



**New South Wales  
Law Reform Commission**

# **Review of the Guardianship Act 1987**

## **Draft proposals**

November 2017  
[www.lawreform.justice.nsw.gov.au](http://www.lawreform.justice.nsw.gov.au)

# Review of the Guardianship Act 1987

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## Make a submission

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**Email:** [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

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For more information about us, and our processes, see our website:  
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## Terms of reference

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Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and
  - The *NSW Trustee and Guardian Act 2009* (NSW)
  - The *Powers of Attorney Act 2003* (NSW)
  - The *Mental Health Act 2007* (NSW)
  - other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.
7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

*[Reference received 22 December 2015]*



## Introduction

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### This paper

The Attorney General has asked us to review and report on whether NSW should make changes to the *Guardianship Act 1987* (NSW). This paper sets out our draft proposals for change.

The proposals envisage a new framework for assisted decision-making laws in NSW that reflects the UN Convention on the Rights of Persons with Disabilities (“UN Convention”). They draw upon contemporary understandings of decision-making, and are designed to operate within and alongside the social and legal frameworks in place in NSW.

Since our proposals represent a significant departure from the current guardianship framework, we are releasing this paper to give people the opportunity to consider the details of the proposals in the context of the whole proposed framework. It is also a final opportunity to consider the appropriateness of the parts of the existing framework that we propose be retained.

### The review so far

Over the course of the past year and a half, we have released six question papers covering a range of issues relating to guardianship, including decision-making models, the functions and responsibilities of those assisting with decision-making, court and tribunal procedure, and safeguards. We have also consulted face to face with people across NSW.

We thank everybody who has taken the time to write or speak to us.

Please visit our website - [www.lawreform.justice.nsw.gov.au](http://www.lawreform.justice.nsw.gov.au) - to read the question papers (including in Easy Read format), the submissions that respond to them, and further information about the review.

### Your feedback

We seek your feedback on the draft proposals by **Friday 9 February 2018**.

### Final steps

Once we have received and considered feedback on the proposals, we will write our final report to the Attorney General. The report will explain each of our recommendations.

### Summary of key draft proposals

Our key draft proposals are:

- NSW should have a new Act called the *Assisted Decision-Making Act* that provides a formal framework for both supported decision-making and (as a last resort) substitute decision-making.
- New general principles should reflect the UN Convention. These should include recognising the right to autonomy and the importance of giving effect to a person's will and preferences wherever possible.
- The term "decision-making ability" should be adopted (instead of "capacity").
- The term "disability" should be removed as a precondition for a Tribunal order and from the legislation altogether.
- The new Act should provide guidance on assessing a person's decision-making ability.
- The new Act should provide for two types of formal supported decision-making arrangements: personal support agreements and tribunal support orders.
- The new Act should provide for two types of formal substitute decision-making arrangements as a last resort: enduring representation agreements (to replace the current arrangements for enduring guardians and enduring powers of attorney) and representation orders (to replace the current arrangements for guardians and financial managers).
- The new Act should not allow the Tribunal to make plenary (or unlimited) orders (as it currently can for guardianship). Rather, the new Act should require all agreements and orders to specify the particular personal, healthcare, financial and/or restrictive practices functions for a supporter or representative.
- New decision-making principles should require representatives to give effect to a person's will and preferences wherever possible rather than a person's "best interests".
- The new Act should strengthen the safeguards that apply to enduring representation agreements and representation orders.
- The new Act should introduce review periods for representation orders where the representative has a financial function.
- The new Act should introduce new advocacy and investigative functions, to be performed by a Public Advocate.
- The new Act should set out specific considerations relevant to Aboriginal people and Torres Strait Islanders.
- The new Act should be internally consistent and be drafted using simple and accessible language and structure.

The proposals assume the existence of the following key entities: the NSW Trustee (currently titled the NSW Trustee and Guardian), the Public Representative (currently titled the Public Guardian), the Assisted Decision-Making Division (currently titled the Guardianship Division of the NSW Civil and Administrative

Tribunal), and the Public Advocate (a proposed new entity). We propose that the roles of the Public Representative and Public Advocate should be combined; however, we have distinguished these entities within the proposals in case different administrative arrangements are adopted, to make clear which agency should undertake which function.

Proposals about transitional provisions, especially those that relate to existing agreements and orders, are not included in this paper but we intend to include them in the final report.

## Draft proposals

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### 1. A new framework

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**Proposals 1.1–1.17** seek to establish a new framework for assisted decision-making laws in NSW. They include proposals for:

- A new *Assisted Decision-Making Act* (**Proposal 1.1**) to replace the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW) (“*Powers of Attorney Act*”).
- Simpler, more streamlined provisions (**Proposal 1.2**).
- New terminology (**Proposals 1.3–1.7**) for new concepts and roles, including definitions of the types of decisions that can be made under a formal assisted decision-making arrangement. Importantly, this includes restrictive practices decisions. We propose that the definition of “restrictive practices” be the same as the definition used in the National Disability Insurance Scheme’s statutory framework.
- New statutory objects (**Proposal 1.8**) that emphasise the rights of people in need of decision-making assistance and the importance of the UN Convention principles.
- A revised list of general principles (**Proposal 1.9**) to be observed by everyone exercising functions under the new Act. The revisions intend to bring the general principles into line with contemporary human rights and disability rights principles.

Important changes include: removing the current requirement that people give “paramount consideration” to the person’s “welfare and interests”; introducing the requirement that a person’s will and preferences be respected and their personal and social wellbeing maintained; and requiring that a person’s existing informal supportive relationships are recognised.

