discussion Paper.²

We endorse the recommendation of the NSW Standing Committee that the powers and functions of a Public Advocate should include:

- promoting and protecting the rights of vulnerable adults at risk of abuse, exploitation and neglect;

¹ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 2016) [Elder Abuse in New South Wales](#) [8.79–8.80], rec 11.

² Australian Law Reform Commission (2016) [Elder Abuse Discussion Paper](#), Proposals 3-1-3-3.

- receiving and investigating complaints about abuse, exploitation and neglect by individuals or organisations;
- conducting investigations on its own motion, where it believes an investigation is warranted;
- powers to require specified documents, written answers to questions and attendance at a conference for the purpose of resolving a matter under investigation;
- powers of entry and inspection; and
- engaging in both individual and systemic advocacy³

The advocacy could relate to issues that have been brought to light through the substitute decision-making undertaken by the Public Guardian. An independent public body is particularly important for older people because of strong evidence of elder abuse in our community.

Greater clarity of ‘person responsible’ hierarchy

NCOSS agrees with the Council on the Ageing NSW (COTA NSW)⁴ that the *Guardianship Act* should provide greater detail in relation to the ‘person responsible’ hierarchy. Legislation should:

- articulate the rights and obligations of the person responsible;
- specify that if the first person in the hierarchy is not ‘readily available and culturally appropriate’, responsibility automatically shifts to the next person (as occurs in Queensland);⁵ and
- empower the Public Guardian or Public Advocate to resolve disputes between two eligible decision-makers (as occurs in Queensland);⁶

Recognition of advance care directives

NCOSS supports advance care directives being recognised and legislated for in the *Guardianship Act* to provide greater certainty about their operation. Legislative recognition would be a mechanism by which a person’s will and preference can be recognised, in accordance with the principles of person-centred care.

Practically, legislative recognition of advance care directives would clarify to family members and health care professionals that an advanced care directive is legally binding and takes precedence over the decisions of an Enduring Guardian. To ensure the relationship between

³ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 2016) [Elder Abuse in New South Wales](#) [8.79–8.80], rec 11.

⁴ Council on the Ageing, *Preliminary Submission*.

⁵ *Powers of Attorney Act 1998* (Qld) s 63.

⁶ *Guardianship and Administration Act 2000* (Qld) s 42(1).

the two instruments is clarified, it is appropriate that both are regulated under the *Guardianship Act*.

NCOSS supports the recommendations of Seniors Rights' Service that:

- advance care directives be attached to a guardianship appointment form so that the guardian is aware of the existence of the directive; and;
- a template advance care directive form be included in the *Guardianship Regulation* to raise awareness of the issue.⁷

Regulation of restrictive practices

Restrictive practices are commonly used in relation to older people in aged care facilities, hospitals and community facilities. NCOSS supports the explicit regulation of such practices in the *Guardianship Act*. It is important that such practices are:

- used only as a last resort;
- the least restrictive response available;
- in proportion to the risk posed by the behaviour of concern.

We note that such principles are outlined in the NSW Health Guideline *Working with People with Challenging Behaviours in Residential Aged Care Facilities*.⁸ Legislative recognition would give these requirements legal force.

NCOSS agrees that it is preferable that restrictive practices are only authorised by an independent guardian appointed specifically for this purpose. The Public Guardian or Public Advocate could play an oversight role, similar to the role played by the Senior Practitioner in relation to the use of restrictive practices against people with disability.

As an additional safeguard to ensure the restrictive practice is proportional to the behaviour of concern, NCOSS recommends that any application to apply a restrictive practice must:

- include an outline of action taken to respond to the underlying cause of challenging behaviour; and
- provide evidence that a plan to work with the person to resolve unaddressed issues is in place for the period after any restrictive practice has been instituted.

If you have any questions related to the points raised above, please contact Ya'el Frisch (Policy Officer, Disability and Ageing) at yael@ncoss.org.au.

Yours sincerely

⁷ See Seniors' Rights Service, *Response to Question Paper 4*.

⁸ NSW Department of Health (2006) *Working with People with Challenging Behaviours in Residential Aged Care Facilities*.

Melanie Fernandez
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