Australian Law Reform Commission Inquiry
Equality, Capacity and Disability in Commonwealth Laws: Discussion Paper 81

The Australian Guardianship and Administration Council (AGAC) thanks the Australian Law Reform Commission (ALRC) for the opportunity to provide comment in response to Discussion Paper 81. The issues canvassed and proposals and questions put are complex and the time available within the projects timeframe completion necessarily limit the degree of in depth response.

Supported decision making principles

AGAC supports the supported decision making principles articulated in the paper, noting that that the principles have very broad application and could be incorporated into any review of state-based guardianship and administration regimes, as well as enduring instruments that have been executed by a principal (for example enduring power of attorney and enduring guardianship).

Substitute decision making – process for appointment

AGAC acknowledges the changing focus in "protective legislation" over time; the move from protection to focussing on autonomy to the greatest extent possible. AGAC recognises that a status-based medical approach to decision making, in which a diagnosis leads to an assumption of incapacity, is untenable under international law. AGAC submits that current state legislation in relation to guardianship and administration is not based on a status or medical model. While that was certainly true thirty (30) to forty (40) years ago, since the advent of contemporary guardianship legislation this has been displaced by a hierarchy of consideration notably:

1. Evidence of a disability; **and**
2. Inability to manage decisions for themselves, **and**
3. A problem that cannot be resolved in any other way.

Firstly, evidence of a disability, such as a diagnosis and associated medical reports, is essential evidence for tribunals. It is a necessary for a tribunal to make a factual finding, as a threshold issue, that the tribunal's jurisdiction has been engaged. Secondly, in most state and territory jurisdictions the finding of a disability is intrinsically linked to a finding that the person is unable to make decisions for him or her -self in one or more areas of daily living (a finding of incapacity). Finally, the Tribunal has discretion concerning whether a substitute decision making order ought to be made. The discretion often centres on ensuring that the facts and circumstances justify that a formal substitute decision maker should be appointed. In other words, that informal and supported decision making arrangements will not suffice for the person.

Whilst the tests in each jurisdiction may not be articulated as clearly as the proposed tests in the Discussion Paper, in practice the jurisdictions are focused on a functional assessment of the person's capacity to make decisions, after establishing the appropriate threshold evidence of disability. Accordingly, AGAC supports legislative models that do not rely upon a status-based approach to the appointment of substitute decision makers.

The introduction of the notion of legal agency applied to these processes and the decisions that attend to them is important. It has long been known but hard to implement that a person with a disability may well be able to make decisions in one part of their life but not in others. The universal application of mental capacity as a test has had adverse impact on their exercise of fundamental human rights.

AGAC supports reform to further strengthen the shift away from assessment of mental capacity to recognition of legal capacity and assessment of legal agency. The proposal by the ALRC to use "ability" rather than perpetuate the confusion around the words "capacity", legal capacity and mental capacity, is supported. We note however that this will take time to embed in the minds of the community in the same way as all previous linguistic changes have done.

The Discussion Paper acknowledges the importance of collective decision making processes in Aboriginal and Torres Strait Islander communities which have been historically very poorly understood in this field and many others. AGAC wishes to emphasise that work to ameliorate this, in an appropriate manner that addresses risk, is very important.

Supported and substitute decision making

We recognise the confusion that surrounds supported decision making and substituted decision making. There has long been tension in this area and, if it is possible to locate a new linguistic paradigm, we believe that this will be helpful in underpinning the principles intended in the UN Convention on the Rights of People with Disabilities. However the adoption of a new linguistic paradigm must be accompanied by legislative and cultural change, as well as funding for resources and education.

We reaffirm the AGAC position that supported decision making is not capable of universal application. We note this is supported by the NSW Council for Intellectual Disability and that issues of conflict and abuse must be addressed. However we agree that there is scope for reform of current guardianship legislation. For example, AGAC supports initiatives that will limit the reliance on substitute decision making, where supported decision making is a practical alternative. This is particularly important with an ageing population, as the number of people requiring access to services and accommodation is predicted to increase. Currently there are circumstances in which a tribunal may be required to make a guardianship order with, for example, advocacy and services functions only, because a carer is experiencing difficulties in making arrangements for the person informally. Better recognition of informal supporter arrangements may assist to reduce the number of substitute decision makers being appointed.

