Mental Health Community Coalition ACT Inc.

Submission
Inquiry into the *Guardianship and Management of Property Act 1991* (ACT)
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Submission
Inquiry into the Guardianship and Management of Property Act 1991 (ACT)

<> June 2015

About Mental Health Community Coalition ACT Inc.

The Mental Health Community Coalition of the ACT (MHCC ACT), established in 2004 as a peak agency, provides vital advocacy, representational and capacity building roles for the community managed mental health sector in the ACT. This sector covers the range of non-government organisations that offer recovery, early intervention, prevention, health promotion and community support services for people with a mental illness.

MHCC ACT vision statement:

Our vision is for an ACT community where good quality mental health and wellbeing is available to all.

MHCC ACT works with people who have lived experience of mental illness, carers and the community managed mental health services of the ACT, to achieve this by:

- Providing leadership for the community managed mental health sector in the ACT
- Promoting recovery oriented practice and quality service delivery
- Undertaking sector development that includes capacity building, workforce development and quality improvement
- Raising awareness of mental health issues through advocacy, community education and mental health promotion
Overview

MHCC ACT welcomes the opportunity to respond to the current review by the ACT Law Reform Advisory Council of guardianship arrangements for adult people with disabilities in our community.

We strongly support moves to ensure that all legislation and practices within the ACT are fully compliant with the United Nations Convention on the Rights of Persons with Disability (‘UN CRPD’), including where the disability arises as a result of mental illness.

MHCC ACT approves of the introduction of supported decision-making provisions in regard to the Guardianship and Management of Property Act 1991 (ACT) (‘Guardianship Act’), and hopes to see a similar move in other areas of law where the decision-making ability of the individual is impaired.

We are broadly supportive of the approach taken by the Australian Law Reform Commission as outlined in the ‘Tell Us What You Think’ document and of the move towards greater consistency in legislation pertaining to people with impaired decision-making ability, both within and across Australian jurisdictions.

MHCC ACT would like to take this opportunity to offer some general comments on certain issues arising from the ACT Law Reform Advisory Council response booklet.
Key Recommendations

1. Greater recognition that the Australian Law Reform Commission’s model involves ‘substitute decision-making’ (or representative decision-making), as opposed to ‘supported decision-making’. Currently, the ‘Tell Us What You Think’ document seems to conflate substitute (representative) decision making into supported decision making, as though there is little difference between the two.

2. Expansion and detail of when, and under what circumstances substitute (representative) decision making would be employed. There should be a clear statement regarding the criteria for the use of a substitute decision-maker, especially in the case of psychosocial disability when the capacity to make one’s own decisions is likely to fluctuate.

3. Under the ‘Proposed Guidelines for Giving Effect to Will, Preferences and Rights’, under the heading ‘Representative Decision-Making’, point ‘d’ says that “A representative may override the person’s will and preferences only where necessary to prevent harm.” However, there is no indication as to whether the ‘harm’ must be ‘serious’ or ‘significant’, and nor does it give any idea of whether the concept of ‘harm’ applies only to physical harm, or whether it is intended to cover harm to reputation, relationships, finances, self-neglect etc. This should be clarified under the Guidelines.

4. In relation to the above point regarding ‘Representative Decision-Making’, there is nothing said about the need to balance consideration of risk of harm with consideration of the person’s autonomy and right to make subjectively ‘poor decisions’ like anyone else. The latter should be included in the Guidelines.

5. There is the possibility that legal issues may arise out of decisions made through both ‘supported decision-making’ and ‘substitute (representative) decision-making’. The legal issues could affect either or both of the parties (the ‘supporter’ or ‘representative’ and the person ‘supported’ or ‘represented’ in making the decision). For instance, if someone is ‘supported’ in a decision to enter a hire-purchase agreement, or if a ‘representative’ makes the decision for them, is the decision to enter that agreement as binding as if it were entered into by any other member of the public? Could a person later try to nullify the agreement, claiming they were overly influenced by a ‘supporter’, or by claiming that a ‘representative’ made the decision without their agreement or even knowledge?

