Tasmanian Council of Social Service Inc.

Submission to the Tasmanian Law Reform Institute Review of the *Guardianship and Administration Act 1995* (Tas)

March 2018

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About TasCOSS

TasCOSS is the peak body for the community services sector in Tasmania. Our membership includes individuals and organisations active in the provision of community services to low income, vulnerable and disadvantaged Tasmanians. TasCOSS represents the interests of its members and their clients to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

TasCOSS welcomes the opportunity to provide input into the Tasmanian Law Reform Institute's (TLRI) Review of the *Guardianship and Administration Act 1995* (Tas).

In preparing this submission TasCOSS spoke to several member organisations and stakeholders.

Given the complexity of the *Act*, TasCOSS won't address all of the questions raised in the Issues Paper. Our submission focuses on the need to align the *Act* with Australia's obligations under the UN *Convention on the Rights of Persons with Disabilities*[1], in particular Article 12, and measures the Tasmanian Government would need to take to give meaningful effect to any legislative changes.

Australia's obligations under the Convention on the Rights of Persons with Disabilities

The UN *Convention on the Rights of Persons with Disabilities* was established to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[2] Article 12 is particularly relevant because it sets out the specific requirements that States parties must take to ensure the right to equality before the law for people with disability.[3] There are five broad principles governing those requirements:

1. People with disability have a right to be recognised as persons before the law. This is a prerequisite for recognition of a person's legal capacity.[4]
2. Persons with disability possess legal capacity on an equal basis with others in all areas of life.
3. States parties have an obligation to provide persons with disability with access to support in the exercise of their legal capacity. This support must respect the rights, will and preferences of persons with disability "and should never amount to substitute decision-making".[5]
4. States parties must create appropriate and effective safeguards for the exercise of legal capacity, the primary purpose of which must be to ensure the respect of the person's rights, will and preferences.

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[1] Australia is a State Party to the Convention, having ratified it on 17 July 2008 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en>.

[2] http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

[3] Since the Convention was written, terminology has shifted to refer to 'people with disability' rather than 'people (or persons) with disabilities'. When quoting the Convention we use the Convention's phrase and elsewhere use the current terminology.

[4] Legal capacity refers to the ability to hold rights and duties and to exercise those rights and duties.

[5] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement

5. States parties must take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disability with respect to financial and economic affairs, on an equal basis with others.

It is clear that these requirements oblige States parties to:

a) recognise that people with disability have legal capacity, and

b) where necessary, provide support for people with disability to exercise that capacity.

This requires "a shift from the substitute decision-making paradigm to one that is based on supported decision-making".[6]

In 2013, the UN Committee on the Rights of Persons with Disabilities (the "Convention Committee")[7] recommended that Australia "take immediate steps to replace substitute decision-making with supported decision-making".[8] As it is currently written, Tasmania's *Guardianship and Administration Act* is based on the substitute decision-making paradigm. It is therefore the strong view of TasCOSS that the Tasmanian *Act* be reviewed and rewritten so that it is in step with our obligations under the Convention to which Australia is a State party.

A number of implications flow from this. These are discussed below.

Implications

1. Supported decision-making as a continuum

Most of us draw on formal or informal supports for making decisions at different points in our lives – we turn to our partner, friends, financial and other professional advisors, life coaches and psychologists. For many of us, our largest financial asset—our superannuation—is usually managed by someone else because of their expertise. In these cases our decision-making capacity is not assumed to be absent. Rather, it is simply recognised that supported decision-making can enhance the outcomes we seek.

In contrast, when people with disability (particularly due to cognitive impairments) and older people are involved in decision making we as a society tend to focus on their capacity to make those decisions and

[6] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement, p. 2

[7] UN Committee on the Rights of Persons with Disabilities <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

[8] Convention Committee, Concluding Observations on the initial report of Australia, adopted by the Committee at its 10th session, UN Doc CRPD/C/AUS/CO/1 (2-13 September 2013) 25.

often presume an absence of capacity that requires an intervention in the form of an alternative decision maker. This is inconsistent with the principles in the Convention.

A project trialled in the ACT refers to 'spectrums of support', which is explained as follows:

> … support for decision making needs to exist on a spectrum, from formal to informal, and encompassing people with disabilities along with those who share their lives. Some people may need only a little support to access information or weigh up a decision. Others, however, will need to access more comprehensive support, including support to understand decision making, build expectations that they will be involved in the decisions that are important to them, or consider the possibilities for decision support, even before they identify a decision and work towards its fulfilment.[9]

Where a decision cannot be made by the person, even with support, for example if a person is in a coma or otherwise unable to communicate, Article 12 makes it clear that a decision be made that is "the best interpretation of will and preferences".[10] This should replace "best interest" interpretations which are highly subjective—and often based on gendered and class- and race-based notions of what makes "a good life"—and may be in conflict with the person's will and preferences. The ACT *Spectrum of Support* report argues that what is required is "decision support … provided to people to enable their will and preference to be heard in substitute decisions that are being made by others".[11]

This seems to go some way to what is required under the Convention. It does not, however, formally ensure that the person remains the decision maker themselves, rather than having another person make the decision on their behalf, even with their input. This seems to require a more significant shift in the legal framework to incorporate other concepts beyond (or perhaps falling short of) guardianship. The protections provided by accountability of guardians are important and should remain to ensure that formal supports for decision making are accountable and continue to truly support the person to make decisions that reflect their rights, will and preferences.

