Tell us what you think

1. Tell us about your experiences with the current Guardianship arrangements in the ACT: what has worked for you and/or what problems you have had with them?:

The following comments relate both to guardianship (Q1) and power of attorney (Q2).

Our recent discussions with organisations which assist and support the elderly (such as ADACAS) and collection of ‘case studies’ of older people who experienced elder abuse while under guardianship or power of attorney arrangements suggests that the mandating of formal, regular monitoring of guardianship and PoA should be considered.

Elderly people may be particularly vulnerable to abuse by guardians and attorneys under PoA because 1) they are at a stage in life where they are likely to have amassed financial assets including property; 2) the people most likely to be appointed as guardians, attorneys etc are also quite likely to have an interest in the principal’s financial assets (eg as potential beneficiaries of a will). This vulnerability does not relate only to decision-making around money, since decision-making around one area of someone’s life will inevitably be linked and have consequences for other areas (for example, decisions around other areas of life such as health or social participation can have financial ramifications, so even if a guardian is only empowered to make or support decisions around, for instance, where someone lives, this will have wider implications. An example would be someone moving into aged care or a granny flat, which might enable relatives to access money or property, or someone who is socially isolated by their guardian being vulnerable to pressure in other life areas including financial).

Our research, as well as occasional contact with the public via the Seniors Information Line, indicates that financial and other abuse by guardians/attorneys does occur more often than it should. When financial abuse does occur, it is sometimes detected too late for authorities to do anything about it ‘the money is gone’. This has serious implications for an elderly person in relation to residential aged care, among other things, because of the high cost etc.

The Act specifies that guardians and property managers should act in ‘the interests’ of their principals, and what this means is spelled out in detail. However, the Act does not require any form of regular or ongoing monitoring to ensure that guardians and property managers are in fact acting in the interests of their principals. As a consequence, when they don’t, this might...
only be detected by chance – a neighbour noticing something, a relative asking questions, etc. If the ‘principal’ is isolated in the community by culture, language, ill health, education or any one of a number of factors, this makes ‘accidental’ detection of misuse of guardianship powers quite unlikely (and that is why abuse perpetrators are quite likely to isolate their victims).

It is therefore very important that any kind of legal arrangement that empowers one person to make decisions on behalf of another person in a vulnerable group (or even ‘support’ autonomous decisions) should be subject to monitoring, review and appropriate safeguards.

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2. Tell us about your experiences relating to powers of attorney: what has worked for you and/or what problems have you had with them?:
See response to Question 1.

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3. What do you think about the ALRC National Decision-Making Principles? Are they the best way of making decision-making laws consistent with the UN Convention on the Rights of Persons with Disabilities?:
This question relates to the rights of people with disabilities, not to the rights of older people (on which there is, currently, no UN Convention). However, our comments relate to the rights of anyone who has guardianship exercised for/over them under the Act, including older people.

The Act currently specifies that guardians should act in such a way as to respect the rights of the person under the guardianship, for instance in relation to participating in social life in the community, maintaining their preferred lifestyle, preventing physical or mental harm, etc. However there are no mechanisms in the Act for ensuring that guardians do so, other than the possibility of review by the ACAT.

We support the inclusion of the National Decision Making Principles outlined, and would want them to specifically cover anyone who is ‘protected’ under a guardianship arrangement. The Principles should ensure that there are regular mechanisms for reviewing guardianship arrangements so that they meet the guidelines. External (ie professional) support for people under guardianship arrangements to augment supported decision-making processes would be very helpful. Even people with cognitive impairment or dementia can express preferences which should be heard and taken into account – but it is not always easy for carers or relatives to know how to do so.

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4. What you think about the Australian Law Reform Commission’s Guidelines for Decision-Making Support. Do you think they are useful? Is there anything else that should be there?:
We believe the Guidelines are useful in their current form, but in practice compliance with the guidelines will need to be monitored and enforced in some way. The same applies to Question 5.1, in relation to decision-making support guidelines.

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5.1 What do you think about the ALRC Guidelines for Giving Effect to Will, Preferences and Rights? Are they useful? Is there anything else that should be there:
5.2. What evidence should a supporter be required to keep to show that they provided support to help the person make a decision? Should this vary with different types of decisions?:
Many types of decision (for instance, decisions around healthcare, employment, access to services) would not necessarily be accompanied by ‘evidence’ that could be shown to a monitoring body such as ACAT. However, for major decisions with far-reaching or serious consequences, it would be important to ensure that the guidelines were followed. Perhaps some types of decisions (sale of property, wills, major healthcare decisions, disbursement of funds beyond a certain level) should be automatic triggers for a review, involving perhaps an interview of the relevant parties by ACAT or a neutral third party support provider.

Discussion at COTA’s forum confirmed that decision-making can be influenced by complex family dynamics and relationships, and that this makes ‘elder abuse’ difficult to address in the real-life context of families and care situations. For this reason, procedures to ensure that supported decision-making works as it should, need to include mechanisms for supporting and negotiating family relationships. For instance, an older person’s daughter provides support to her mother about a decision to enter aged care, based on financial considerations. The mother does not want to enter aged care but does not want to anger her daughter and damage the relationship. What is needed here may not be so much legal advice but mediation and counselling support.