- Additional principles that apply when the person in need of decision-making assistance is an Aboriginal person or Torres Strait Islander (**Proposal 1.10**). This proposal aims to ensure that people exercising functions under the new Act specifically consider the circumstances of Aboriginal people and Torres Strait Islanders and the systemic disadvantage they experience.
- Guidance on determining a person’s will and preferences when applying the first of the general principles, that the will and preferences of people in need of decision-making assistance should be given effect where possible. (**Proposal 1.11**)

Currently, those exercising functions under the *Guardianship Act*, including the Guardianship Division of the NSW Civil and Administrative Tribunal (“the Tribunal”), must consider a person’s views, but are not required to give effect to those views. Requiring the decision-maker to be guided by a person’s will and preferences, and if these are not knowable, then to consider the person’s personal and social wellbeing, represents a departure from the current “best interests” test, which is widely seen as paternalistic.

- A new definition of decision-making ability (**Proposal 1.12**). There is no clear or consistent definition of decision-making ability (or “capacity”) in the *Guardianship Act*. This is despite the fact that a finding that a person lacks decision-making ability can have serious consequences for their autonomy.

The definition of decision-making ability is relevant to all circumstances covered by the new Act including, the entry into, and continued operation of, personal support agreements and enduring representation agreements, the making and continued operation of support orders and representation orders, and making decisions about healthcare. The definition we propose replaces various expressions in existing laws that deal with questions of decision-making ability, including, for example, “incommunicate” under the *Powers of Attorney Act*.

Submissions generally supported defining decision-making ability either in guidelines or legislation.

The proposal is framed in terms of ability – this is part of a move away from the language of disability and other discriminatory aspects of the *Guardianship Act*. By specifically referring to decision-making ability “for a particular decision”, this proposed definition acknowledges the reality that a person’s decision-making ability can vary depending on the circumstances. In practice, we envisage that a person might have two or more different assisted decision-making arrangements in place at any one time; for example, both a support agreement and an enduring representation agreement. Which one applies will depend upon the person’s decision-making ability for the decision at hand.

- A new statutory presumption of decision-making ability (**Proposal 1.13**). While the presumption of decision-making ability exists at common law, there is no statutory presumption in NSW, and submissions generally supported its introduction.
- New guidance on assessing decision-making ability (**Proposals 1.14–1.15**). These proposed provisions place an onus on the relevant decision-maker, which might be the Assisted Decision-Making Division of the NSW Civil and Administrative Tribunal (“the Tribunal”), any representative, supporter, person responsible, or any witness to an agreement. Submissions generally agreed that it is important for the law to acknowledge that decision-making ability is decision and time specific; and that it should be clear what factors do not result in a finding of a lack of decision-making ability.
- Additional considerations when the Tribunal is making orders in relation to Aboriginal people and Torres Strait Islanders (**Proposal 1.16**). This proposal responds to the overrepresentation of Aboriginal people and Torres Strait Islanders in parts of the guardianship system.

### 1.1 A new Act

- (1) There should be a new Act to provide for supported decision-making and substitute decision-making called the *Assisted Decision-Making Act* (“the new Act”).
- (2) The new Act should replace the *Guardianship Act 1987* (NSW) and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW).
- (3) The new Act should include:

- (a) statutory objects and general principles that reflect the values upon which the Act is based and guide its interpretation
- (b) principles to guide the assessment of decision-making ability
- (c) assisted decision-making arrangements and the mechanisms for putting these in place, including processes for personal appointments, court and tribunal appointments and default arrangements
- (d) principles to guide decision-making
- (e) the roles and responsibilities of decision-makers
- (f) safeguards that ensure accountability of decision-makers, including monitoring and review of orders and decisions, and
- (g) the functions and powers of a new Public Advocate role.

### 1.2 Language and structure of the Act

The new Act should contain language and a structure that are as simple and as accessible as possible.

### 1.3 Key terms

The new Act should provide:

- (1) When someone appoints another person to make personal, financial, healthcare and/or restrictive practices decisions on their behalf, that person is to be referred to as an “**enduring representative**” and the person on whose behalf they act is a “**represented person**”.
- (2) A person appointed by the Supreme Court or Tribunal to make personal, financial, healthcare and/or restrictive practices decisions on behalf of someone else is to be referred to as a “**representative**” and the person on whose behalf they act is a “**represented person**”.
- (3) A person appointed by the court or tribunal or under a personal agreement to support someone else make decisions, is to be referred to as a “**supporter**” and the person they support is a “**supported person**”.
- (4) The NSW Trustee and Guardian is to be renamed **NSW Trustee**.
- (5) The Public Guardian is to be renamed the **Public Representative**.
- (6) The Guardianship Division of the NSW Civil and Administrative Tribunal is to be renamed the **Assisted Decision-Making Division** (“the Tribunal”).

### 1.4 Personal decisions

The new Act should provide:

- (1) A “personal decision” is a decision that affects a person’s everyday activities and wellbeing.
- (2) The following are examples of personal decisions:

- (a) where the person is to live (for example, in the person's home or in an aged care facility)
- (b) what kind of personal services the person should receive (for example, in-home care, respite services, or occupational therapy), and
- (c) any other matters that concern the person's everyday activities (for example, organising holidays or arranging for groceries).

### 1.5 Financial decisions

The new Act should provide:

- (1) A "financial decision" is a decision about one or more aspects of the person's property.
- (2) The following are examples of financial decisions:
  - (a) paying bills
  - (b) making gifts and donations
  - (c) paying for improvements to property
  - (d) executing documents (for example, contract for sale of goods or property, signing a lease, and authorising bank payments)
  - (e) maintaining the person's dependents
  - (f) maintaining the person, including ensuring their future maintenance (for example, ensuring sufficient funds for amenities, clothing, furniture, medical payments and other everyday expenses)
  - (g) disposing of property
  - (h) paying debts
  - (i) taking up the rights to the issue of new shares to which the person is entitled
  - (j) making decisions on legal matters (for example, bankruptcy, signing contracts or deeds, and retaining a lawyer for legal advice), and
  - (k) investing money.

### 1.6 Healthcare decisions

The new Act should provide:

- (1) A **healthcare decision** is a decision about a person's healthcare.
- (2) Healthcare has the meaning set out in **Proposal 6.3**.