Equally, appropriate safeguards need to be in place so that people who may require support to exercise, or who are unable to exercise their decision making ability at all due to the extent of disability (for example, acute brain injury), are not inadvertently placed at greater risk. This is especially important for people who either never have had the ability to communicate functionally or whom have lost it completely due to their condition.

We support the views of the Office of the Victorian Public Advocate; noting that there is a real risk of net widening with the current accessible schema. This was never the

intention of the legislation, in fact quite the opposite. All Australian legislation provides for the making of orders only where there is a demonstrable need. Indeed the potential for multiple supporter appointments under each piece of legislation could create new nets.

Supporter/Representative model
We fully support the move away from the status based approach to defining capacity. We also look forward to the introduction of question specific or issues specific decision making. However the issue of safeguards to prevent abuse is of paramount importance. Proposal 3-8 and 9-9 address these concerns at a high level. More detail is required around implementation of safeguards.

While we agree in principle that the Commonwealth laws identified should have the Commonwealth Decision Making model apply, we are concerned about the details of implementing this in a practical sense and the very real risk of fragmentation, confusion and a potential for a lesser level of support being the functional outcome. In short it runs the risk of making everyday decision making more, not less complex, by adding an additional layer of formal decision making appointment.

Some AGAC members are concerned that the declarative nature of some recommendations may have the effect of unintentionally limiting an individual's choice about whether or not they want a supporter in the first place. For example the use of the words 'support in decision making must be provided´ rather than wording such as 'the person must have access to support'.

There is a difference of opinion amongst AGAC members about the potential for confusion concerning the use of the term representative. Some members have raised concerns that the use of the term is potentially too broad and may lead to duplication of appointments under state legislation, and also possible conflict between multiple decision makers appointed under different regimes. Other members argued that 'representative' is closely aligned with concepts of agency, where principals have capacity to instruct. Conversely, other members felt that it is appropriate. All AGAC members agreed that there was a need to move from old language to new language, to remove the stigmatising effect of terms such as 'financial manager' and 'guardian'. We also support the adoption of a nationally consistent approach to define incapacity, assessing a person's ability and the mechanisms to support an individual on an ongoing basis.

Decision making principles
AGAC supports the decision making principles as currently expressed. AGAC has identified that it will be imperative that the principles are not 'watered down' or amended as they are implemented into individual pieces of Commonwealth legislation. It may be necessary that the principles exist in a separate piece of legislation that can be referenced to by enabling Act to ensure that the principles are consistent across all jurisdiction.

To some extent the principles appear to replicate the principles that most Public Guardians and Advocates apply. AGAC refers the ALRC to the AGAC National Standards of Public Guardianship. The National Standards prescribe that, when appointed as a person's guardian, Public Guardians and Advocates must attempt to identify the person's will and preference and give effect to those views where possible;

this principle is also recognised in the Discussion Paper. AGAC notes that the will and preferences of the person may be evident in discussions with the person directly or from information about their previously expressed views (if they are no longer able to express a view). However, in practice, guardians may receive contradictory information about a person's will and preferences; from the person themselves or from carers and family members in conflict or with competing interests.

The proposed model for representative's decision making assumes that the will and preferences of the person will always be able to guide a representative's decision making process; there is no acknowledgement that in certain circumstances, the views of the person might lead to outcomes that are significantly detrimental to the person's health and welfare. In these circumstances, recognition of the representative's authority to make decisions contrary to the wishes of the person is essential.

AGAC acknowledges the proposal that human rights principles may provide some framework for decision making in circumstances where the person's view should be acknowledged but not implemented due to the serious personal and financial risks that may flow as a consequence. However, AGAC suggests that such a framework must be expressly included (including identifying the relevant rights and considerations) in order for it to be effective.

AGAC also notes that one of the real challenges with implementing principles for supported decision making will be to ensure that private supporters and representatives acknowledge and adhere by the principles. Some AGAC members have expressed concern that there should be sufficient safeguards to ensure that supporters and representatives are able to access resources and assistance as to the exercise of their functions and that there are appropriate safeguards to resolve situations where a supporter or representative may be taking advantage of the principal, where the principal does not have the ability to recognise this and resolve it for him or her –self.

An additional complexity is raised when considering the principle that family and carers views should be respected. The National Standards of Public Guardianship acknowledge that the role of families, carers and significant people should be respected but the person should remain at the centre of the decision. The difficulty in achieving the balance between the person's views and the support network's views needs to be acknowledged in the safeguards.

