

Law Reform Commission of Western Australia Review

Project 114: Guardianship and Administration Act 1990

A Dementia Australia submission

June 13, 2025

Introduction

Dementia Australia is grateful for the opportunity to make a submission to this timely and important review of the 1990 WA Guardianship and Administration Act (the Act). As the peak dementia advocacy organisation in Australia, we amplify the voices of people living with dementia by sharing their stories and helping inform others. As the trusted source of information, education, and support services, we advocate for positive change for people living with dementia, their families, and carers, and support vital research across a range of dementia-related fields.

Dementia Australia strongly supports the endeavour to contemporize the Act and make it fit for purpose in both language and intent. It is critical that any revisions undertaken in relation to the appointment of a guardian or administrator and related matters, ensure that the appropriate mechanisms and safeguards are in place to support and uphold the rights of people living with disability, including people living with dementia.

As the peak advocacy body, we hear regularly from our stakeholders about issues they identify as significant in their lives as people living with dementia, and as people caring for and supporting them. The community we represent consistently raise concerns about the need for a rights-based approach to care and support, how and when to assess a person's decision-making ability, and the most appropriate and supportive way to ensure a person living with dementia is enabled to make decisions about all aspects of their lives for as long as possible.

This submission is focussed on questions raised in Chapters 7 - 9 of *Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1* (the discussion paper) related to these issues accordingly.

We make the following broad recommendations in relation to any revisions undertaken to the WA Act:

- All revisions of the Act should require that all reasonable steps have been taken to ensure the person's rights in making their own life decisions, including the provision of appropriate supports for decision-making
- The appointment of a Guardian should not mean that all decision-making is limited; it should be proportionate and specific to high-risk or high-necessity objectives
- In the event of the appointment of a guardian or administrator, there should be the appropriate review mechanisms and safeguards in place
- Legislation should require that all less restrictive options are pursued before a guardianship order is made

We make the following specific recommendations in relation to key questions in the discussion paper:

- 'Decision-making ability' is our preferred term when describing or referring to a person's 'decisional capacity'
- The 'best interests' standard for decision-making should be replaced with a standard that addresses the will and preferences of the person
- The potential for fluctuating decision-making ability must be acknowledged and enshrined in the revised Act
- A supported decision-making model should be formally adopted in the Act

Chapter Seven: Decisional capacity

The discussion paper identifies that the current Act includes a range of different terms in relation to determining a person's ability to make decisions. These terms are used differently and sometimes interchangeably, contributing to a lack of clarity. We also note and support the intention of the review to update the Act in terms of the language and understanding around disability more generally, particularly in light of the findings and recommendations of the recent Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) and the various corresponding pieces of legislation in Australian states and territories.

We strongly support the review's motivation to enshrine a rights-based approach in recognising the rights of people living with disability to be involved in making decisions about all aspects of the lives in line with the 2008 United Nations Convention on the Rights of Persons with Disabilities.

Dementia Australia believes decision-making ability should be encompassed by a single term to ensure clarity of understanding in the Act, and in relation to assessment of decision-making ability in the broader community. We understand the arguments made in the discussion paper for the proposed use of decisional capacity but as an organisation, we believe the term 'decision-making ability' is preferable because the term 'ability' removes ambiguity around the use of capacity.

'Capacity' has historically been a predominantly legal term but even in a legal context, the interpretation of the term and its application in determining a person's ability to make decisions about legal and other matters, has not been consistently understood and applied.

We support the definition of decision-making ability suggested by the Disability Royal Commission in its Final Report as this reflects considerations that are important for people living with dementia:

'The ability of a person to make a particular decision with the provision of relevant and appropriate support at a time when a decision needs to be made.'¹

¹ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 373

Living with dementia and decision-making ability

Dementia is a progressive disease with a variable trajectory. While there are symptoms common to certain types of dementia, every person diagnosed with dementia will experience the condition, and changes in physical and cognitive abilities, differently. Every person living with dementia will therefore have unique physical and cognitive needs which will change over time. Flexible and responsive support with decision-making will be required at different stages of the dementia trajectory and will be vital in promoting independence and wellbeing and the ability to be involved in decision-making for as long as possible.