### 1.7 Restrictive practices decisions

The new Act should:

- (a) provide that a “restrictive practices decision” is a decision to approve or disapprove the use of restrictive practices on a person.
- (b) adopt the definition of restrictive practices used in the National Disability Insurance Scheme legislation.

### 1.8 Statutory objects

The new Act should include a statement of statutory objects that sets out that:

- (a) the Act is founded on the principle that people in need of decision-making assistance have the same human rights as all members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights, and
- (b) the objects of the Act are accordingly to:
  - (i) implement the principles of the UN Convention, and
  - (ii) promote the independence and personal and social wellbeing of people in need of decision-making assistance and provide safeguards in relation to the activities governed by the Act.

### 1.9 General principles

The new Act should provide that it is the duty of everyone exercising functions under the Act to observe the following principles with respect to people in need of decision-making assistance:

- (a) Their will and preferences should be given effect where possible, in accordance with **Proposal 1.11**.
- (b) They have an inherent right to respect for their worth and dignity as individuals.
- (c) Their personal and social wellbeing should be maintained.
- (d) They have the right to participate in and contribute to social and economic life.
- (e) They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance.
- (f) They have the right to respect for their age, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.
- (g) They should be supported to develop and enhance their skills and experience.
- (h) They have a right to privacy and confidentiality.
- (i) They have the right to live free from neglect, abuse and exploitation.

- (j) Their relationships with their families, carers and other significant people should be recognised.
- (k) Their existing informal supportive relationships should be recognised.
- (l) They have changing abilities, strengths, goals and needs.
- (m) Their rights and autonomy should be restricted as little as possible.

### **1.10 Additional general principles for Aboriginal people and Torres Strait Islanders**

The new Act should provide that everyone exercising functions under this Act with respect to a person in need of decision-making assistance who is an Aboriginal person or Torres Strait Islander must:

- (a) to the extent that it is practicable and appropriate to do so, act in accordance with that person's culture, values and beliefs
- (b) recognise that Aboriginal people and Torres Strait Islanders have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters
- (c) recognise that many Aboriginal people and Torres Strait Islanders may face multiple disadvantage
- (d) address that disadvantage and the needs of Aboriginal people and Torres Strait Islanders, and
- (e) work in partnership with Aboriginal and Torres Strait Islander people in need of decision-making assistance to enhance their lives.

### **1.11 Determining a person's will and preferences**

The new Act should state that anyone exercising functions under it should approach the task of giving effect to a person's will and preferences wherever possible, as follows:

- (a) First, to be guided by the person's expressed will and preferences (including a valid advance care directive) wherever possible.
- (b) If these cannot be determined, to be guided by the person's likely will and preferences. These may be determined by the person's previously expressed will and preferences, and by consulting people who have a genuine and ongoing relationship with the person and who may be or have been aware of the person's will and preferences.
- (c) If these too cannot be determined, to make decisions that promote the person's personal and social wellbeing.
- (d) If giving effect to a person's will and preferences creates an unacceptable risk to the person (including the risk of criminal or civil liability), to make decisions that promote the person's personal and social wellbeing.

- (e) Regardless, a person's decision to refuse healthcare in an advance care directive must be respected if that refusal is clear and extends to the situation at hand.

### **1.12 Definition of decision-making ability**

The new Act should provide that a person has decision-making ability for a particular decision if they can, when the decision needs to be made:

- (a) understand the relevant information
- (b) understand the nature of the decision and the consequences of making or failing to make that decision
- (c) retain the information to the extent necessary to make the decision
- (d) use the information or weigh it as part of the decision-making process, and
- (e) communicate the decision in some way.

### **1.13 Presumption of decision-making ability**

The new Act should provide for a rebuttable presumption that a person has decision-making ability.

### **1.14 Assessing decision-making ability**

The new Act should provide:

- (1) When assessing whether a person has decision-making ability, a decision-maker must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision-making ability can be assessed most accurately.
- (2) In determining whether a person has decision-making ability, a decision-maker should consider that:
  - (a) decision-making ability is specific to the decision being made
  - (b) inability to make a decision may be temporary or permanent
  - (c) decision-making ability may be different at different times
  - (d) a person may develop, gain or regain decision-making ability, and
  - (e) a person has decision-making ability for a matter if it is possible for the person to make the decision with practicable and appropriate support.
- (3) A decision-maker should not reach the conclusion that a person does not have decision-making ability only because of one or more of the following:
  - (a) the person's age
  - (b) the person's appearance
  - (c) an aspect of a person's behaviour (or manner)

- (d) the person's political, religious, or philosophical beliefs
- (e) the fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise
- (f) the fact that the person has a physical or mental condition
- (g) the fact that a person is a forensic patient, or may become a forensic patient
- (h) the person's methods of communication
- (i) the person's gender identity, sexual preference or sexual conduct
- (j) the person's cultural identity, or
- (k) the person's history of drug or alcohol use.

### **1.15 Assessing decision-making ability of Aboriginal people and Torres Strait Islanders**

The new Act should provide that, to the extent that it is appropriate and practicable to do so, when determining whether an Aboriginal person or Torres Strait Islander has decision-making ability, a decision-maker should have regard to:

- (a) any cultural or linguistic factors that may impact on an assessment of the person's decision-making ability, and
- (b) any other relevant considerations pertaining to the person's culture.

### **1.16 Additional Tribunal considerations for orders about Aboriginal people and Torres Strait Islanders**

The new Act should provide that, to the extent that it is appropriate and practicable to do so, the Tribunal must, when determining whether a support or representation order should be made for an Aboriginal person or Torres Strait Islander, have regard to:

- (a) the likely impact of the order on the person's culture, values, beliefs (including religious beliefs) and linguistic environment
- (b) the likely impact of the order on the person's standing or reputation in their Indigenous community, and
- (c) any other relevant consideration pertaining to the person's culture.