6. In some circumstances, a person with impaired legal capacity may wish to be ‘supported’ in decision making by someone from a community-based organisation from which they receive a service, and which they trust. However, there is no funding currently available to pay the organisation to provide such support, and nor are most organisations resourced with information and expertise to provide that support. A form of funding should be established for this purpose, and a package of information needs to be developed to assist workers from community-based organisations to give appropriate decision-making support.
Detailed Comments

Need for greater detail and clarity around proposed reforms

MHCC ACT welcomes the introduction of supported decision-making provisions into the Guardianship Act. We also generally support the use of a "will, preferences and rights" approach to situations involving substitute decision-making (such as "representative decision-making").

However, we note that very little detail is provided by the ACT Law Reform Advisory Council regarding the form of the proposed changes and how they would work in practice. In the absence of such details it is difficult to properly assess the potential impacts of the proposed changes for our constituency.

MHCC ACT would like to see a more detailed exposition of what reform is being proposed by the ACT Law Reform Advisory Council, and in particular one which addresses the general issues and concerns that we raise in this submission.

Need to specifically consider, consult about and address issues relevant to people with a mental illness

MHCC ACT would like to see some specific consideration, consultation and assessment of the impact on people with a mental illness of any proposed changes to the Guardianship Act.

Individuals with decision-making ability that is impaired or that is potentially impaired as a result of mental illness face a range of quite specific concerns due to both the nature of mental illness and the history of legal provisions affecting people with psychosocial disability.

These concerns relate to a range of issues including:

- how decision-making ability is assessed;
- in what circumstances substitute decision-making will be utilized;
- how "will, preferences and rights" will be assessed and promoted;
- how issues relating to risk and potential harm are addressed;
- how fluctuations in decision-making ability are dealt with; and,
- the interaction between the Guardianship Act and other provisions impacting upon the legal capacity of people with a mental illness (for example the Powers of Attorney Act and the Mental Health Act).

Need to recognise that the Australian Law Reform Commission’s model involves substitute decision-making

MHCC ACT would like to see more overt recognition that the proposed model involves substitute decision-making processes and exploration of the principles that will underlie these. We note that "representative" decision-making is a form of substitute decision-making.
None of the National Decision-Making Principles references the possible use of substitute decision-making, and the manner in which they are phrased may create the impression that substitute decision-making will not form part of the proposed model and provides little guidance as to what principles will apply in such cases.

Similarly the General Guidelines and Guidelines for Assessing Support Needs are phrased in terms of individuals who require "decision-making support" though they appear to be intended to apply to representative decision making. It may be inappropriate to refer to "decision-making support" or to assessing "support needs" when referring to representative decision-making processes. Representative decisions ultimately entail the making of substitute decisions rather than the provision of decision-making support to the protected person. In such circumstances individuals are not receiving support to make a decision; rather, a decision is being made for them. MHCC ACT would support greater clarity as to this.

Need for greater clarity regarding "representative" decision-making

MHCC ACT is concerned that there is little detail regarding how and on what basis individuals will be found to require representative decision-making or the form that representative decision-making will take.

We note that "representative" decision-making is ultimately a form of substitute decision-making and that how provisions relating to it will operate will determine whether any proposed changes are consistent with the UN CRPD and promote the autonomy and rights of people with impaired decision-making ability.

The Guidelines for Assessing Support Needs come closest to providing some guidance as to how decision-making ability and the need for representative decision-making will be assessed. However, it is very difficult to get a sense of how these are intended to work in specific examples.

It is particularly important to concretely address these issues with specific reference to people who have a mental illness that may be impairing their decision-making ability. It is not uncommon for the ‘will and preferences’ of such persons to be potentially affected by their mental illness. It is unclear whether the intention of the proposed reforms is for most of these individuals to continue to be under a substitute decision-making regime (i.e. representative decision-making provisions) or for them to be transitioned to a supported decision-making model.