The test for the appointment of a guardian should reflect the principle of equality before the law. That is, it should not be assumed that a person lacks capacity continuously or in all situations. Indeed, the assumption should be that they have capacity and require support to exercise that capacity fully. For

[9] http://www.adacas.org.au/media/1083/spectrums-of-support-final-20130911.pdf

[10] Article 12, paragraph 4.

[11] http://www.adacas.org.au/media/1083/spectrums-of-support-final-20130911.pdf

example, under Irish law a person's capacity is understood in functional terms, rather than as a permanent or continuous state of being:

> ... a person's capacity shall be assessed on the basis of his or her ability to understand, *at the time that a decision is to be made*, the nature and consequences of the decision to be made by him or her in the context of the available choices *at that time*.[emphasis added][12]

This suggests that the need for a guardian to make decisions on the person's behalf is highly likely to be sporadic or limited to very particular circumstances, including kinds of decisions. The TLRI Issues Paper includes examples about when and how supported decision makers, including guardians, are appointed in other jurisdictions. TasCOSS recommends these other models are investigated in any review of Tasmania's *Act*.

It is of particular relevance to note that the current approach seems to preclude formal recognition of supported decision-making and those who are available to provide that support. Without a re-conception of guardianship and administration law to incorporate mechanisms for formal recognition of the continuum of decision-making capacity and the benefits of formal recognition of support, it is difficult to see how this area of legislation can be part of Australia's compliance with its Convention obligations under Article 12. The legal and lay meaning of "guardianship" in particular and the principle that it is a last-resort intervention need to be recognised and a broader schema for supported decision-making be established through legislation.

2. Funding for decision support programs, including for care workers, families and family guardians, as well as public awareness raising and capacity building for individuals

A shift of this kind will require awareness raising amongst people with disability and older people, their carers and family members, current guardians, and health and other general and specialist service providers about each person's right to autonomy, and the availability and potential of different kinds of support.

It will also require building capacity in people with disability and those around them.

These activities would need to be adequately resourced, most particularly by the Tasmanian Government, to ensure that everyone involved in supported decision-making has the required knowledge and skills to give meaningful effect to the exercise of a person's rights, will and preferences. The aim of this funding would be to avoid or minimise the use of guardianship and administrative orders

[12] http://www.irishstatutebook.ie/eli/2015/act/64/section/3/enacted/en/html#sec3

(that is formal orders giving authorisation to make substitute decisions and to manage a person's finances on their behalf).

3. Oversight and monitoring

The *Spectrums of Support* report recommends establishing in the ACT a paid monitor role to oversee and coach decision makers and decision supporters. Regular reviews of guardians are already written into the Tasmanian *Act.* However if a continuum of support was introduced and formally recognised in Tasmania, an oversight and monitoring regime would also be necessary for formal and informal decision supporters who are not in a statutory guardianship or administrator role.

4. Establish an independent Office of the Public Advocate

The oversight and monitoring role could operate within a new Office of the Public Advocate. That Office would be empowered and resourced to engage in individual advocacy, community empowerment and systemic oversight and advocacy. Again, Tasmania could look to other jurisdictions to determine what is the most effective and efficient machinery to ensure effective and robust oversight, education and advocacy for supported decision-making.

While the TLRI Issues Paper suggests that this role and function could be incorporated within that of the Public Guardian, it is TasCOSS's preliminary view that this would not be desirable due to the conflicting demands of these very different roles.

Conclusion

TasCOSS considers the current review provides a timely opportunity for Tasmania to develop, based on world's best practice, a supported decision-making schema that complies with the UN Convention obligations. This will require a shift both in thinking and in the focus of resourcing. It is, however, an opportunity not to be missed.

Recommendations

1. The Act be re-written to ensure that Tasmania is enacting its obligations under the UN Convention. In particular, this requires reframing the legislation around Article 12 of the Convention to replace the notion of substituted decision-making with supported decision-making, up to and including (as a very last resort) guardianship and administration.
2. TasCOSS further recommends that the Tasmanian Government investigate models in other jurisdictions, with a view to including best practice in supported decision-making regimes in any revision of the Tasmanian Act.
3. That the move to fully establish a legislated supported decision-making regime include a paid monitor role to oversee and coach decision makers and decisions supporters.
4. That the Tasmanian Government fund decision support programs which enable people to avoid or minimise guardianship and administrative orders.

5. That support for decision-making encompasses capacity building resources for care workers, families and family guardians, in addition to capacity building for individuals.
6. That the Tasmanian Government establish the role of Public Advocate, separately to the Office of the Public Guardian. The Advocate should be resourced to undertake duties and functions in points 3, 4 and 5above.