

Assessment of the Need of Support in Exercising Legal Capacity Australia

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[Presentation to be read in conjunction with written paper]



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4th World Congress on Adult Guardianship
14.–17.09.2016





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- What happens when a person's capacity to make decisions is impaired?
- Where should the person live?
- What medical treatment and services should they receive?
- How is their money to be managed?
- Who should provide the assistance that a person needs and in what circumstances should that assistance be provided?
- Whose values or standards or what decision making framework is to be applied in making such decisions?
- How is the desire to prevent the risk to or the exploitation of vulnerable people balanced against a person's freedom to make their own decisions?
- What tests should be applied to determine the level of capacity required to make these everyday decisions?
- Should a person be free to make decisions that may not accord with a 'best interests' standard?



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The Law & Decision Making Capacity in Australia / NSW

- Six States
 - New South Wales 7.67 million
 - Queensland 4.80 million
 - Victoria 5.99 million
 - Western Australia 2.6 million
 - South Australia 1.7 million
 - Tasmania 517,000
- Two Territories
 - Northern Territory 244,000
 - Australian Capital Territory 393,000



Source: Australian Bureau of Statistics, available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0> [accessed 16 August 2015]



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The Law & Decision Making Capacity in Australia / NSW

- Part of the common law world
- “*Parens patriae*” jurisdiction – formerly only Courts
- Now – across Australia – Guardianship (protective) jurisdictions conducted by Tribunals (rarely Courts)
- In NSW – by the Guardianship Division of NCAT:
 - Substitute decision-making model
 - Best interests test
 - 3 members on Tribunal panels
 - Written reasons for majority of orders
 - Triage system for applications
 - 112 Tribunal members
 - 70 staff who prepare matters for hearing
 - Focus is on the PWD
 - PWD encouraged to attend hearing



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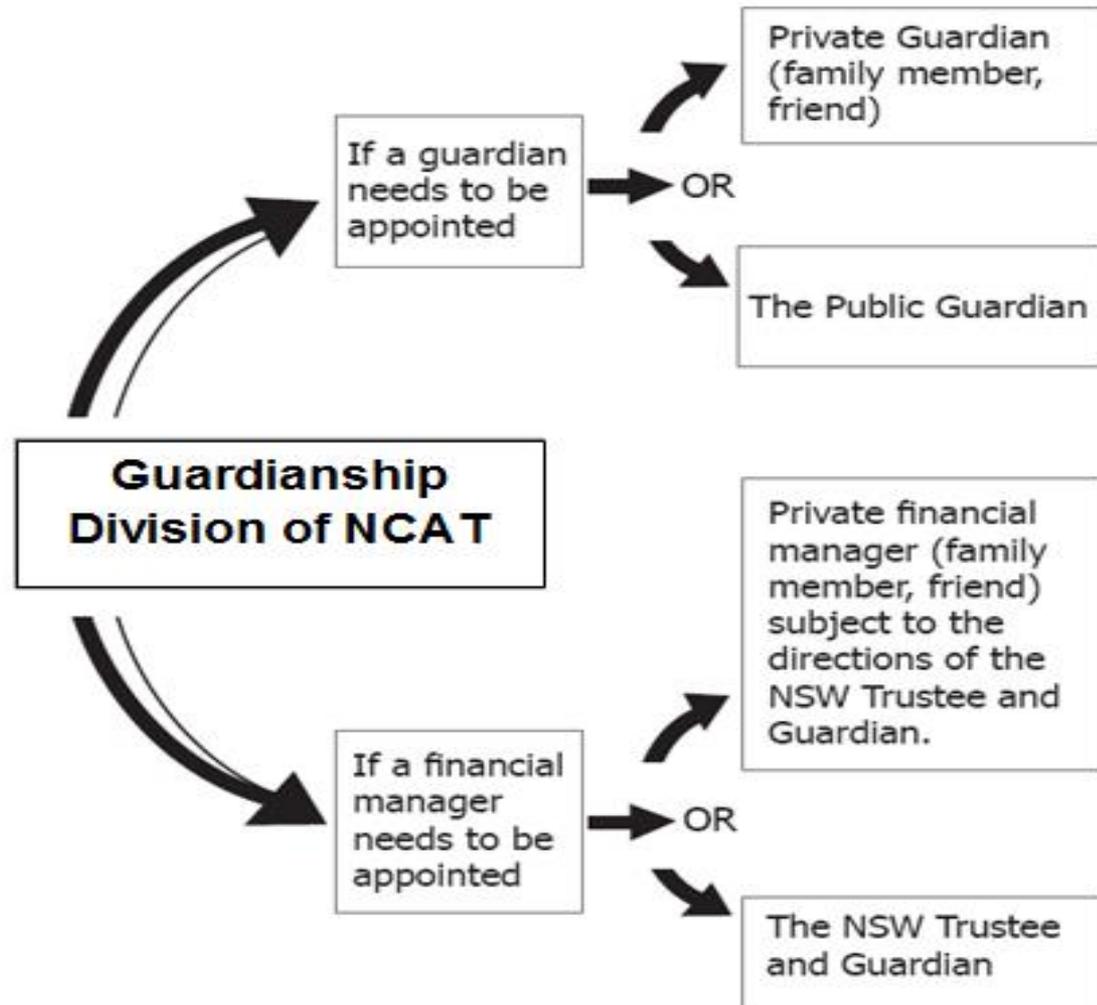