For someone living with dementia, in addition to the progression of their dementia, decision-making ability can be influenced by a variety of environmental and psychosocial factors. Studies emphasise the importance of ensuring conditions are conducive to decision-making so that the person with dementia is not discouraged from, or deprived of, the opportunity to express their preferences.²

Maximising comfort and familiarity and minimising noise and other sensory disruptions are important considerations. Fatigue can be a significant issue for people living with dementia so ensuring the time of day suits the person, and checking with them on the day, is also an important factor in optimising their decision-making ability.

Medication, clinical issues and psychological factors, including anxiety, can also have potential impacts on decision-making ability for a person with dementia. People living with dementia can experience neuropsychiatric symptoms or be socially positioned by others around them in a way that limits their opportunities for decision-making.

Acknowledging differences in understanding and beliefs about dementia and decision-making in the ethnically, culturally and socially diverse communities that characterise contemporary Australia is also critical. The provision of appropriate information and support for people living with dementia, their family members and carers will assist in maximising engagement in the decision-making process.

Presenting information in an appropriate language and accessible formats that accommodates the specific communication needs of each person will encourage engagement in the decision-making process. This could include but is not limited to hard copy 'Easy' or 'Plain English' resources, and information provided in audio, video and audio, speech-to-text and other formats.

² J. N. Viaña, F. McInerney & H. Brodaty (2020) Beyond Cognition: Psychological and Social Transformations in People Living with Dementia and Relevance for Decision-Making Capacity and Opportunity, *The American Journal of Bioethics*, 20:8, 101-104, DOI: 10.1080/15265161.2020.1781960

Should the Act prescribe factors that are relevant or irrelevant to assessing decisional capacity? Should these factors focus on a person's ability to make a decision rather than the outcomes of their decisions?

Dementia Australia believes the central focus of decision-making in the Act should be on assessing a person's ability to make informed decisions, with the appropriate information and support, rather than the nature or outcomes of the decision. We note the reference in the discussion paper to the Queensland Law Reform Commission's (QLRC) view that including a list of factors relevant to decision-making ability would be unhelpfully prescriptive. The Commission goes on to note that while such a list would be relevant in some circumstances, it would be unlikely to cover all contingencies.

As outlined above, there are many different types of dementia, with a range of symptoms and variable trajectories. There are also a number of different factors that might influence decision-making ability for a person living with dementia, including psychosocial, medical, clinical and environmental factors. In line with the position taken by the QLRC, Dementia Australia has concerns that taking a prescriptive approach and listing factors that are relevant or irrelevant in assessing decision-making ability could have unhelpful or negative consequences for a person living with dementia. There could be factors or circumstances relevant to a person living with dementia that are not captured in a proposed list which might potentially influence an assessment of the person's decision-making ability, and in turn have an impact on the associated decisions to appoint a guardian or administrator.

Dementia Australia also believes that acknowledging the potential impact of the cultural context and other factors in assessing decision-making ability should be considered in the review of the Act. As with the New South Wales Law Reform Commission (NSWLRC) recommendations in relation to the NSW Act and assessments regarding the decision-making ability of Aboriginal and Torres Strait Islander people, we would support addressing cultural and linguistic factors, and any other considerations related to a person's culture, that might have an impact on the assessment of their decision-making ability.³

Recognition of fluctuating decision-making abilities

Dementia Australia strongly supports the proposed amendment of the Act to specifically recognise that people may have fluctuating 'decision-making abilities.' As outlined above, for a person living with dementia, there are a range of factors that can influence decision-making ability.

³ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 455

This can include medical, clinical and cognitive changes associated with their condition. Changes in decision-making ability might occur in the course of the day, or as the condition progresses over time. Acknowledging the potential for and making provision for fluctuating ability is a critical consideration in any process that seeks to support or assess decision-making ability for a person living with dementia.

