

Response to the Consultation on the Guardianship and Administration Amendment Bill

Introduction

COTA Tasmania welcomes this opportunity to respond to the draft Guardianship and Administration Amendment Bill 2022 (draft bill). The appropriate protection of the rights of older Tasmanians is core to our submission.

Amending the Guardianship and Administration Act is one important, and much awaited, step to address the collective harms experienced by those who have been disempowered and inappropriately supported through substitute decision making. Amendments must go far enough to afford Tasmanians the protection of their agency and human rights, while ensuring that they are also protected from harm such as elder abuse. The amended act must also recognise the importance of a person's support networks, both in making assessments about a person's decision-making capacity and when a substitute decision maker is appointed.

Impaired decision making ability

COTA is concerned about the Act's lack of clarity around the meaning of impaired decision making. Section 10 clauses (3) and (6) could conflict and the Act provides no means of prioritisation.

We disagree with Section 10 clause (3)(d). An inability to communicate should not be considered an impaired decision-making ability.

The Convention on the Rights of Persons with Disabilities ensures people with disability have equal recognition before the law. Therefore, the Act must ensure that appropriate measures are taken to provide people with any support necessary to enjoy their legal rights on an equal basis and before determining that a person has impaired decision making. We consider that a supported decision-making framework could be strengthened if legislated.

Understanding and using the views, wishes and preferences of a person with impaired decision-making ability

The Act must foremostly ensure the recognition of people's agency. Respecting the views, wishes and preferences of an individual is not enough. Decisions made by a substitute decision maker should comply with and be consistent with the views of the person with impaired decision-making ability. We recommend the rewording of Principles to be observed (1)(c) to 'decisions made by a substitute decision maker must comply with and be consistent with the views of the person with impaired decision making ability.'



Access to independent support should be made available to ensure people can effectively share their views, wishes and preferences. We recommend the rewording of Principles to be observed (1) (d) to ‘a person who requires support in decision-making is provided with access to the support necessary, **independent of the substitute decision maker**, to enable the person, as far as is practicable in the circumstances -’

Overriding the views, wishes and preferences of the person with impaired decision making ability should only occur in very limited circumstances. Those circumstances must be clearly outlined and communicated. We recommend under 9. Decision -making process (e) add a second point reflecting that the substitute decision maker must provide clear information about why they have overridden the person’s views, wishes and preferences.

The importance of support networks

The Act needs to recognise the importance of a person’s support networks, such as when there are other significant people in the person’s life who can be involved in or support the decision making of the person. A person may have reduced decision-making capability but may be capable of making appropriate decisions for themselves with the support of a trusted family member, spouse or other close associate. Assessment must first consider the availability of support and the presence of significant people before considering substitute decision making as an option. When people are isolated from support, they may appear to not be able to adequately make decisions, when they are in fact capable. For example, when someone is alone in an unfamiliar and unnatural environment such as a hospital, their ability to make decisions may appear impaired. But when they are accompanied by a trusted support person, their decision-making capacity may markedly improve.

Close personal and family relationships are often used by people when making decisions. Their ability to continue to do this should be incorporated into processes, ensuring all reasonable steps to provide appropriate decision-making supports.

We recommend the following change to Principles to be observed (1) (e) ‘the role of close relatives, cares and other significant persons in the life of a person with impaired decision-making ability in respect of decisions is **always considered**.’



Medical research

We are concerned about the extensive provisions around medical research that have been introduced in the Bill. The nature of the wording of Objects of the Act (e) providing for arrangements for the conduct of medical research **on** people with impaired decision making ability is offensive. We recommend replacing the word 'on' with 'involving', recognising that people should only be involved in the research with their free and informed consent, not involuntarily experimented on.

Therefore, the sections on medical research within the Act should be rewritten to focus on providing people with the appropriate independent support to enable them to make decisions about being involved in medical research with free and informed consent.

Independent support and review

We believe it is necessary that the Act provisions for independent reviews of compliance with the Act. Independence is necessary to provide appropriate oversight and resolution of concerns without conflict of interest.

We also believe that the Act should make provision for a support person to apply for revocation of a substitute decision making order if they can demonstrate that their role in supporting a person with their decision-making renders that order unnecessary.

Communication with the person and their supporters

Fundamentally, persons with impaired decision making and their supporters must be informed about their rights, responsibilities and how they might be impacted by provisions within the Act. This needs to be communicated accessibly and in plain language.

We recommend that Objects of the Act (f) be reworded from '**ensuring** that persons with impaired decision-making ability and their families are informed of, and make use of, the provisions of this Act' to '**requiring** that persons with impaired decision-making ability and their families are informed of, **and ensuring they make use of**, the provisions of this Act.'

If not complied with, there should be provisions for and order to be made null and void, perhaps through an application to an independent reviewer.

We believe that it is necessary for the Act to require that the person and or their family/supporters to be informed when an application for Guardianship is being submitted. Statements of reasons and transcripts of hearing should be provided automatically, not by request. Communication needs to occur in a way that is understood. Services of an independent advocate or representative should be offered.

Where a third party is providing advice to the substitute decision maker, the person concerned and their supporters should be consulted in relation to that advice. The services of an independent advocate should be offered.

Comments on related issues

There is a need for a change of culture in the organisations involved in guardianship to ensure that implementation of the amended Act occurs in a way that avoids a paternalistic, best interest approach.

COTA Tasmania will continue to represent the collective voice of older Tasmanians in advocating for their rights, interests and futures. We aim to do that through a positive working relationship with the State Government in supporting their implementation of the recommendations of the Independent Review of the Public Trustee. We participate in the Public Trustee Stakeholder Reference Group providing key input into the implementation of recommendations within that organisation. We will continue to advocate to Government for improvements to the legal and policy frameworks that involve guardianship and administration.

COTA Tasmania strongly advocates for a preparatory and preventative approach to planning for the future. Awareness raising, education and supported planning activities are all investments that empower people to prepare for situations where they may be unable to express their wishes. COTA Tasmania aims to work in partnership with governments and community organisations to support more Tasmanians to establish the legal frameworks that support their wishes being known and followed.