Section 4 Principles

- Anyone exercising functions under the Guardianship Act (the Tribunal, guardians, financial managers) must:
 - a) Ensure the welfare and interests of the person are paramount
 - b) Restrict the person's freedom of action and decision-making as little as possible
 - c) Encourage the person to live as normally as possible
 - d) Consider the person's views
 - e) Recognise family relationships and culture
 - f) Encourage self reliance
 - g) Protect the person from abuse, exploitation or neglect
 - h) Encourage these principles within the community



3 Separate organisations

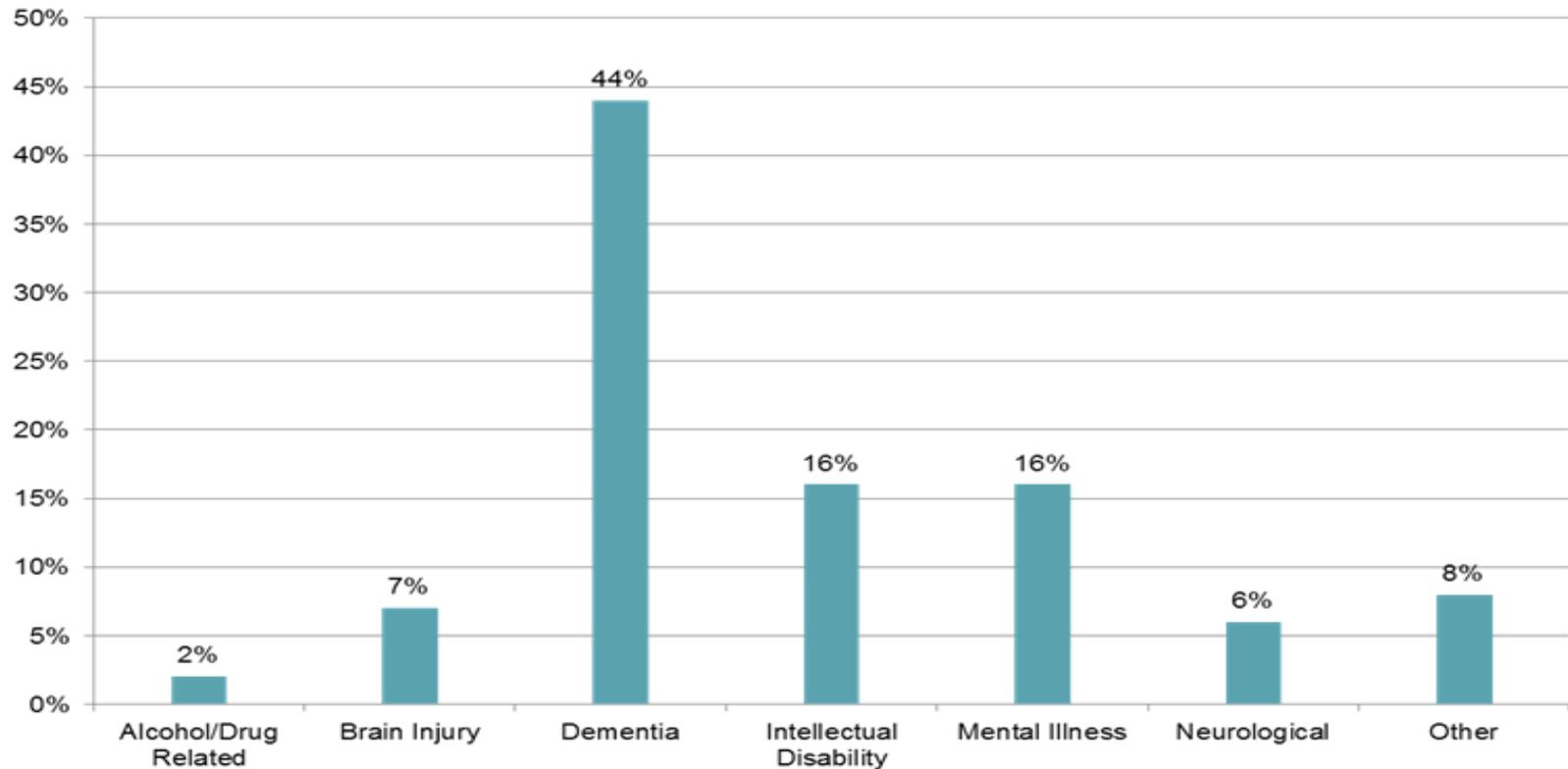




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Disability Demographics 2015/16



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Supported Decision Making in Australia..... so far

- Powers of Attorney – Financial & Legal
- Enduring Guardianship – Lifestyle
- Informal Support mechanism – no regulation
- Numerous Pilot Projects



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National Disability Insurance Scheme (NDIS)

- Trial sites operating for the last 2 years
- National roll-out commenced on 1 July 2016.
- A lifetime disability insurance scheme funded by a 0.5% levy on all tax payers
- Individuals can formulate their own support plans and determine what support and services they receive.
- NDIS promotes supported decision making over substituted decision making.
- Major policy change in Australia concerning the way support and services are provided for people with disability, their families, and carers.



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The Future – proposals for Reform

- Australian Law Reform Commission (ALRC) Report - *Equality, Capacity and Disability in Commonwealth Laws Report 124* (2014)
- Victorian Law Reform Commission (VLRC) Report – *Guardianship: Final Report 24* (2012)
- Queensland Law Reform Commission (QLRC) Report – *A Review of Queensland’s Guardianship Laws 67* (2010)
- New South Wales Parliament Legislative Council – *Elder Abuse in New South Wales* (2016)
- New South Wales Law Reform Commission – *Review of the Guardianship Act 1987*



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ALRC – National Decision making Principles

- ***Principle 1: The equal right to make decisions***

