



**From the President**

13 October 2016

Mr Alan Cameron AO  
Chairperson  
NSW Law Reform Commission  
GPO Box 31  
Sydney NSW 2001

Via Email: [nsw\\_lrc@justice.nsw.gov.au](mailto:nsw_lrc@justice.nsw.gov.au)

Dear Mr Cameron AO

**Review of the Guardianship Act 1987 - Question 1: “Preconditions for alternative decision-making arrangements”**

Thank you for engaging with The Royal Australasian College of Physicians (RACP) regarding the review of the Guardianship Act 1987.

The RACP connects, represents and trains over 15,000 Physicians and 7,500 trainee Physicians in Australia and New Zealand across a wide range of specialties, including rehabilitation medicine, palliative medicine and geriatric medicine. We have consulted with relevant expert groups across the RACP to prepare this response to Question 1 of the review of the Guardianship Act 1987, “*Preconditions for alternative decision-making arrangements*”.

The RACP notes the requirement for equal recognition for persons with disabilities before the law as outlined in article 12 of the United Nations Convention on the Rights of Persons with a Disability<sup>1</sup>. Comments on specific questions are provided in Table 1 below.

Question	RACP response
<b>3.1: Elaboration of decision-making capacity</b> (1) Should the <i>Guardianship Act</i> provide further detail to explain what is involved in having, or not having, decision-making capacity? (2) If the <i>Guardianship Act</i> were to provide further detail to explain what is involved in having, or not having, decision-making capacity, how should this be done?	Decision-making capacity needs to be clearly defined. Examples should be provided to illustrate each aspect of the definition.

<sup>1</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>

<p><b>3.3: Defining disability</b> If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?</p>	<p>If the link between disability and incapacity is retained, this should be described in functional terms and consideration must be given to whether the disability and the incapacity are temporary or permanent.</p>
<p><b>3.4: Acknowledging variations in capacity</b> (1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision? (2) How should such acknowledgements be made? (3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed? (3) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?</p>	<p>The RACP recommends that the law acknowledge variations in capacity over time and depending on the subject matter of the decision. There should be clear guidance about assessing capacity in relation to particular decisions e.g. making a will, making a decision about health care etc.</p>
<p><b>3.5: Should the definitions of decision-making capacity be consistent?</b> (1) Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements? (2) If the definitions of decision-making capacity were to be aligned, how could this be achieved?</p>	<p>The RACP recommends definitions of decision-making capacity be aligned within NSW, and that to the extent possible, definitions should be aligned nationally.  Clearly defined and specific domains of capacity, and validated processes for assessment which are culturally and linguistically appropriate, are needed.</p>
<p><b>3.6: Statutory presumption of capacity</b> Should there be a statutory presumption of capacity?</p>	<p>The RACP recommends the statutory presumption of capacity, as is the case in a number of other jurisdictions.</p>
<p><b>3.7: What should not lead to a finding that a person lacks capacity</b> (1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity? (2) If capacity assessment principles were to include such statements, how should they be expressed?</p>	<p>Examples should be given of illnesses or states that should not lead to the conclusion that a person lacks capacity: such as mental illnesses and transient medical conditions such as delirium, or following a stroke.</p>
<p><b>3.8: The relevance of support and assistance to assessing capacity</b> (1) Should the availability of appropriate support and assistance be relevant to assessing capacity? (2) If the availability of such support and assistance were to be relevant, how should this be reflected in the law?</p>	<p>The availability of appropriate support and assistance is relevant to assessing capacity.</p>

**3.9: Professional assistance in assessing capacity**

- (1) Should special provision be made in NSW law for professional assistance to be available for those who must assess a person's decision-making capacity?  
(2) How should such a provision be framed?

The RACP recommends the availability of professional assistance so that persons assessing capacity have the skills and knowledge to enable a proper assessment, particularly in complex or contentious situations.

The RACP end of life position statement, *Improving Care at the End of Life: Our Roles and Responsibilities*<sup>2</sup> includes information and recommendations on decision-making at the end of life, including advanced care planning (ACP) and supported decision-making.

If you would like to discuss these matters further please contact Louise Hardy, Manager, Policy and Advocacy [Louise.Hardy@racp.edu.au](mailto:Louise.Hardy@racp.edu.au).

Yours sincerely

Dr Catherine Yelland PSM

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<sup>2</sup>Improving Care at the End of Life: Our Roles and Responsibilities, The Royal Australasian College of Physicians 2016 <https://www.racp.edu.au/docs/default-source/advocacy-library/pa-pos-end-of-life-position-statement.pdf>