

9 February 2018

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



To whom it may concern

Thank you for the opportunity to respond to the Commission's draft proposals in relation to 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 develop as needs and circumstances evolve. This submission has been approved by the Deputy CEO.

NCOSS has responded to the Question Papers released throughout the Commission's thorough consultation process. In the capacity of secretariat, we also had significant input into the responses of the NSW Disability Network Forum (DNF), a group of non-government, non-provider peak representative, advocacy and information groups whose primary aim is to promote the interests of people with disability.

We highly commend the rights based approach underlining the draft proposals, consistent with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In particular, we commend the assumption throughout the draft proposals that a person has decision making ability and should be supported to exercise their will and preferences in relation to a decision at hand. The revised lists of principles and objects¹ reflect this approach.

While strongly endorsing the spirit of the draft proposals, we make a small number of suggestions for improvement below.

Public Advocate advocacy functions should complement, not replace, community advocacy

NCOSS supports the establishment of a public body to undertake many of the functions outlined in proposal 9.1. In our response to Question Paper 4, we noted the important role this body could have in relation to elder abuse. To be effective, it is vital that the Public Advocate have full statutory administrative independence (including security of tenure and dedicated staff) and report annually to Parliament.

¹ Draft proposals 8 and 9.

However, in relation to advocacy on behalf of people with disability, we reiterate the points made in the DNF response to QP4 that advocacy functions of the Public Advocate need to complement those of community based advocacy. In the context of uncertainty of funding for disability advocacy in NSW beyond June 30 this year, we emphasise that the continued funding of community based advocacy, grounded in the experience of people with disability, should be a higher priority than resourcing the Public Advocate to undertake advocacy functions.

In this context, we do not support draft proposal 9.1(3)(c)(i). Community advocacy organisations are better placed than the Public Advocate to negotiate on behalf of people who need assistance from Government agencies.

In addition, we support the contention of our member the NSW Council of Intellectual Disability that Tribunal staff are better placed in the Public Advocate to investigate the need for an order. Having the Public Advocate perform this function creates a potential conflict of interest, as resource constraints would prevent orders being recommended in some cases where they would be appropriate.

Guardianship Act should regulate restrictive practices

In response to Question Paper 5, both NCOSS and the DNF expressed support for explicit regulation of restrictive practices in the Guardianship Act. Regulation would set clear and consistent standards, and clarify the circumstances in which a breach occurs.

The Commission proposes that the Government monitor the implementation of the NDIS restrictive practices scheme, and then consider whether to apply a similar scheme to other sectors it regulates. However, we consider that more proactive action is needed. The NDIS Quality and Safeguarding Framework does not deal with authorisation of restrictive practices, and emphasises that State and Territory Governments remain responsible for restrictive practices in other sectors.²

In terms of our recommendations for the content of the restrictive practices regime, please refer to detailed comments in the DNF response to Question Paper 5.³

Recognition of the needs of culturally and linguistically diverse communities

While we are pleased to see draft proposal 1.10 recognise the need for specific considerations for the needs of Aboriginal and Torres Strait Islander (ATSI) people, it is important that the Guardianship Act also recognises the specific considerations relevant to culturally and linguistically diverse (CALD) communities. We recommend that a proposal similar to 1.10 be included addressing these considerations; see further comments in the DNF response to Question Paper 6.⁴

Three year statutory review period to evaluate implementation of Act

As highlighted in the DNF response to Question Paper 1 we recommend a statutory review period of three years to measure how the new Act operates within an environment where people with disability have access to increased support and

² Council of Australian Governments (2017) [NDIS Quality and Safeguarding Framework](#), at 72.

³ Disability Network Forum (2017) [Response to Question Paper 5](#).

⁴ Disability Network Forum (2017) [Response to Question Paper 6](#).

autonomy, due to the roll out of the National Disability Insurance Scheme (NDIS) and *Disability Inclusion Act 2013 (NSW)*.

Additional requirements around service providers acting as supporters

As emphasised in our response to the Question Papers, it is important that representatives have minimal conflict of interest with the person needing support, as well as a compatible personality where possible. In our view, the proposal to have minimum eligibility requirements for supporters has the potential to create conflicts of interests in cases where a person chooses an existing service provider to act as a supporter. We recommend additional safeguards be put in place to minimise conflict of interest in such cases; these safeguards could be located in guidelines developed by the Tribunal and/or the Public Advocate.

Once again, we congratulate the Commission on draft proposals which emphasise the human rights and autonomy of people needing decision making support. If you have any questions about points raised above, please email Ya'el Frisch (NCOSS Policy Officer, Disability and Ageing) at yael@ncoss.org.au.

Yours sincerely



Melanie Fernandez
Deputy Chief Executive Officer

