

# Council for Intellectual Disability

## **Position Statement on Reform of NSW Guardianship Laws**

### **May 2022**

#### **Our goal**

The NSW Guardianship Act should be replaced by an Assisted Decision Making Act which provides for:

- People with intellectual and other disability to get the support they need to make their own decisions.
- Any decisions that need to be made for a person being based on the person's will and preferences rather than their "best interests".

#### **Where things stand**

The NSW Guardianship Act is over 30 years old. It was ground-breaking legislation back then but now it is out of date.

The Act allows guardians and financial managers (under the NSW Trustee and Guardian Act) to be appointed even if people have not been given the support they need to make their own decisions.

The "paramount consideration" in the Act is the best interests of the person with disability which is an old fashioned and paternalistic approach.

"Best interests makes me feel like I am being treated like a child".  
CID member

The NSW Government has not updated the Guardianship Act despite three key drivers of change:

#### **The UN Convention on the Rights of Persons with Disabilities**

Australia signed the CRPD in 2008 meaning Australian Governments should make sure the rights in the Convention can be enjoyed by all people with disability.

Article 12 of the CRPD says people with disability must have the right to equal recognition before the law, legal capacity and support to make decisions.

### **Australian Law Reform Commission Report**

In 2014, the Australian Law Reform Commission wrote a report; Equality, Capacity and Disability in Commonwealth Laws. They recommended the National Decision Making Principles.

Principle 1: All people have an equal right to make decisions and have them respected.

Principle 2: People who need decision making support must be provided with support to make their own decisions if they want or need it.

Principle 3: The rights, will and preferences of people who may need decision making support must direct decisions that affect their lives.

Principle 4: Laws must include safeguards for people who use supported decision making or who have a substitute decision maker. Safeguards aim to stop others influencing a person's decision making or causing harm to themselves or others.

See <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124>

### **NSW Law Reform Commission report**

In 2018, the NSW Law Reform Commission released its Review of the Guardianship Act 1987. They recommended the Guardianship Act be replaced by an Assisted Decision Making Act. This new legislation would cover supported decision making and substitute decision making.

It would include

- Provisions sending a clear message that people with intellectual disability have equal rights in decision making.
- Recognition of the customary law, culture, values and beliefs of Aboriginal and Torres Strait Islander peoples.
- A definition of decision making ability and a guide to assessing what supports a person may want and need to make decisions.
- Allowing for informal and formal supported decision making to be considered with substitute decision making as a last resort.

- A person's will and preferences being the key consideration rather than their best interests.
- An independent statutory body that educates people about decision making and supports people with disability who do not have family and others around them.

### **Case study**

Tony has missed paying some major bills. His mother used to support him with financial decisions and bill paying, but she is no longer able to do this. His support workers make an application to the NSW Civil and Administrative Tribunal (NCAT) for financial management through NSW Trustee, although this is not what Tony wants.

Under current legislation, there is a high chance of NSW Trustee and Guardian being appointed as Tony's financial manager.

Under a new Act, other options would need to be considered before an application was made. Tony's will and preference to be supported to manage his own affairs and choice of supporter would be given greater status.

If a financial management order was made, NSW Trustee would have a responsibility to develop and support Tony's capacity to make financial decisions and to be involved in financial decisions. A financial management order would be more easily reviewable.

### **What is the solution?**

The NSW government should:

1. Work with people with disability and their representative organisations to act on the NSW Law Reform Commission's Review of the Guardianship Act taking account also of Article 12 of the CRPD and the ALRC Decision Making Principles.
2. Ensure key elements of the new legislation include the will and preferences of a person with disability and a strong preference for supported decision making over substitute decision making.
3. Implement will and preferences and supported decision making in all other relevant NSW laws and practices.

## **What CID has done**

CID was an active member of the working party which developed the Guardianship Act. In the decades since, CID has advocated for improvement and updating of the law including through submissions to Law Reform Commission inquiries.

CID has advocated for the practices of the Guardianship Tribunal (now the Guardianship Division of NCAT), Public Guardian and NSW Trustee to be inclusive and respectful of the voice of people with disability.

CID's own governance is based on people with intellectual disability being the majority of our board with the support they need to carry out this role.

## **What CID has achieved**

CID's role in the development of the Guardianship Act contributed to what were then major reforms, including a tribunal that operated much less formally than a court and guardianship being limited to specific decisions only.

CID's advocacy has had a major impact on guardianship tribunal practice in NSW being much more inclusive of the participation and voice of people with disability than in some other parts of Australia.

Related: CID's Position Statement on Support for Decision Making  
<https://cid.org.au/resource/our-position-statement-on-support-for-decision-making>