### **1.17 Supreme Court's inherent protective jurisdiction**

The new Act should not limit the Supreme Court's inherent jurisdiction, including its *parens patriae* jurisdiction.

## 2. Personal support agreements

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**Proposals 2.1–2.16** establish a legal framework for personal “support agreements”, one of two new formal supported decision-making options under the proposed framework (the other being Tribunal “support orders”, proposed in **Part 3**).

When it comes to making important decisions, people usually rely on the assistance or advice of family, friends or other people in their lives. These informal decision-making arrangements can be a satisfactory way of supporting someone to make decisions of their own. However, in some cases informal decision-making arrangements fail to provide adequate protection for the people being supported. When informal arrangements are used it can also be unclear who must undertake what roles and responsibilities in the decision-making process.

There was broad support among submissions for the introduction of formal supported decision-making, including support agreements and Tribunal support orders. On the other hand, few submissions liked the idea of co-decision-making. We therefore do not propose co-decision-making in the new framework.

Support agreements provide a mechanism for people requiring support to elect someone to assist them with making decisions in various areas of their life, for example, finances or healthcare. We propose that support agreements are written in a prescribed form and made subject to the formal requirements that currently apply to the appointment of enduring guardians under the *Guardianship Act*. We have attempted to align the requirements for support agreements and enduring representation agreements (see **Part 4**) to the extent that is appropriate.

Most people we heard from thought that before a support agreement can be made, the person needing support should be at least 18 years of age, understand the role of the supporter and the nature of the relationship, and should enter into the arrangement voluntarily. This is incorporated in **Proposal 2.1**.

We have sought to minimise limitations on who can become a supporter. We propose to allow supporters to be as young as 16 years of age. Significantly, our proposal permits the appointment of paid care workers, volunteers and others involved in providing medical, accommodation or other daily services, as supporters. Most submissions acknowledged this was appropriate particularly where the person requiring support lacks other community ties. However, there were concerns about conflict of interest and the need to supervise and train volunteers. A number of people said that an employee of a person’s accommodation provider should be excluded from appointment as their supporter. No such limitation is included in our proposals, in the interest of not limiting the supported person’s autonomy to decide who is appropriate. As an important safeguard, **Proposal 2.3** introduces some protections where a person wants to appoint a person who has been bankrupt or committed offences of dishonesty.

Importantly, our proposals make clear that the role of the supporter is to access or collect information that is relevant to the decision, assist the supported person to communicate their decision and advocate for the implementation of that decision. A supporter is not to make decisions on behalf of the supported person or exercise their powers without the supported person’s knowledge and consent. The supported

person can also specify in the agreement any limitations to or conditions on the functions of the supporter. For example, they could decide to limit the functions a supporter can perform in relation to significant financial transactions, as a means of safeguarding against financial abuse: **Proposal 2.8**.

A supported person can revoke a support agreement. We have also proposed oversight of support agreements by the Tribunal and the Supreme Court by way of review mechanisms set out in **Proposals 2.12** and **2.14**, respectively.

We see support agreements as being one of a suite of different assisted decision-making options. They will not suit every circumstance. Nor is it intended that support agreements take the place of informal arrangements that are working well. The broader framework seeks to provide a range of options and to promote the least restrictive option in every case. The existence of support agreements should provide a less restrictive option for people who, for example, would otherwise be subject to substitute decision-making arrangements.

### **2.1 Eligibility to appoint a supporter**

The new Act should provide that a person may appoint a supporter through a support agreement if the person making the appointment:

- (a) is at least 18 years of age
- (b) has decision-making ability to enter the agreement, and
- (c) is making the agreement voluntarily.

### **2.2 Types of decisions a support agreement may cover**

The new Act should provide that a support agreement may apply to decisions including those about personal matters, financial matters, healthcare and restrictive practices. The agreement should specify what decisions or types of decisions the supporter may assist with as well as any conditions or limitations.

### **2.3 Eligibility for appointment as a supporter**

The new Act should provide that a person is not eligible to be appointed as a supporter if:

- (a) the person is under 16 years of age
- (b) they are to assist with financial decision-making and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the support agreement, or
- (c) they are the Public Representative or the NSW Trustee.

## 2.4 Making a support agreement

The new Act should provide:

- (a) that a support agreement must be in a prescribed form and be signed by the person making the appointment and the proposed supporter accepting the appointment (although not necessarily at the same time or in the presence of each other)
- (b) for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and
- (c) for eligible witnesses to witness the signature, and, in the case of the person making the appointment, to certify that the person signed voluntarily and appears to have decision-making ability in relation to the agreement.

## 2.5 When a support agreement has effect

The new Act should provide that a support agreement has effect in relation to a decision to which it applies except for any period during which:

- (a) the supported person does not have decision-making ability for that decision even when assisted by the supporter, or
- (b) the agreement is revoked or suspended or has lapsed.

## 2.6 Appointment of multiple supporters

The new Act should:

- (a) allow a person to appoint two or more supporters to act jointly or severally, in relation to one or more functions, and
- (b) provide for situations where one or more of the supporters cannot act (by reason of death, resignation, or loss of decision-making ability).

## 2.7 Appointment of reserve supporters

The new Act should allow a person to appoint a reserve supporter to act if the original supporter dies, resigns or does not have decision-making ability (temporarily or permanently) to act under the agreement.

## 2.8 Functions of supporters

The new Act should provide:

- (1) A supporter may have the following functions:
  - (a) to communicate or assist the supported person in communicating their decisions to other people, and advocate for the implementation of the decision where necessary, and
  - (b) to access, collect or obtain, or assist the supported person in accessing, collecting or obtaining any relevant personal information (including financial information) about the supported person in order to assist the supported person to understand the information.
- (2) A supporter's functions and any limits on these functions are determined by the support agreement.
- (3) A supporter is not authorised to:
  - (a) make decisions on behalf of the supported person, or exercise their powers without the supported person's knowledge and consent.
  - (b) access, collect or obtain personal information about the supported person that the supported person would not be entitled to access, or collect or obtain personal information beyond that permitted by the agreement.
- (4) Unless otherwise specified in the agreement, a supporter may, on behalf of a supported person, sign and do all such things as are necessary to give effect to any function under the agreement.