We also support the NSWLRC's statement that 'a person's decision-making ability can change and fluctuate over time and *can differ depending on the subject matter*' (our italics).⁴ Understanding that decision-making can be context or decision-specific are equally important considerations for someone living with dementia. For example, a person in the early stages of dementia may be capable of making decisions about all aspects of their life, including complex financial and medico-legal matters. As their condition progresses, the person may not be able to make decisions about financial or legal matters but with the appropriate information and support, could continue to continue to make decisions about their health treatment and care or living arrangements. Careful consideration of the context and type of decision being made, and the provision of appropriate information and support, should be considered in the revised Act.

Equally, we support the principle that a person's decision-making ability should focus on their ability to *make* the decision, rather than the decision or the outcome itself. We believe the position taken by Queensland, the Northern Territory, Victoria and Tasmania in not assessing the 'reasonableness' of the decision but the process by which it was undertaken, is an appropriate and respectful one.⁵

We agree with the position taken in these jurisdictions in adopting a common law test that assesses the person's ability to:

- Understand relevant information (including the consequences of the decision).
- Retain that information to the extent necessary to make the decision.
- Use or weigh that information in the course of making the decision.
- Communicate the decision.

Dementia Australia also notes that the Victorian Act offers a valuable exemplar in its onus on the responsibility of the person assessing decision-making ability to conduct the assessment in an appropriate and supportive environment, optimising an accurate assessment of that ability.

⁴ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 91

⁵ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 92

Dementia Australia supports the clause in that Act that states that the person who is assessing whether a person has ‘decision-making capacity’ in relation to a particular matter must ‘take reasonable steps to conduct the assessment at a time at which, and in an environment in which, the person’s decision-making capacity can be assessed most accurately’. ⁶

In this context, we also support the adoption of the general principle included in the Queensland Act, which states that an adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.⁷

Chapter Eight: The decision-making standard

The discussion paper outlines the current conditions in the Act that would determine how a guardian or administrator applies a best interests standard in making decisions on behalf of another person. This standard, and the associated decision-making processes, is guided by their perception of what is judged to be in the best interests, rather than the wishes and preferences, expressed by the represented person.

As noted in the discussion paper and observed by the WA State Administrative Tribunal, ‘*Best interests can be a very elastic concept and variable from one set of circumstances to another*’ and further, determining what is in the best interests of the person ‘*is informed, but not dictated by the views and wishes of that person*’. ⁸

The Disability Royal Commission supported the adoption of the will and preferences standard as a key component of their recommendation in favour of a supported decision-making framework ⁹. The Commission’s argument that a will and preferences standard would best support a person with disability to exercise autonomy in decision-making is a compelling one. We also note the Victorian Law Reform Commission (VLRC) and the Australian Law Reform Commission (ALRC) support the adoption of the will and preferences standard as a more appropriate, contemporary support a person’s autonomy.

⁶ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 95

⁷ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 95

⁸ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 488

⁹ Law Reform Commission of WA (2025). Project 114: Guardianship and Administration Act 1990 (WA), Discussion Paper Volume 1, p 162

We agree with the VLRC's observation that in the context of substitute decision-making, adopting will and preferences rather than best interests standards gives effect to a person's wishes and preserves their autonomy by seeking to place them in the same position they would have been in if they had the capacity to make the decision themselves.

Dementia Australia believes that changing the current application of a best interests standard in the Act is of critical importance in the overall review of the Act. Historically, the standard of 'best interests' has reflected a paternalistic approach to decision-making, allowing decisions to be made on behalf of a person according to the decision-maker's assessment of what constitutes the best interest of the person they are acting for, rather than knowledge about that person's will and preferences. Dementia Australia believes that a best interests standard does not reflect contemporary research and attitudes on how best to support decision-making processes for a person living with disability, including a cognitive disability such as dementia.

