



Physical Disability Council of NSW
Ordinary People Ordinary Lives

Submission for the NSW Law Reform Commission
Review of the NSW Guardianship Act 1987
Response to Question Paper One

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Who is the Physical Disability Council of NSW?

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities across New South Wales. This includes people with a range of physical disability issues, from young children and their representatives to aged people, who are from a wide range of socio-economic circumstances and live in metropolitan, rural and regional areas of NSW.

Our core function is to influence and advocate for the achievement of systemic change to ensure the rights of all people with a physical disability are improved and upheld.

The objectives of PDCN are:

- To educate, inform and assist people with physical disabilities in NSW about the range of services, structure and programs available that enable their full participation, equality of opportunity and equality of citizenship
- To develop the capacity of people with physical disability in NSW to identify their own goals, and the confidence to develop a pathway to achieving their goals (ie: self-advocate).
- To educate and inform stakeholders (ie: about the needs of people with a physical disability) so they are able to achieve and maintain full participation, equality of opportunity and equality of citizenship.

Introduction:

The Physical Disability Council of NSW (PDCN) appreciates the opportunity to comment on the review of the Guardianship Act 1987 (NSW.)

PDCN is heartened to see this review take place, and would hope that the outcome of the review will see an alignment with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to which Australia has ratified, and in looking forward to the implementation of the National Disability Insurance Scheme, that they promote a culture of empowerment and autonomy wherever possible for those whom would be affected by them.

PDCN would also note that some of broader concepts will be discussed in the further question papers that specifically address them, as they are released.

Question 3.1: Elaboration of decision - making capacity

(1) Should the NSW Guardianship Act provide further detail to explain what is involved in having, or not having, decision- making capacity?

(2) If the NSW Guardianship Act was to provide further detail to explain what is involved in having, or not having, decision- making capacity, how should this be done?

The Physical Disability Council of NSW (PDCN) recommends the inclusion of a definition of 'decision - making capacity' be included in Part 1 - Preliminary (3) Definitions of the NSW Guardianship Act 1987 (the Act) to ensure consistency between national and international legislation (CRPD - Convention of the Rights of Persons with Disabilities). Article 12 of the CRPD refers to the requirement to implement provisions that ensure equal recognition before the law. The following five actions are essential components of decision - making capacity that need to be highlighted so the all stakeholders have a common understanding of their relevance:

That any decision consists of the following five components:

- An understanding of the facts involved
- An ability to separate and determine how each option will impact
- An ability to assess the preferred option
- An understanding of the impact of each option and
- An ability to communicate the preferred decision.

That decisions vary in complexity from capacity specific decisions, to decisions requiring a greater complexity.

To maximise decision making capacity on all occasions it is fundamental that the Tribunal mandate that information is always accessible in a range of formats, including braille, easy English, and languages other than English are provided. Additionally, supports and safeguards need to be made available to enhance and facilitate decision making. Safeguards need to be provided with the aim of preventing abuse and conflicts of interest.

Question 3.2 Disability and decision - making capacity

How if at all, should a person's disability be linked to the question of his or her decision- making capacity?

Reduced decision - making capacity is not necessarily linked to a person's disability, and subsequently PDCN does not see that this link should stay as part within the Act. The incidence of reduced or no decision - making capacity is not necessarily only associated with severe cognitive disability, but a lot more common in an ageing population, and legislation needs to be updated to reflect this.

Question 3.3 Defining disability

If a link between disability and incapacity were to be retained, what terminology should be used when describing disability and how should it be defined?

Paragraph 3.30 of Question Paper 1 of this review identifies the different termed States and Territories use when referring to disability. Some of the different terms used to define disability include the following array: impairment, injury, disability, dementia, abnormality, absence, damage, illness, delay, impairment and disorder. If PDCN was in favour of linking capacity directly to disability it would recommend that all legislation use the following terminology – 'people with disability' to minimise confusion in the community and possible negative stereotypes. People with disability is used by the

Council of Australian Governments (COAG) and in other Commonwealth Government legislation.

Question 3.4 Acknowledging variations in capacity

- (1) Should the law acknowledge that decision- making capacity can vary over time and depend on the subject matter of the decision?**
- (2) How should such acknowledgements be made?**
- (3) If the definition of decision- making capacity were to include such an acknowledgement, how should this be expressed?**
- (4) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?**

Variations in capacity will differ depending on the complexity of subject matter and the competence of the individual. It is critical that all community based stakeholders recognize that individual competence will vary. To minimise circumstances where decision - making capacity is low, every opportunity needs to be used to enhance communication and understanding. This could be done by building on the contents of the NSW Capacity Toolkit. PDCN would recommend that the capacity assessment principles included in the Capacity Toolkit be expanded with a seventh principle focusing on the individual needs, skills and aspirations.

Question 3.6: Statutory presumption of capacity

Should there be a presumption of capacity?