## 2.9 Responsibilities of supporters

The new Act should provide:

- (1) Supporters must:
  - (a) observe the Act's general principles
  - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the supported person
  - (c) act within the conditions or limitations of the agreement
  - (d) ensure that they identify and respond to situations where their interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary
  - (e) treat the supported person and important people in their life with dignity and respect
  - (f) if they are assisting with financial decision-making, keep accurate records and accounts
  - (g) respect the supported person's privacy and confidentiality by:
    - (i) only collecting personal information to the extent necessary for carrying out the supporter's role, and
    - (ii) only disclosing such information in circumstances permitted by **Proposal 10.5**, and

- (h) notify the Public Representative and/or NSW Trustee as appropriate, if the supported person no longer has the decision-making ability to be supported to make the relevant decision.
- (2) Supporters must, where possible, develop a person's decision-making ability and promote and maximise a person's autonomy.
- (3) Supporters must sign an acknowledgement that they have read and understood these responsibilities.

### **2.10 Resignation of a supporter**

The new Act should provide that a supporter under a support agreement may resign their appointment:

- (a) if the supported person understands the nature and consequences of the resignation, by giving notice in a prescribed form (signed and witnessed) to the supported person, or
- (b) if the supported person does not understand the nature and consequences of the resignation – with the approval of the Tribunal.

### **2.11 End or suspension of a support agreement**

The new Act should provide:

- (1) A supported person may, by a prescribed form that is signed and witnessed, revoke an appointment under a support agreement if the supported person:
  - (a) has decision-making ability in relation to the agreement and its revocation, and
  - (b) revokes the agreement voluntarily.
- (2) A support agreement does not lapse when a supporter dies, if there is a joint or reserve supporter to carry out the functions.
- (3) A support agreement is suspended, so far as it appoints a supporter, if the supporter becomes a person who does not have the decision-making ability to act as a supporter under the agreement.
- (4) If a supported person becomes subject to a Tribunal representation order, any support agreement is suspended for the duration of the order, unless the Tribunal orders otherwise.

### **2.12 Tribunal review of support agreements**

The new Act should provide:

- (1) The Tribunal may review a support agreement on its own motion.
- (2) The Tribunal must review a support agreement if requested to do so by:
  - (a) the supported person

- (b) the supporter, or
- (c) a person with a genuine interest in the personal or social wellbeing of the supported person,

unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the agreement.

- (3) The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate a decision).
- (4) The Tribunal may order that the agreement is suspended until the review is complete.

### 2.13 Tribunal action on review

The new Act should provide:

- (1) The Tribunal must, when reviewing the agreement:
  - (a) determine whether the supported person had the decision-making ability to enter into the agreement, and
  - (b) if the person did have the decision-making ability to enter into the agreement, have regard to:
    - (i) the fact that the supporter was chosen by the person
    - (ii) whether the eligibility criteria for a supporter are still met, and
    - (iii) whether the supporter is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing a support agreement, do any of the following to the agreement, in whole or in part:
  - (a) confirm it, with the consent of the supported person
  - (b) vary it, including by appointing a replacement supporter who is suitable and eligible
  - (c) suspend it, or
  - (d) revoke it.
- (3) The Tribunal may make a representation order or a support order in accordance with the new Act to supersede the agreement which has been suspended or revoked.

### 2.14 Supreme Court review of a support agreement

The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of a supporter under a support agreement and make such orders as it thinks appropriate in respect of the appointment.

### 2.15 Tribunal may declare appointment has effect

The new Act should provide that a supporter, a supported person, or other person with a genuine interest in the personal or social wellbeing of the supported person, may apply to the Tribunal for a declaration that an appointment under a support agreement is valid.

### 2.16 Protection from liability for supporters and third parties

The new Act should provide:

- (1) A person who acts as a supporter under a support agreement in good faith and without knowing the agreement does not have effect is entitled to rely on the agreement in any case.
- (2) A third party dealing with a person who acts as a supporter under a support agreement is entitled to rely on the agreement, so long as the third party acts in good faith and without knowing that the agreement does not have effect.

## 3. Tribunal support orders

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**Proposals 3.1–3.17** establish a legal framework for Tribunal “support orders”.

Tribunal support orders are the other way in which our proposed framework facilitates formal supported decision-making. A tribunal support order involves the Tribunal appointing a supporter to assist a person requiring support, rather than that person making the appointment. Under **Proposal 3.1**, an application may be made to the Tribunal by the person requiring support, the Public Representative, the NSW Trustee, or a person with a genuine interest in the wellbeing of the person who requires support.

Most submissions favoured accommodating both tribunal and personal appointment of supporters. Some submissions thought that tribunal appointment should only occur if personal appointment is not possible.

In our model, tribunal support orders are intended to cover the same areas as personal support agreements and to function as a last resort to facilitate supported decision-making. Tribunal support orders may only be made with the consent of the supported person and the supporter. **Proposal 3.5** sets out the matters that the Tribunal must take into account when deciding who to appoint as a supporter, including the will and preferences of the person in need of support, the nature of the relationship between the proposed supporter and that person, and any conflict of interest that may arise. Paid workers or those who might be receiving financial remuneration to act as a supporter can be appointed.

Supporters appointed by Tribunal orders have the same functions and responsibilities as supporters appointed under a personal support agreement. Tribunal support orders are also subject to termination, as set out in **Proposal 3.13**,

as well as review by the Tribunal or the Supreme Court, as set out in **Proposals 3.14** and **3.16**, respectively.