We believe that with the appropriate information and support, people living with dementia can and should be enabled to express their will and preferences in decision-making processes for as long as possible. Dementia Australia believes that the model of supported decision-making is the apposite approach in this context, as it recognises the importance of making decisions with rather than for the person. Supported decision-making enables people with cognitive disabilities to exercise their legal rights about decisions that affect their lives, including medical and financial matters, with support from a team of people they know and trust. It is an inclusive and respectful approach that acknowledges both the relational nature of decision-making (making decisions in genuine partnership), and that support must be tailored to meet the needs of the individual. Dementia is a progressive condition associated with a series of cognitive and other changes, and we also acknowledge there will be situations and contexts in which substitute decision-making is an appropriate approach to supporting a person with dementia to express their will and preferences.

For the reasons outlined above, Dementia Australia believes that the views and wishes of the person, rather than a 'best interests' assessment by another person, should be prioritised in the decision-making process. We support replacing the current Act's best interests standard with a standard that acknowledges the will and preferences of the represented person as the most appropriate way of ensuring the autonomy of represented person, their ability to be involved in decision-making processes as much as possible, and that the outcomes of these processes accurately reflect their will and preferences.

Chapter Nine: A formal model of supported decision-making

As outlined above in response to issues related to the Act's current best interests standard, Dementia Australia strongly supports the adoption of a model of supported decision-making. This is the most appropriate approach to support people living with disability, including dementia, to be involved in decision-making about all aspects of their lives for as long as possible. Further, we believe that what has been characterised as a 'spectrum model of supported decision-making', incorporating different types of support at different stages of dementia, tailored specifically for each individual, is an approach that specifically addresses the changing cognitive needs and abilities, and supports decision-making, for people living with dementia.¹⁰ A more detailed rationale for our support for this approach can be found in our position statement on supported decision-making for people living with dementia: **Supported decision-making**.

The discussion paper highlights the Disability Royal Commission and ALRC recommendations that Australian guardianship laws incorporate a formal supporter model. Dementia Australia agrees with this recommendation and the principal justification for it, namely, that a formal supporter model maintains the independence and autonomy of the person as much as possible and offers a less restrictive approach compared with a substitute decision-making process.

Dementia Australia believes that the Victorian approach, as also outlined in the discussion paper, offers a valuable template for enshrining the supported decision-making in the revised WA Act. The Victorian model includes the appointment of a 'formal supporter', subject to that person meeting specific criteria in relation to that role. Dementia Australia acknowledges the potential issues associated with the model including the need for a formal supporter to agree to the appointment and to have decision-making ability themselves. We also acknowledge that there might be situations where a person does not have an appropriate individual to nominate as a formal supporter and there would need to be additional processes or safeguards in place including the possibility of a publicly funded role.

We also acknowledge that there has been a modest number of formal supporters appointed since the Victorian Guardianship and Administration Act 2019 commenced in 2020. Given this is a relatively short period, we do not view this as a disincentive to adopt a similar model but rather an indication that such a model or approach requires careful implementation and evaluation, and a public education campaign about the new approach and its consequences so that it is understood, trusted and embraced by the community.

¹⁰ National Health and Medical Research Centre, Cognitive Decline Partnership Centre (CDPC). (2019). Supported Decision-Making in Dementia Care: Final Project Report. Sydney: NHMRC Cognitive Decline Partnership Centre. <https://cdpc.sydney.edu.au>, p18

CONCLUSION

In conclusion, we reiterate our strong support for implementation of changes to the Act that are fundamentally rights-based, will improve the WA guardianship and administration system, and ensure that people with disability, including people living with dementia, have the right to make decisions about their lives, with the appropriate information and support.

We restate our recommendations in relation to revision of the Act:

- 'Decision-making ability' is our preferred term when describing or referring to a person's 'decisional capacity'
- The 'best interests' standard for decision-making should be replaced with a standard that addresses the will and preferences of the person
- The potential for fluctuating decision-making ability must be acknowledged and enshrined in the revised Act
- A supported decision-making model should be formally adopted in the Act

Dementia Australia welcomes the opportunity to provide more information or to discuss any of the issues raised in this submission in more detail.

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