Dear Professor Rice,

SUBMISSION ON THE REVIEW OF THE GUARDIANSHIP AND MANAGEMENT OF PROPERTY ACT (1991)


2. ALHR was established in 1993 and is a national network of over 2600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

3. ALHR provides comment on Point One of the Terms of Reference which addresses the impact of the United Nations Convention on the Rights of Persons with Disabilities and other international human rights instruments, on principles for guardianship and management of property in the ACT. In addition, this submission will specifically address the proposed National Decision Making
Principles\(^1\), Guidelines for giving effect to will, preferences and rights\(^2\) and Guidelines for Safeguards.\(^3\)

4. In summary:

a. Provisions of the *Guardianship and Management of Property Act 1991* (ACT) that relate to involuntary medical treatment must be repealed so the Act aligns with the UN Convention for the Rights of Persons with Disabilities.

b. ‘Legal capacity’ should be defined so that it is preserved even where a person has deficits in decision-making capacity.

c. ALHR supports the National Decision Making principles and the incorporation of these Principles into the Guardianship and Management of Property Act 1991 (ACT). However, it must be that the person’s right to autonomy and physical and mental integrity is fiercely protected and supported decision making models are used in rare circumstances.

d. ALHR is in favor of the Proposed Guidelines for giving effect to will, preferences and rights. However, greater emphasis is needed to respect and acknowledge cultural practices in decision-making and the representative model should be used with absolute caution. A Capacity Toolkit should be developed to assist supporters/representatives acting in these models and also improve accountability and transparency of these roles.

e. ALHR agrees with the importance of safeguards for people with reduced decision-making capacity but believes the Guidelines for Safeguards needs to be realigned with the principles of will, preferences and rights of people with disabilities to ensure this is a central consideration.

**Impact of the UN Convention for the Rights of Persons with Disabilities on the Guardianship and Management of Property Act 1991 (ACT)**

3. The UN Convention for the Rights of Persons with Disabilities (“CRPD”) protects, promotes and ensures the fundamental rights and freedoms of people with disabilities.\(^4\) Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009.

4. It is imperative that the principles and provisions of the *Guardianship and Management of Property Act 1991* (ACT) (“Guardianship Act”) reflect the international human rights obligations provided in the CRPD.

5. Article 14 of the CRPD addresses the liberty and security of the person, providing:

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\(^1\) See question 1 of the Discussion Paper  
\(^2\) See question 3 of the Discussion Paper  
\(^3\) See question 5 of the Discussion Paper  
\(^4\) UN CRPD, article 1.
1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
   a. Enjoy the right to liberty and security of person;
   b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

6. Further, article 17 provides:
   Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

7. ALHR submits that immediate reform needs to be made to provisions relating to involuntary medical treatment to align with article 14 and 17 of the CRPD and further review of the principles of the Guardianship Act to redefine legal capacity needs to be considered.

Involuntary medical treatment: articles 14 and 17

8. Section 69 of the Guardianship Act permits a guardian to consent to medical procedure or other treatment on behalf of a person who is not competent to give consent.

9. In 2013, the UN Committee on the Rights of People with Disabilities (“UN Committee”) made the concluding observation that State Parties should “repeal all legislation that authorizes medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders.”

10. ALHR stresses the seriousness of authorising medical intervention without the free and informed consent of people with disabilities. These practices are a breach of the fundamental human rights of people with disabilities. Practices and legislation that permits the exercise of medical intervention without consent on the basis of person’s disability should be abandoned immediately.

11. ALHR does support the principles of supported decision making and the provisions of support to engage people with disabilities to obtain their informed consent.

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consent to medical treatment. Genuine and exhaustive efforts to present medical
decisions in an accessible format for the person to make an informed decision
must be implemented.

12. The personal autonomy of adults with disabilities and their right to choice⁶ must
be paramount.

13. Further, article 17 of the CRPD requires the respect of the physical and mental
integrity, on an equal basis with others. This fundamental right should be
recognised in the prohibition of involuntary medical treatment of persons with
disabilities on the basis of their disability.

14. Clearly there will be times for all people, with or without disability where they are
unable to make medical decisions. ALHR makes cogent objection to the unique
application of these laws to people on the basis of their disability.