Supporter/Representative duties

AGAC suggests that a practical consideration for the operation of the proposed Commonwealth model is the availability of people who can properly discharge the role of supporters. There may be a need for mechanisms to resolve issues where the appointed supporter is perceived by other family members or service providers to be acting inappropriately, but the principal refuses to consider changing the appointment or has subsequently lost the capacity to do so, is essential. This is, in our opinion a critical safeguard to ensure that we are not perpetuating a system that reflects conflict of interest or undue influence in decision making.

We note that formal supporters shall have an obligation to support a person in consulting family members and a similar duty is proposed for representatives. Where the person is receiving support to make their own decision they should have choice about who is consulted - and that might not include family members etc. The proposals

need to keep the focus on the person and be clearer about when a supporter is assisting the person to come to a decision themselves or when it is 'fully supported'.

Over many years of practical experience AGAC members have heard cases where purported supporters are not acting in the interests of the person with the disability and may have a conflict of interest. In these situations, a guardianship or administration order can be a tool to empower the person with the disability to exercise his or her own choice of support. Care must be taken to frame legislations with appropriate checks and balances to address such realities.

The quality and consistency of guidance and training provided to any individuals undertaking the role of supporter cannot be understated and will be critical to the real implementation of the principles enshrined in the UN Convention and articulated in the ALRC report. The point at which supported decision making moves to 'fully supported decision making' needs to be closely monitored by supporters, but especially by agencies responsible for implementing the scheme. There is currently no Commonwealth equivalent of the state-based public substitute decision making bodies who may be appointed in circumstances where informal arrangements have broken down and are placing the person at risk.

This comes to particular prominence with the proposal raised in paragraph 4.89 in the Discussion Paper that it would be possible to have both a Commonwealth supporter or a representative and a state or territory appointed decision maker. The practical implication of the proposal is that state legislation would be amended so as to preclude a state appointed administrator from managing Commonwealth benefits, which may be one of the person's principal sources of income. It is not entirely clear how this would operate and particularly in areas where administrators (financial managers), be they private or public, have responsibility for managing all other aspects of a person's affairs when they are on a Centrelink benefit.

This becomes even more complex when considering the second approach discussed at paragraph 4.94. This approach would involve considering whether a state based appointee should also be appointed under the Commonwealth scheme. While we appreciate the "principle" behind this is intended to simplify the process, if implemented it may risk a duplication of effort. It also appears that the implication is for a preference for automatic recognition of state orders. Mechanisms would need to be in place for the Commonwealth appointment to be reviewed should the state based appointed be varied or revoked. There may also be implications for a requirement to establish appeal mechanisms for challenging these 'recognition' type appointments.

Interaction between Commonwealth and State-based schemes

The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) has the most extensive experience of the impact upon Tribunals and potential flow on effect to guardians and financial managers, due to the commencement of the trial sites in the Hunter and Newcastle regions. The following is an excerpt from the Tribunals report on the impact of the scheme to date:

> The NDIS launch site in the Hunter region, including Newcastle, Maitland and Lake Macquarie, has been operating in NSW since July 2013. It is anticipated

that about 10,000 Hunter region residents will be covered by the NDIS by 2016.[1] This has presented the Tribunal with an unique perspective on the interaction between the NDIS and state-based decision making arrangements.

The Guardianship Division of the Tribunal has received over 85 applications for the appointment of a guardian for a person who is or will become a participant in the NDIS. Evidence received at a hearing in March 2014 was that the National Disability Insurance Agency (NDIA) had not yet appointed a nominee for any of the 1,731 participants in the scheme in NSW.[2] The implication of this evidence is that where the participant is not able to self-manage their plan, the NDIA is managing the plan on the participant's behalf.

Applications to the Tribunal for a guardianship order have been made by family members or care providers raising concerns about the operation of the NDIS. Where the person has an active informal support network and strong advocate in a family member or friend, the Tribunal had, to date, dismissed the application. In KTT [2014] NSWCATGD 6, the Tribunal commented that:

> The Tribunal was cautious about pre-empting the NDIA processes by making a guardianship order so that Mrs LBU was all the more likely to be appointed nominee by the NDIA. [29]

By contrast, in KCG [2014] NSWCATGD 7 the Tribunal determined to make a guardianship order for Miss KCG, appointing the Public Guardian, as she did not have a friend or family member involved in her care. The Tribunal commented:

> The irony in reaching this conclusion is that a state based appointment is required for a person in Miss KCG's circumstances to ensure that her interests in relation to a Commonwealth scheme are protected, as it seems there is no Commonwealth equivalent of a Public Guardian, a Public Advocate or other independent body who could be appointed as a nominee on her behalf [69].