### 3.1 Application for a tribunal support order

The new Act should provide:

- (1) An application to the Tribunal for a support order may be made by:
  - (a) the person to whom the order will apply
  - (b) the Public Representative or the NSW Trustee, or
  - (c) a person with a genuine interest in the personal or social wellbeing of the person who is the subject of the application.
- (2) An application must specify the grounds upon which there is a need for an order.
- (3) As soon as practicable after making the application, the applicant must serve the application on each of the parties.
- (4) Before conducting a hearing into the application, the Tribunal must notify each party of the hearing's time, date and location.
- (5) Failing to serve a copy of the application or a notice does not invalidate the Tribunal's decision on the application.
- (6) The Tribunal may treat an application for a representation order, or review of a support order, support agreement or enduring representation agreement as an application for a support order.

### 3.2 Making a support order

The new Act should provide that, after conducting a hearing into an application, the Tribunal may appoint a supporter to assist the person if:

- (a) the person needing support ("the person") is of or above the age of 18
- (b) there are one or more decisions to be made
- (c) an eligible and suitable supporter is available
- (d) the person would have decision-making ability in relation to the decision(s) covered by the order if assisted by the proposed supporter
- (e) less intrusive and restrictive measures have already been considered and are either unavailable or not suitable
- (f) the proposed supporter consents to the appointment, and
- (g) the person consents to the appointment.

### 3.3 Types of decisions a support order may cover

The new Act should provide that the Tribunal may make orders which apply to decisions including those about personal matters, financial matters, healthcare

and restrictive practices. The order should specify what decisions or types of decisions the supporter may make as well as any conditions or limitations.

### 3.4 Eligibility for appointment as a supporter

The new Act should provide:

- (1) The Tribunal may not appoint a person as a supporter under a support order if:
  - (a) the person is under 16 years of age, or
  - (b) they are the Public Representative or the NSW Trustee.
- (2) The Tribunal may appoint the Public Representative or the NSW Trustee to facilitate the development of a support agreement between parties.

### 3.5 Suitability for appointment as a supporter

The new Act should provide:

- (1) In deciding whether a proposed supporter is suitable, the Tribunal must take into account:
  - (a) the will and preferences of the person in need of decision-making assistance ('the person'), determined as set out in **Proposal 1.11**
  - (b) the nature of the relationship between the proposed supporter and the person
  - (c) the abilities and availability of the proposed supporter
  - (d) whether the proposed supporter will be likely to act honestly, diligently and in good faith in the role
  - (e) whether the proposed supporter has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts
  - (f) whether the supporter would promote the person's personal and social wellbeing
  - (g) the person's cultural identity, and
  - (h) where the proposed supporter will assist with financial decision-making, whether they have been bankrupt or been convicted of a dishonesty offence.
- (2) A person should not be prohibited from appointment as a supporter on the basis that they will receive financial remuneration for their appointment.

### 3.6 When a support order has effect

The new Act should provide that a support order has effect for the period specified in the order, except when:

- (a) the supported person does not have decision-making ability for that decision even when assisted by the supporter, or

- (b) the order is terminated or suspended.

### 3.7 Appointment of multiple supporters

The new Act should:

- (a) allow the Tribunal to appoint two or more supporters for a person, to act jointly or severally, in relation to one or more functions, and
- (b) provide for situations where one or more supporters cannot act (by reason of death, resignation, or loss of decision-making ability).

### 3.8 Appointment of reserve supporters

The new Act should allow the Tribunal to appoint a reserve supporter to act if the original supporter dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the order.

### 3.9 Functions of supporters

The new Act should provide:

- (1) A supporter may have the following functions:
  - (a) to communicate or assist the supported person in communicating their decisions to other people, and advocate for the implementation of the decision where necessary, and
  - (b) to access, collect or obtain, or assist the supported person in accessing, collecting or obtaining any relevant personal information (including financial information) about the supported person in order to assist the supported person to understand the information.
- (2) A support order must set out the supporter's functions and any limits on those functions.
- (3) A supporter is not authorised to:
  - (a) make decisions on behalf of the supported person, or exercise their powers without the supported person's knowledge and consent
  - (b) access, collect or obtain personal information about the supported person that the supported person would not be entitled to access, or access, collect or obtain personal information beyond that permitted by the order
- (4) Unless specified in the order, a supporter may, on behalf of a supported person, sign and do all such things as are necessary to give effect to any function under the order.

### 3.10 Responsibilities of supporters

The new Act should provide:

- (1) Supporters must:
  - (a) observe the Act's general principles
  - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the supported person
  - (c) act within the conditions or limitations of the order
  - (d) ensure that they identify and respond to situations where their interests conflict with those of the supported person, ensure the supported person's interests are always the paramount consideration, and seek external advice where necessary
  - (e) treat the supported person and important people in their life with dignity and respect
  - (f) if they are assisting with financial decision-making, keep accurate records and accounts
  - (g) respect the supported person's privacy and confidentiality by:
    - (i) only collecting personal information to the extent necessary for carrying out the supporter's role, and
    - (ii) only disclosing such information in circumstances permitted by **Proposal 10.5**, and
  - (h) notify the Public Representative and/or NSW Trustee as appropriate if the supported person no longer has the decision-making ability to be supported to make the relevant decision.
- (2) Supporters must, where possible, develop a person's decision-making ability and promote and maximise a person's autonomy.
- (c) Supporters must sign an acknowledgement that they have read and understood these responsibilities.

### 3.11 Effect of order on other appointments

The new Act should provide that a support order (including an order of the Supreme Court to like effect) operates to suspend any support agreement in its entirety, unless the Tribunal or Court allows limited operation of the agreement.

### 3.12 Resignation of a supporter

The new Act should provide that a supporter under a support order may resign their appointment:

- (a) if the supported person understands the nature and consequences of the resignation - by giving notice in a prescribed form (signed and witnessed) to the supported person, or
- (b) if the supported person does not understand the nature and consequences of the resignation – with the approval of the Tribunal.