MHCC ACT would like to see greater clarity regarding when substitute decision-making will be used, particularly in relation to individuals with psychosocial disabilities.

Need for greater clarity regarding individuals with fluctuating and/or differential levels of decision-making ability

MHCC ACT is concerned to ensure that the needs of individuals who have fluctuating and/or differential levels of decision-making ability are appropriately met in a manner that ensures the highest possible level of autonomy for those individuals and which provides sufficient clarity as to the legal status of decisions.
This is particularly important in relation to many individuals with a mental illness whose level of decision-making ability may vary considerably either over time or with respect to different kinds of decisions.

We recognise that the Guidelines for Assessing Support Needs (e) and (f) acknowledge these issues. However, it remains unclear how these guidelines are intended to operate in practice as they are very broadly stated.

**Need for greater clarity regarding how risk issues will be addressed**

MHCC ACT would like to see greater clarity regarding how risk issues will be addressed under the proposed reforms.

The proposed guidelines regarding supported decision-making make no reference to issues of risk, including the prevention of harm.

The proposed guidelines regarding representative decision-making allow a person's will and preference to be overridden when necessary to prevent harm. However, this is very broadly stated and provides little guidance as to when such overriding should take place and what considerations should be made by representative decision-makers. MHCC ACT supports greater clarity in regard to this provision, for instance by specifying that the harm must be significant and that it must be weighed against the importance of promoting the autonomy of protected individuals.

MHCC ACT also recommends that the ACT Law Reform Advisory Council specify whether the relevant harm relates solely to the protected person or includes broader harm, for instance to others, and that the forms of potential harm be spelled out – for instance, whether it includes only physical harm, or can include harm to reputation, relationships, finance, self-neglect or other forms of harm.

**Need to ensure clarity and certainty regarding decisions made by, or on behalf of, people with impaired or potentially impaired decision-making ability**

MHCC ACT believes it is important to ensure that there is sufficient clarity and certainty with regard to decision-making by individuals with impaired or potentially impaired decision-making ability.

Persons with disability, carers and service providers need a framework which ensures that there is a high level of clarity about both the process by which decisions are made, and the content and legal status of those decisions.

This is especially important where individuals have variable or fluctuating decision-making ability. Complex issues can arise regarding whether an individual can make a specific decision in a legally valid manner where that individual has decision-making ability with respect to some issues but not others, or has decision-making ability at some points but not others.

It is difficult to get a sense from the ACT Law Reform Advisory Council booklet as to what process will be in place to ensure that there is sufficient clarity and certainty with regard to
decision-making. The Australian Law Reform Commission’s Principles and Guidelines provide an overarching framework, but require more details relating to implementation in specific areas such as guardianship.

Ongoing resource implications of proposed model

Funding, training and ongoing support would be needed for service providers who are likely to be affected by the changes to ensure that they have the knowledge and ability to confidently transition to the proposed new model.

A clear ongoing process must exist to ensure that service providers are able to access advice relating to their obligations and responsibilities under a supported decision-making model. There needs to be a commitment for this to continue beyond any transition process as ultimately a successful supported-decision making model will require a community which is well informed and confident about how it operates generally and in individual cases.

Funding must also be implemented in order to ensure that individuals with impaired or potentially impaired decision-making ability are able to access independent advice and advocacy with regard to decision-making.

Interrelationship between the Guardianship Act, the Powers of Attorney Act 2006 and the Mental Health (Treatment and Care) Act 1994

The move to include supported decision-making in guardianship law will increase the disparity between Guardianship Act processes and Mental Health Act processes. Whilst the two acts would not be per se inconsistent, they would be inconsistent in the approach that they take to impaired decision-making ability. The Mental Health Act remains based on substitute decision-making (with only some requirement for consultation).

MHCC ACT believes it is important to recognise that the proposed reforms would increase this disparity.

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