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

- ***Principle 2: Support***

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

- ***Principle 3: Will, preferences and rights***

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

- ***Principle 4: Safeguards***

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.



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ALRC - Will and Preferences

A person's 'will, preferences and rights' is explained by the ALRC as follows:

Article 12(4) of the CRPD uses the formulation 'rights, will and preferences'. The ALRC formulation follows the spectrum of decision-making based on the will and preferences of a person, through to a human rights focus in circumstances where the will and preferences of a person cannot be determined. The inclusion of 'rights' is the crucial safeguard. In cases where it is not possible to determine the will and preferences of the person, the default position must be to consider the human rights relevant to the situation as the guide for the decision to be made.

The emphasis should be shifted from 'best interests' to 'will and preferences' approaches. Even in those examples of approaches where 'best interests' are defined by giving priority to 'will and preferences',[46] the standard of 'best interests' is still anchored conceptually in regimes from which the ALRC is seeking to depart.



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Challenges for Reform

- if a person's decision making capacity to make a particular decision is called into question, what is the test for assessing capacity to ensure that a person can be supported to make that decision?
- who makes this assessment and then determines what level of support is required?
- how do models of supported decision making work for people with fluctuating cognitive capacity?
- what safeguards are required to ensure that:
 - supports provided are suitably independent and free from conflict of interest?;
 - if a person's capacity diminishes, that substitute decision-making does not take place under the nomenclature of supported decision-making, that is how and when are steps taken to appoint a substitute decision maker for someone who can no longer be supported to make their own decisions?