### 3.13 End or suspension of a support order

The new Act should provide:

- (1) A supported person may, by a prescribed form that is signed, witnessed and provided to the Tribunal and Public Representative, terminate a support order, if the supported person:
  - (a) has decision-making ability in relation to the termination of the order, and
  - (b) terminates the order voluntarily.
- (2) A support order does not lapse when a supporter dies, if there is a joint or reserve supporter to carry out the functions.
- (3) A support order is suspended, so far as it appoints a supporter, if the supporter becomes a person who does not have the decision-making ability to act as a supporter under the order.
- (4) If a supported person becomes subject to a representation order, any support order is suspended for the duration of the order, unless the Tribunal orders otherwise.

### 3.14 Tribunal review of support orders

The new Act should provide:

- (1) The Tribunal may review a support order on its own motion.
- (2) The Tribunal must review a support order if requested to do so by:
  - (i) the supported person
  - (ii) the supporter, or
  - (iii) a person with a genuine interest in the personal or social wellbeing of the supported person,
 unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the order.
- (3) The Tribunal must, before carrying out the review, notify each party of the review's time, date and location (although failure to do so will not invalidate any decision).
- (4) The Tribunal may order that the support order is suspended until the review is complete.

### 3.15 Tribunal action on review

The new Act should provide:

- (1) The Tribunal must, in deciding what action to take upon review:
  - (a) determine whether the supported person had the decision-making ability to consent to the order and,
  - (b) if so, have regard to whether:

- (i) there is still a need for a support order
  - (ii) the eligibility and suitability criteria for a supporter are still met, and
  - (iii) the supporter is meeting their responsibilities and carrying out their required functions
- (2) The Tribunal may, on reviewing a support order, do any of the following to the order, whole or in part:
- (a) confirm it, with the consent of the supported person
  - (b) vary it, including by appointing a different supporter who is suitable and eligible
  - (c) suspend it, or
  - (d) terminate it.
- (3) The Tribunal may make a representation order in accordance with the new Act to supersede the support order which has been suspended or terminated.

### 3.16 Supreme Court review of a support order

The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of a supporter under a support order and make such orders as it thinks appropriate in respect of the appointment.

### 3.17 Protection from liability for supporters and third parties

The new Act should provide:

- (1) A person who acts as a supporter under a support order in good faith and without knowing the order does not have effect is entitled to rely on the order in any case.
- (2) A third party dealing with a person who acts as a supporter under a support order is entitled to rely on the order, so long as the third party acts in good faith and without knowing that the order does not have effect.

## 4. Enduring representation agreements

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**Proposals 4.1–4.20** establish a formal substitute decision-making system of “enduring representation agreements” that would effectively replace the current separate arrangements for enduring guardians under the *Guardianship Act 1987* (NSW) and enduring powers of attorney under the *Powers of Attorney Act 2003* (NSW).

We have decided on a single regime on the grounds that the current systems of enduring guardians and enduring powers of attorney, in substance, allow a person to make arrangements for others to act for them when they lose decision-making ability for particular decisions. There is, therefore, no reason why the requirements

and safeguards for the two current systems need to be different in content or expression.

Other powers of attorney arrangements (that is, those that do not relate to enduring powers of attorney) will continue to be dealt with under the *Powers of Attorney Act*.

This proposal for a single regime of enduring representation agreements also aligns with our proposal for a single regime of representation orders (replacing the separate regimes of guardianship and financial management orders – see **Part 5**). Many of the proposals, where relevant, are therefore mirrored in our proposals for representation orders, as well as personal support agreements and Tribunal support orders (see **Parts 2 and 3**).

In framing the proposals for enduring representation agreements we have drawn on requirements and safeguards under the existing regimes. Our aim has been to avoid unnecessary requirements, to streamline procedures and to maintain and increase, where desirable, the safeguards that were previously available to one or other or both regimes.

For example, we have proposed adopting safeguard provisions relating to enduring guardianship in cases where the *Powers of Attorney Act* is inadequate or silent on the matter, such as in the case of eligibility requirements for representatives (**Proposal 4.3**).

We have also proposed adjustments to accommodate the principle that decision-making ability is specific to the decision being made and that decision-making ability may change over time (for example, **Proposal 4.5**).

Specific additional safeguards include the requirement that a person who has been bankrupt or convicted of a dishonesty offence must disclose this before they can be appointed as a representative with financial functions (**Proposal 4.3**).

We are also proposing that the new Act make clear statements in areas where the existing provisions are inadequate or silent on a question. For example, we are proposing that the new Act:

- set out the responsibilities of enduring representatives and require enduring representatives to acknowledge them (**Proposal 4.9**)
- set out the factors that the Tribunal should consider when reviewing an enduring representation agreement (**Proposal 4.14**), and
- confirm the status of an advance care directive in an enduring representation agreement if the agreement has been suspended or revoked or has lapsed (**Proposal 4.17**).

We have decided not to adopt an existing provision, which we consider unnecessary, that the appointment of a person as an enduring representative is revoked if the appointor marries someone else. (**Proposal 4.12**).

#### **4.1 Eligibility to appoint an enduring representative**

The new Act should provide that a person may appoint an enduring representative through an enduring representation agreement if the person making the appointment:

- (a) is at least 18 years of age
- (b) has decision-making ability to enter into the agreement, and
- (c) is making the agreement voluntarily.

#### **4.2 Types of decisions an enduring representation agreement may cover**

The new Act should provide that an enduring representation agreement may apply to decisions including those about personal matters, financial matters, healthcare and restrictive practices. The agreement should specify what decisions or types of decisions the enduring representative may make as well as any conditions or limitations.