5.3. What evidence should a representative be required to keep about how they made a decision that gave effect to the person’s will, preferences and rights? Should this vary with different types of decisions?:

5.4. How will a representative work out what the person would likely want when the person is unconscious or otherwise unable to communicate their wishes and preferences?:

Realistically, there is no way to ensure that a person’s wishes are followed in this scenario unless they have previously recorded some kind of advance directive. Disagreements about what a person would want is not uncommon within families in situations where, for instance, a person is unconscious and hospitalised or otherwise unable to communicate: the stakes, emotionally and financially, are quite high. The only way to address this issue is to encourage people to make their wishes known (and if possible, record them) in advance – and even when they do, we need to recognise that not all possible future situations can be covered and that the system will never be able to guarantee that people’s wishes are accurately interpreted.

5.5. What if the people consulted by a representative do not agree about what the person would want? Should a representative’s decision be able to be challenged – how and by whom?:

See response to Question 5.4

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6. What you think about the Australian Law Reform Commission’s Guidelines for Safeguards. Do you think they are useful? Is there anything else that should be there?:

We fully support the principles for the Guidelines for Safeguards, particularly the requirement for review.

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7. What suggestions do you have for ways of providing decision-making support?:

Where possible, it is certainly safer for someone to have more than one source of decision-making support especially in relation to major life decisions, and for at least one of the sources of support to be neutral – that is, to have no interest in the outcome of decisions other than the best interest of the protected person. For this to be the case, it is likely that that person should not be a relative or carer, but rather someone from an advocacy, social service or legal organisation.
8.1. How can a person’s need for support be balanced with the person’s right to independent decision-making?:

Adults do have a right to make their own decisions independently as far as possible, even if those decisions are poor decisions, but this needs to be balanced with their capacity to do so. ‘Supported decision making, as opposed to ‘substitute’ decision making, needs to ensure that the person has access to information, advice and support from a neutral source other than a carer, relative or friend.

It should be recognised that adults under guardianship, like all other adults, do have the right to express preferences in their decision-making which might not reflect the preferences of other people - and this should be respected. For instance a person might want to socialise with certain people, spend their time in a particular way, or eat certain foods which a guardian (or an aged care facility) considers not in their best interests - but people's preferences should only be over-ridden when the consequences of not doing so are very serious.

8.2. How can we know what level of support a person needs, and when they need it?:

An assessment of support needs, level of support and timing needs to be made by a small number of people qualified to make such an assessment, as a team. This group might include the person’s carer/relative, a health professional, and an advocacy/social service professional or member of ACAT. Using the guidelines outlined earlier in the discussion paper, the key person in this assessment should be the person requiring support.

9. Have you had any experience with supported decision-making? If so, tell us about what worked well and what didn’t.: The process of supported decision-making may be different depending on the characteristics of the person being supported. In the case of an elderly person, a web-site may not be the best (or at least should not be the only) resource to help guide people through the process of making decisions. There will also be cultural differences for people of CALD or indigenous background. The ‘Let’s have a conversation’ model of advance care planning in the ACT may have some application to supported decision-making processes for older people.

10. Trials of supported decision-making have identified stages in the process of supported decision-making. Do you have any comment about how these stages might work in practice?: Training is essential (and should be mandatory) for people who are entering legal arrangements involving supported decision-making, and strongly encouraged for people who are providing decision-making support in any major way. There is no need for training and regulation to be particularly burdensome, but it needs to be more than simply recommendations to ‘read this booklet’ and ‘follow these guidelines’.

Our research indicates that a certain amount of abuse occurs when either the perpetrator or the victim doesn’t fully understand their rights and responsibilities, and therefore in legal arrangements of this kind, educating both should be a priority.

11. Tell us what you think about practical issues that arose in the trials of supported decision-making, such as training and skills, risk of exploitation, burdensome regulation, and lack of resources.:
12. What areas of life do you think will be affected by such a commitment to a person’s autonomy, and right to make their own decisions, and what changes should be made to decision-making in these areas of life?:

Tell us more information:
We understand that a move may be underway to enable guardians to consent to participation in medical trials for their ‘protected person’. While this makes sense (assuming the guardian acts in accordance with the guidelines in the Act around protecting the health-related interests of the person), it can be difficult for a guardian to assess whether it is in fact in the person’s interest to participate in a medical trial. It is in the interests of health professionals, to some extent, to advise consumers to participate – but it is not always in the interests of consumers to take this advice. We would therefore suggest that any such measure should specify that the guardian must seek the advice of at least one independent source (eg another health care professional) before consenting to participation in a medical trial on behalf of their protected person.

I will forward, by separate email, a summary of proceedings at COTA ACT's recent forum on elder abuse and a draft COTA ACT report comprising case study experiences and perspectives on elder abuse, for your information.

The results of this submission may be viewed at: http://law.anu.edu.au/node/24584/submission/17227