15. ALHR urges the ACT Law Reform Advisory Council to repeal section 69 which
permits involuntary medical intervention on people with disabilities without the
free and informed consent.

Defining legal capacity

16. ALHR submits that the term legal capacity needs to be carefully defined and
differentiated from mental capacity. In General Comment no. 1⁷, the Committee
on the Rights of Persons with Disabilities states that a deficit in mental capacity
must not lead to a loss of legal capacity. Therefore, guardianship laws must not
revoke a person’s legal capacity on the basis that the individual has decision-
making ability deficits. Such laws are breaching international human rights
obligations.

17. Where a person is found to have a deficit in mental capacity, the person must
have the right to equal recognition before the law.⁸ The Interpretative Declaration
of article 12 provides that “the CRPD allows for fully supported or substituted
decision-making arrangements … only where such arrangements are necessary,
as a last resort and subject to safeguards…”⁹ This Interpretative Declaration was
was divided with some representatives arguing “article 12 does not allow for
substitute-making in any circumstances and others arguing that it does, but only
in specific restricted circumstances, as a measure of last resort and subject to

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⁶ UN CRPD, Preamble (n).
⁷ UN Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal
Recognition before the Law, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014)
⁸ Article 12
⁹ Disability Rights Now 'Civil Society Report to the United Nations Committee on the Rights of Persons with
¹⁰ Ibid.
stringent safeguards, when in the best interests of the person to achieve their human rights and as a means for the person to exercise legal capacity.” ALHR adopts the latter view and stresses that the circumstances in which substituted decision making are employed are severely restricted and in rare situations where it is used, stringent safeguards are enlivened.

Responses to the Discussion Paper

National Decision-Making Principles (“NDM Principles”)

18. Topic 3 of the Discussion Paper recommends that the four NDM Principles are adopted for guardianship laws in the ACT.

19. The NDM Principles echo the requirements of article 12 of the CRPD. ALHR is in favour of these principles insofar as they allow individuals with disability to make decisions in a manner consistent with their rights under the CRPD. It is prudent to reiterate though, that a mental capacity deficit should not lead to a loss of legal capacity, but should trigger support.

20. Further, ALHR calls for the NDM Principles to be clear that advance directives made by persons with disability in times of legal capacity should be expressly considered as a valid expression of their will and preferences.

Guidelines for Decision-Making Support (“Guidelines”)


22. ALHR commends the concept of the Guidelines. However, the language and implementation of the Guidelines must reflect a Rights Based Model approach to disability. In doing so, it must be made clear that any decision-making support given should be proportionate to the situation. An individual must not be ‘over-supported’ to the point where decision-making becomes substituted.

23. The Guidelines for assessing support need to cover a range of issues associated with decision-making ability. With respect to specific items of the guidelines, ALHR submits:

23.1. Points (a), (b), (d) and (f) reflect article 12 of the CRPD and require no change.

23.2. Point (c) needs to be re-worded so that it reflects the need to preserve the rights of the person making the decision and does not create situations where a lack of supports available becomes a valid reason to

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find that a person has a lower decision-making capacity. The focus must be on providing all supports necessary to enable a person to exercise their decision-making capacity.

23.3. Caution should be exercised when implementing point (e) to ensure that it is recognised that people will need support to exercise their decision-making capacity and this support will be given in all necessary circumstances so they can make the most decisions possible.

Guidelines for Giving Effect to Will, Preferences and Rights

31. Topic 5 of the Discussion Paper provides the Guidelines for Giving Effect to Will, Preferences and Rights. These Guidelines will help to give effect to the NDM Principles and describe two types of decision making support; supported decision making and representative decision making.

32. Article 12(4) of the CRPD requires that safeguards for the exercise of legal capacity respect the will and preferences of a person with disability.

Supported Decision Making

33. ALHR commends the supported decision-making model. This model focusses on supporting an individual to express their will and preferences and more importantly, to develop their decision-making ability. ALHR stresses the importance of developing a person’s decision-making ability to increase individual autonomy and control in their life.

