31 July 2015

Guardianship Submissions
ACT Law Reform Advisory Council
c/o ANU College of Law
ANU CANBERRA ACT 0200

Via email: lrac@anu.edu.au

Re: Reform of Guardianship Arrangements in the ACT

Dear Professor Rice,

Thank you for the opportunity to comment on the reform of guardianship arrangements in the ACT.

Leading Age Services Australia (LASA), the voice of aged care, is the peak body for service providers of retirement living, home care, and residential aged care. LASA is committed to improved standards, equality and efficiency throughout the industry and in so doing, helping older Australian live well. We advocate for the health, community and accommodation needs of older Australians, working with government and other stakeholders to advance the interests of all age services providers, and through them, the interests of older Australians.

LASA is not in a position to directly comment on issues specifically raised in the Response Booklet, however we would like to offer the following comments.

Many of the people our members provide care and accommodation to, require the support of family and friends in assisting them to make decisions on matters that are important to them. What we find though, is that some family members may confuse their legal right to make decisions on behalf of a care recipient (when they have lost legal capacity) especially in relation to health care decisions and in relation to money or property. Some feel that if they hold the role of ‘manager’ as described on page 4 of the Response Booklet, they automatically also have the right to act as the ‘health attorney’.

Exacerbating the problem is when ‘substitute decision makers’ might not agree with each other or the person they are meant to be representing. The care provider is placed in a difficult situation in trying to ensure they are advocating on behalf of the care recipient, not ‘overstepping’ their responsibilities under the Aged Care Act, and carrying out the directions they have been given when a care recipient is deemed not to have ‘legal capacity’.

Aged care providers in this instance will often only follow the directions of those in receipt of such legal status to best meet the needs of the care recipient, often causing significant problems between families, the care recipient and the provider.

Where a care recipient has lost capacity and has not made a ‘power of attorney’ prior, the above only become more complicated especially when decisions may not be made in the best interests of the person.
LASA is of the opinion that providers of age services want to respect the rights of all care recipients, and try to respect a person’s rights, will and preferences, even if they are not competent to make legal decisions. For example, a person with cognitive impairment such as dementia should still have an opportunity to participate in any decisions made on their behalf, even if they legally do not have capacity, their decision-making ability may fluctuate over time and they should still have a voice. LASA therefore supports the proposed points where a representative may only override the person’s will and preferences only where necessary to prevent harm.

Another area of concern for LASA is the relationship between aged care and health, be it in the ACT or other states. Anecdotal evidence suggests that despite age services supporting care recipients and families to document future health plans, those documents are not always sought (or in some instances not sent) and so may not impact on the decisions that are required to be made when a person enters a hospital. Often it is difficult to be sure when a person is not fully competent to make decisions and good communication between health and aged care is vital in these situations.

Because of compliance and accountability requirements under the Aged Care Act and to ensure they act appropriately on behalf of the care recipient, aged care providers need clear guidance as to what legal documents support decision making, especially for those people who have lost capacity to make legal decisions on their own.

Frustrating to aged service providers, especially to those that have service outlets in multiple states, is the variation in legislation in each state. The sooner there is national alignment of this type of legislation the better an individual, the community and service providers will be.

Again thank you for the opportunity to comment. Should you have any questions regarding our submission, please do not hesitate to contact Ms Kay Richards, LASA National Policy Manager on 02 6230 1676.

Yours sincerely

Patrick Reid
Chief Executive Officer
Leading Age Services Australia