Although there is no statutory presumption in NSW legislation, it is recognised within NSW, national and international legislation. To ensure a connection between NSW legislation and the CRPD, a recognised statutory presumption of capacity needs to be adopted as an eight capacity assessment principle.

Question 3.7: What should not lead to a finding that a person lacks capacity?

- (1) Should capacity assessment principles state would should not lead to a conclusion that a person lacks capacity?**
- (2) If capacity assessment principles were to include such statements, how should this be expressed?**

Limited capacity cannot be assumed by the presence of other personal characteristics such as personal qualities included in any of the following categories:

- The person's appearance, behaviour, and beliefs
- The fact that people may think that the person's decisions are unwise, and
- The person's method of communication.

Similar state government legislation in the Australian Capital Territory and in the Northern Territory identify that a person's capacity is not assumed as limited when only the following is known about the person:

- Has a disability, illness or medical condition (whether physical or mental), or
- Engages in unconventional behaviour or other forms of personal expression, or
- Chooses a living environment or lifestyle for which other people do not agree, or
- Makes decisions for which other people do not agree, or
- Does not speak English to a particular standard or at all, or
- Does not have a particular level of literacy or education, or
- Engages in particular cultural or religious practices, or
- Does or does not express a particular religious, political or moral opinion, or
- Is of particular sexual orientation or gender identity or expresses particular sexual preferences, or
- Takes or has taken, or is or has been dependent on alcohol, drugs (but the effect of alcohol or drugs may be taken into account), or
- Engages or has engaged in illegal or immoral conduct

PDCN would recommend that s 5(6) of the Northern Territory Guardianship for Adults Act be added to the NSW Guardianship Act and the NSW Capacity Toolkit.

Question 3.8: The relevance of support and assistance to assessing capacity

(1) Should the availability of support and assistance be relevant to assessing capacity?

(2) If the availability of such support and assistance were to be relevant, how should this be reflected in the law?

Due to the importance of being identified as lacking capacity, all measures of support and assistance must be explored before a person is given such a diagnosis. Subsequently, it is recommended that an additional capacity assessment principle be added requiring jurisdictions to consider “a person’s decision - making ability must be considered in the context of available supports”.

Question 3.9: Professional assistance in assessing capacity

(1) Should special provision be made in NSW law for professional assistance to be available for those who most assess a person’s decision- making capacity?

(2) How should such a provision be framed?

Capacity may be determined by a range of professionals including general practitioners, specialist medical officers, lawyers, financial planners, but ultimately the person who needs to know whether another person has capacity or not, needs to be the person making the decision on whether they believe the person concerned has capacity or not.

Question 3.10: Are there any other issues you want to raise about decision- making capacity?

PDCN would like to reinforce the importance of consistency between state based legislation such as the NSW Guardianship Act and supporting documentation to minimize confusion. This could be done by adopting the following strategies:

1. That the Guardianship Act and supporting documentation referencing the same Capacity Assessment Principles,
2. That decision - making capacity is defined in the glossary of the Guardianship Act and supporting documentation,
3. That legislation and supporting documentation highlight the potential variability in ability to make decisions,
4. A statutory presumption of capacity be identified in relevant legislation and supporting documentation,
5. To remove the assumption in NSW legislation that reduced capacity is assumed to be associated with disability,
6. Highlight the importance of professional supports in legislation and supporting documentation, and
7. Highlight the importance of the professional conducting the assessment to determine capacity within legislation and supporting documentation.

Question 4.1: The need for an order

(1) Should there be a precondition before an order is made to the Tribunal be satisfied that the person is “in need” of an order?

(2) If such a precondition were required, how should it be expressed?

To attain national and international consistency it is important that State Government jurisdictions adopt legislation that include safeguards such as “in need” that comply with Article 12 of the CRPD.

This order is of particular importance when considering restrictive practices. It is understood that this issue of ‘restrictive practices’ will be discussed in greater detail in Question Paper 5.

Question 4.2: A best interests precaution

(1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person’s “best interest”?

(2) If such a precaution were required, how it should be expressed?

(3) What other precaution could be adopted in place of the “best interests” standard?

PDCN believes that the term ‘best interests’ is not compliant with the philosophy of the CRPD because it sees that everyone has a right to legal capacity, regardless of their level of decision - making ability. Furthermore, it is felt that all people with disability should be empowered to exercise their legal capacity by expressing their will and capacity.

Question 4.3: Should the preconditions be more closely aligned?

(1) Should the preconditions for different alternative decision making orders or appointments in NSW be more closely aligned?

(2) If so, in relation to what orders or appointments and in what way?

PDCN does not recommend the assumption that the 'in need' order and the 'best interests' order should necessarily be aligned. This is because PDCN does not support the 'best interests' order, and that PDCN favours an approach that recognises individual need rather than assuming that if a person with disability requires one order then the person needs both orders.