Consultation/discussion paper – guardianship reform

# Introduction

The ACT Government is developing a disability **strategy** for the ACT. A strategy is a plan to achieve a goal. The ACT Government has a goal to make the ACT a place where people with disability can lead the kind of life they want to live. Part of achieving that goal is making sure the rights of people with disability living in Canberra are upheld and respected. That includes making sure people with disability are able to make their own decisions and can get support to make decisions if they need it.

# What happens now in the ACT

## What is substitute decision-making?

Every adult makes lots of decisions in their day to day life. Some decisions are small, like what to eat for breakfast, or what colour shirt to wear. Other decisions are big, like how to spend your money, where to live, what medicine to take, or what job to work at. Decisions about health, legal matters and money can have big impacts on a person’s life.

Everyone has the right to make their own decisions and be supported to make those decisions. Some people with disability need support to make important decisions. No person should have another person make decisions for them if they can make the decision themselves with support.

In the ACT, if a person’s decision-making ability is impaired because of a physical, mental, psychological or intellectual disability, someone else can be appointed to make decisions for that person. This is called **substitute decision-making**.

A substitute decision-maker can make important decisions on behalf of a person, based on what they think is best for that person. A substitute decision-maker cannot make decisions to discipline a person, vote, make a will, adopt a child, consent to marriage or a civil union, or consent to some serious medical treatments.

A substitute decision-maker is usually a family member or other trusted individual. If no one is suitable, a government agency called the Public Trustee and Guardian can be a substitute decision-maker.

The process for appointing a substitute decision-maker

The main way that substitute decision-making happens in the ACT is under the *Guardianship and Management of Property Act 1991* (**the GMP Act**). There are also some other laws that enable substitute decision-making about health directions, powers of attorney, and mental health treatment.

This is how a substitute decision-maker is appointed under the GMP Act:

1. A person (**the protected person**) might need help making decisions because of their disability.
2. Someone else, usually a family member or carer, goes to the ACT Civil and Administrative Tribunal (**ACAT**) asking for someone to be appointed as a guardian or manager for the protected person.
3. ACAT holds a hearing, which is a formal meeting with the protected person, their family and carers, to hear about the protected person’s disability and what kind of decisions they need help with.
4. If the ACAT finds that the protected person really needs help to make decisions about health, welfare, money, or property, it can appoint a substitute decision maker to make those decisions for the person.
5. ACAT can appoint a guardian to make decisions about health and welfare or a manager to make decisions about money and property. ACAT decides what sort of decisions a guardian or manager can make for a person.
6. The guardian or manager makes decisions for the protected person. There are rules about how to make these decisions. A guardian or manager should make decisions in the person’s best interests and should take into account what the protected person wants or prefers, as far as possible.
7. ACAT can review, change or revoke the appointment of a guardian or manager at any time, and must review the appointment every three years.

## Example of substitute decision-making under the GMP Act

Terry is a 40 year old man who works every day at a Government office and lives with two friends. He has an intellectual disability and needs some help to make important decisions.

Terry’s mother had been supporting him to manage his money and pay bills and to make sure things were working well at his home, but his mother is now unwell and in hospital.

Terry’s workers (who provide services at his home) think that Terry needs someone else to help with decisions. They are worried because since his mother has been sick Terry has not been paying rent and other bills and has been spending all the money he had saved up. The workers go to ACAT and ask for a manager to be appointed for Terry. ACAT holds a hearing and decides that Terry needs help managing his money. If Terry doesn’t pay rent and bills he might lose his accommodation and services. ACAT appoints the Public Trustee and Guardian to be Terry’s manager because there are no other family or friends who can take on this responsibility.

The Public Trustee and Guardian takes over managing Terry’s bank account and pays his rent and bills and gives him an amount of money to spend each week. Terry knows he needs support to manage his money but doesn’t like having these decisions made for him.

# Why we want to make change

We know it is important that:

* The government protects the human rights of all adults including the right to make important decisions, and to have those decisions respected.
* People who need support to make important decisions have access to that support.
* People who need support to make important decisions are empowered to make those decisions based on their will, preferences and rights.
* People who need support to make important decisions are protected from abuse.
* People who need support to make important decisions, and their trusted supporters, can access helpful information about making important decisions.

The ACT Government wants to improve our laws to better respect the rights of people with disability to make their own decisions as far as possible. We want our laws to promote **supported decision-making** rather than substitute decision-making. The ACT Government’s commitment to supported decision-making is explained more in the [*Disability Justice Strategy 2019-2029*](https://www.communityservices.act.gov.au/disability_act/disability-justice-strategy).

Supported decision-making is when a person gets help to make their own decisions, rather than other people making decisions for them. A person can seek help from trusted people, get the tools and information they need to make a decision for themselves, and work with their support people to make the decision happen. Supported decision-making means that substitute decision-making is used only as a last resort.

Supported decision-making can help people pursue their own goals, make choices about their life, and control the things that are important to them. It can be more effective in promoting the human rights of people with disability who need support in making decisions and protecting them against abuse.

While there are ACT Government policies and programs that facilitate supported decision-making, there is no broader legal framework for supported decision-making in the ACT.