The practical reality as evidenced in this case is that where the NDIA is managing the plan on a participant's behalf, and the person has no capacity to provide a view and no family or friends to advocate on his or her behalf, the decisions being made by the NDIA are in the nature of substitute decisions with no independent monitoring or scrutiny.

These applications clearly demonstrate that a number of the tensions raised in the Discussion Paper concerning the model laws are already being experienced in relation to implementation of the NDIS. The Tribunal wishes to emphasise that the model laws should be careful not to blur the distinction between supported and substitute decision making, especially where that supported decision making is used to shield what is in reality a substitute decision. Whilst the concept of introducing a formal supported decision making regime in NSW has merit, the role that substitute decision makers play for people with disability who are

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[1] NDIS, *Information for service providers in NSW*, undated. Available at: http://www.ndis.gov.au/document/375

[2] KCG [2014] NSWCATGD 7, [61].

unable to be supported to make their own decisions should continue to be expressly recognised.

Information sharing
AGAC notes that there are some strategies to appropriately address information sharing. The NSW Trustee and Guardian have entered a number of appropriate arrangements via MOU with Commonwealth departments to share data in order to ensure that the needs of persons are protected and to minimise duplication of effect.

However, some AGAC members have previously expressed concerns, and wish to re-iterate those concerns, with the operation of section 65 of the *National Disability Insurance Scheme Act 2013*. This provision appears to prevent a person from disclosing or producing any document or information to a court, tribunal, authority or person that has power to require the production of documents. This provision would appear to prevent tribunals from having access to information held by the National Disability Insurance Agency. Often this information may be critical to the tribunal's consideration of whether a guardianship or administration order is needed.

Banking
We note the comments in relation to the banking industry. We believe that there are some very practical risks associated here and the greatest is undue influence. AGAC Members see and deal with undue influence in a number of our areas of work. This obviously includes applications for the appointment of a financial manager or Guardian. Trustee members are careful to ensure that people who come to us to make a Will, a power of attorney or enduring guardian instrument are not being exposed to undue influence. One of the important safeguards is that we always interview the person on their own and without a supporter present. This is done to make sure that the person is not being pressed into making a decision or a disposition that does not reflect their actual wishes. Banks are highly unlikely to expose themself to a contingent liability that would at least prima facie be so evident.

Aged care
We note the proposals in aged care and in particular refer to paragraph 6.58 in the Discussion Paper. While supporting the principles we also note the importance of the safeguard here and to ensure that there is no conflict of interest, and that the safety of the older person is not being compromised where a representative has a conflict or is exercising undue influence.

Review of state and territory legislation
AGAC notes the recommendation that State and Territory legislation be reviewed and made consistent with the principles articulated at paragraph 10.23 of the Discussion Paper. AGAC wishes to foreground that a number of reviews have been undertaken in Victoria, Queensland and NSW suggesting reforms to decision making regimes. The move to harmonisation of legislation will take some time to achieve and the complexity of this process cannot be underestimated. For this to be achieved it would require united political support and resources from each of the states and territories. AGAC continues to raise this with the Federal and States AGs.

Principal-appointed decision makers
Consideration will need to be given to the interaction between formal supporter instruments and state-based substitute decision making appointments, such as

enduring powers of attorney, enduring guardianship and advance care directives. AGAC fully supports all moves towards consistency between inter jurisdictional recognition of appointments articulated in paragraph 10.41. AGAC also advocates for consistency in the making, review and the recognition of enduring guardianship, enduring power of attorney and advanced health care directives.

AGAC supports any moves to ensure that advance planning is promoted within the community, to avoid reliance on tribunal or court appointed decision makers. Enduring guardianship, enduring power of attorney and advance care directives have the power to increase autonomous decision making for all Australians and reduce the footprint of government in the lives of individuals including people with a disability. Any state based review of guardianship will necessarily include pre-planning instruments and related legislation.

Conclusion

AGAC has a clear and continuing interest in the outcome of the Commissions review. We will be happy to respond to any further questions which may arise. We will be happy to meet with the Commission at any time in the future

Imelda Dodds
A/Chairperson 26/6/2014