34. The recognition of cultural and linguistic circumstance is very important to the success of the decision making model. The role of cultural factors in the decision-making model must be upheld and not used to justify a decision finding a person incapable of making decision. In Fitzpatrick v K [2008] IEHC 104, an African woman was found to lack capacity because of her cultural belief that taking Coca-Cola, tomatoes and eggs could increase blood supply rendering a blood transfusion unnecessary. This was a wide-held belief in parts of Africa. Ultimately, she was found to lack mental capacity or decision-making ability which resulted in the denial of her legal capacity. ALHR recognises the importance of this inclusion in the supported decision-making model.

Representative Decision-Making Model

35. ALHR acknowledges that points (a)-(c) are consistent with obligations under the CRPD but point (d) permitting the will and preferences of a person to be overridden to protect the person from harm should be used with absolute caution.
36. The common law position is that persons can make decisions that are irrational and that this cannot be taken to mean that they lack capacity.\textsuperscript{12} It is important that a representative is not able to override a person’s will and preference because the representative is of the view that it is irrational. Instead, the circumstances of harm should be carefully defined to guide a representative exercising this power. For example, harm may include a serious or imminent threat to the person’s safety or the safety of the community. Defining these circumstances will assist in ensuring that this point of the representative decision-making model is not used in a paternalistic fashion.

**Tools for Representatives and Supporters**

37. To assist the supports and representatives working in the proposed models, ALHR recommends that the ACT develop a Capacity Toolkit similar to those in NSW and Tasmania.\textsuperscript{13}

38. The Capacity Toolkit should detail the obligations of supporters and representatives when supporting an individual to make decisions and provide practical tools to be used when supporting a person to make decisions.

39. The Capacity Toolkit should take the supporter/representative through the process of a capacity determination and give guidance as to how to support the person, along with the obligations of the person, in the event the individual is found to have diminished mental capacity. These features of the Capacity Toolkit offer the opportunity to remind supporters/representatives that the person they are representing has rights and that they are obliged to respect their rights when acting as their representative.

40. Alternative views should be recorded and the justification for the end decision made clear in the Capacity Toolkit.

41. At the centre of the Capacity Toolkit should be the record of the person’s will and preferences and how the supporter/representative took those into consideration. This may also include key people involved in the individual’s life who may be able to expand/explain their wills and preferences.

42. If it is impossible to ascertain a person’s wishes and preferences, caution must be exercised. Consideration must be given to whether they may be able to make decisions in the near future. In the event an urgent decision must be made, the supporter/representative with the legal authority to make decisions on behalf of

\textsuperscript{12} In re T (Adult: Refusal of Treatment) [1993] Fam 95, 113
that person must make the decision that least infringes upon the person’s rights and that is in the person’s best interests which is consistent with the principles of the Guardianship Act.

**Guidelines for Safeguards**

43. Topic 6 of the Discussion Paper provides guidelines for safeguards to protect people from abuse and undue influence.

44. ALHR reiterates the importance of safeguards to ensure people with disability are not over-supported or subjected to abuse or undue influence and have avenues of complaint.

45. The Guidelines for Safeguards do not go far enough to meet the requirements of article 12(4) of the CRPD. To align with article 12(4), the Guidelines for Safeguards should state that the safeguards aim to prevent abuse, respect individual will and preferences and ensure that the exercise of legal capacity is free of conflict of interest and undue influence.

**Conclusion**

46. In conclusion, ALHR commends the timely review of the Guardianship Act after the release of the Australian Law Reform Commission’s report, *Equality, Capacity and Disability in Commonwealth Laws* which recommended four National Decision Making Principles. ALHR submits that the Guardianship Act review approaches to involuntary medical treatment and definitions of legal capacity should be amended to more accurately align with the CRPD. Further, the support decision making model and associated safeguards must place individual will and preferences at the forefront of implementation to guarantee personal autonomy for people with disabilities. ALHR cautions against paternalistic approaches including using Guardianship powers to override the choices of individuals and instead implores that individuals are appropriately supported to exercise capacity. This approach is fundamental to protecting and preserving human rights of people with disabilities.

24. If you would like to discuss any aspect of this submission, please contact Nathan Kennedy, President via email: president@alhr.org.au

Yours faithfully,

Nathan Kennedy
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