## Example of supported decision making

In Terry’s case, if we had a legal framework for supported decision making, there might be a different outcome. If Terry’s workers went to the ACAT to try to get a manager appointed, the ACAT could consider whether Terry could instead continue to make decisions for himself with support.

If the ACAT found that Terry could manage his money himself with more support from a service, or from a friend, it might not order that a manager be appointed, but instead ask that those other options be tried first.

Terry might just need some help from a support person to set up direct debits to pay his rent and bills automatically from his account so he doesn’t forget. He could get help to set up automatic payment to a savings account so he could save up for a holiday he wants to go on. Then he could continue to manage his money himself with a friend checking in with him every month about how it was going. This option helps Terry to stay in charge of his own decisions and gives him skills to manage his own money.

# Some of our ideas

We have started researching how to move toward supported decision-making in the ACT. We have found that supported decision-making models already exist in many places in Australia and overseas. Based on our research and talking to people with disability, below are some of our ideas for enhancing supported decision-making in the ACT.

## Idea 1

Change the law so that guardians or managers can only make decisions for a person where the person cannot make that decision themselves with support. This could result in more people with disabilities who have guardians or managers being supported to make a decision, rather than having decisions made for them. This could also result in ACAT granting fewer applications for guardianship and management.

This could involve changing the GMP Act so that:

1. Before appointing a guardian or manager, ACAT would be required to consider whether a person could make the decisions themselves with support; and
2. Guardians and managers would be required to support people to make decisions for themselves wherever possible, and would only make a decision for the person if the person couldn’t make the decision with support.

This kind of change would be the quickest change to make because it would require simple amendments to our current laws. We think it could be a good starting point that could happen soon, while we work on bigger changes to the whole system.

## Idea 2

Create a new framework to recognise and formalise supported decision-making, which would be an alternative to substitute decision-making. A similar approach is used in Victoria. This approach could help where informal supported decision-making approaches are already working well, but authorisation is required to ensure a protected person’s decision can be legally recognised and given effect.

This could involve changing the GMP Act and other laws so that:

1. Where ACAT finds that a person could make decisions with support, ACAT could make orders appointing someone chosen by the person as a supportive decision-maker for the person
2. The supportive decision maker would help the person to make their own decisions.
3. Even if a person needs support to make a decision, they would still be recognised as having decision-making capacity.
4. ACAT could still appoint a guardian or manager in other situations.

This kind of change would amend existing laws, rather than creating new laws, but is complex and will take more time than idea 1.

## Idea 3

Create a new system to promote and recognise supported decision-making. A similar approach is used in Canada. This approach would go furthest to protect human rights because it seeks to promote the autonomy and agency of people with disability and does not require someone else to be formally appointed to assist them.

This could involve creating new laws so that:

1. Everyone would need to respect and recognise the will, preference and rights of people who need help making decisions;
2. The law would presume a person can act independently and make their own decisions, moving away from concepts like capacity and impairment;
3. A person could choose less formal ‘supporters’, like trusted friends or independent advocates, to help them make decisions, rather than going through formal legal processes;
4. ACAT could appoint a ‘co-decision maker’ if a person cannot choose their own supporter;
5. Organisations like banks, hospitals and government agencies would be required to accommodate a supported decision-making arrangement;
6. ACAT could still appoint substitute decision-making as a last resort, but there would be more safeguards to make sure this only happened when absolutely necessary.

This kind of change would create new laws and amend existing laws. It is the most complex idea and would take the most time to make it happen. If this idea is preferred, it might be good to start with Idea 1 so that some changes could happen quickly while we work on these bigger changes.

# Questions we have for you

Although we have some ideas, we are open to hearing more ideas from you and your community. You can share any ideas, experiences or concerns with us, but you can also respond to any of the specific questions below:

1. We think that it might be good to start with Idea 1 first and then move on to Idea 2 or Idea 3. Do you think there would be any problems with starting with Idea 1?
2. What do you think about Idea 2 and Idea 3? Which Idea do you prefer?
3. What supports do you have that help you make important decisions?
4. What supports do you *wish* you had to help you make important decisions?
5. What changes would make it easier, simpler or quicker for you to make important decisions?
6. When you need to deal with government agencies (such as Access Canberra, hospitals, children youth and family services) to make important decisions, do you feel that they know how to help you make a decision?

You can register to attend a conversation about decision making here: [ACT Disability Strategy - Focused Conversation - Decision-Making Tickets | Eventbrite](https://www.eventbrite.com.au/e/act-disability-strategy-focused-conversation-decision-making-tickets-310378870557) or you can upload a document or a video sharing your ideas and experiences via the [YourSay website](https://yoursayconversations.act.gov.au/act-disability-strategy). If these aren’t accessible for you, please contact the Office for Disability via email officefordisability@act.gov.au or phone (02) 6207 1086 to find out how to share your ideas in a way that is accessible for you.

Please note we cannot investigate complaints, abuse or concerns about particular people. If you want to report concerns or get advice on what to do, you can:

* Call the ACT Human Rights Commission on 6205 2222
* Call the National Disability Abuse and Neglect Hotline on 1800 880 052.
* Call the Older Persons ACT Legal Service (OPALS) on 6243 3436 or via email on opals@legalaidact.org.au.
* Call the National Elder Abuse Hotline on 1800 353 374.