#### **4.3 Eligibility for appointment as an enduring representative**

The new Act should provide:

- (1) A person is not eligible to be appointed as an enduring representative if:
  - (a) they are under 18 years of age
  - (b) they (or their spouse, child, brother or sister) provide, for fee or reward, healthcare, accommodation or other support services to the appointing person
  - (c) they are to be given a financial function and they have been bankrupt or been found guilty of an offence involving dishonesty, unless they have recorded this in the enduring representation agreement, or
  - (d) they are the Public Representative or the NSW Trustee.
- (2) The appointment does not lapse if an enduring representative (or their spouse, child, brother or sister) is subsequently engaged to provide for fee or reward healthcare, accommodation or other support services to the represented person.

#### **4.4 Making an enduring representation agreement**

The new Act should provide:

- (a) that an enduring representation agreement must be in a prescribed form and be signed by the person making the appointment and the proposed enduring representative accepting the appointment (although not necessarily at the same time or in the presence of each other)

- (b) for an eligible signer, where required, to sign for the person in the person's presence and at their direction, and
- (c) for eligible witnesses to witness the signatures, and, in the case of the person making the appointment, to certify that the person signed voluntarily and appeared to have decision-making ability in relation to the agreement.

#### **4.5 When an enduring representation agreement has effect**

The new Act should provide that, unless an enduring representation agreement is revoked or suspended or has lapsed, it has effect in relation to a decision to which the agreement applies only when the represented person does not have decision-making ability for that decision.

#### **4.6 Appointment of multiple enduring representatives**

The new Act should:

- (a) allow a person to appoint two or more enduring representatives to act jointly or severally, in relation to one or more functions, and
- (b) provide for situations where one or more enduring representatives cannot act (by reason of death, resignation, or loss of decision-making ability).

#### **4.7 Appointment of reserve enduring representatives**

The new Act should allow a person to appoint a reserve enduring representative to act if an original enduring representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the agreement.

#### **4.8 Functions of enduring representatives**

The new Act should provide:

- (a) An enduring representative's decision-making functions (and any limits or lawful conditions on them) are determined by the enduring representation agreement.
- (b) An enduring representative may sign and do all such things as are necessary to give effect to any decision-making function.
- (c) An enduring representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.

- (d) The following functions cannot be given under an enduring representation agreement: making or revoking a will, making or revoking an enduring representation agreement, voting in elections, consenting to marriage, divorce, surrogacy arrangements or sexual relations, making decisions regarding the care and wellbeing or adoption of children, and managing the represented person's property after their death.

#### 4.9 Responsibilities of enduring representatives

The new Act should provide:

- (1) Enduring representatives must:
  - (a) observe the Act's general principles
  - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person
  - (c) act within the conditions or limitations of the agreement
  - (d) ensure that they identify and respond to situations where their interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary
  - (e) communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible
  - (f) treat the represented person and important people in their life with dignity and respect,
  - (g) if they have a financial function, keep accurate records and accounts, and
  - (h) respect the represented person's privacy and confidentiality by:
    - (i) only collecting personal information to the extent necessary for carrying out the enduring representative's role, and
    - (ii) only disclosing such information when permitted by **Proposal 10.5**.
- (2) Enduring representatives must, where possible:
  - (a) develop a person's decision-making ability
  - (b) promote and maximise a person's autonomy, and
  - (c) provide decision-making support.
- (3) Enduring representatives must sign an acknowledgement that they have read and understood these responsibilities.

#### 4.10 Resignation of an enduring representative

The new Act should provide that an enduring representative under an enduring representation agreement may resign their appointment:

- (a) if the represented person understands the nature and consequences of the resignation – by giving notice in a prescribed form (signed and witnessed) to the represented person.
- (b) if the represented person does not understand the nature and consequences of the resignation – with the approval of the Tribunal.

#### **4.11 End or suspension of an enduring representation agreement**

The new Act should provide:

- (1) A represented person may, by a prescribed form that is signed and witnessed, revoke an appointment under an enduring representation agreement if the represented person:
  - (a) has decision-making ability in relation to the agreement and its revocation, and
  - (b) revokes the agreement voluntarily.
- (2) An enduring representation agreement does not lapse when the enduring representative dies if there is a joint or reserve representative to carry out the functions.
- (3) An enduring representation agreement is suspended, so far as it appoints an enduring representative, when the enduring representative does not have the decision-making ability to act under the agreement.

#### **4.12 Effect of marriage on an enduring representation agreement**

The new Act should not provide that the marriage of a person who has made an enduring representation agreement automatically revokes the agreement.

#### **4.13 Tribunal review of enduring representation agreements**

The new Act should provide:

- (1) The Tribunal may review an enduring representation agreement on its own motion.
- (2) The Tribunal must review an enduring representation agreement if requested to do so by:
  - (a) the represented person
  - (b) a person with a genuine interest in the personal or social wellbeing of the represented person, or
  - (c) the enduring representative,unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the agreement.

- (3) The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision).
- (4) The Tribunal may order that the agreement is suspended until the review is complete.

### 4.14 Tribunal action on review

The new Act should provide:

- (1) The Tribunal must, when reviewing the agreement:
  - (a) determine whether the person had the decision-making ability to enter into the agreement, and
  - (b) if the person did have the decision-making ability to enter into the agreement, have regard to:
    - (i) the fact that the representative was chosen by the person
    - (ii) whether the eligibility criteria for a representative are still met, and
    - (iii) whether the representative is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing an enduring representation agreement, confirm it (in whole or in part), vary it (including appointing a replacement enduring representative who is eligible and suitable), suspend it (in whole or in part) or revoke it (in whole or in part).
- (3) The Tribunal may, where there is doubt about the validity of an appointment, confirm the appointment if the Tribunal is satisfied it was the appointment the person intended to make.
- (4) The Tribunal may make a representation order or support order in accordance with the new Act to supersede a representative agreement that has been suspended or revoked in whole or in part.

### 4.15 Supreme Court review of an enduring representation agreement

The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of an enduring representative under an enduring representation agreement and may make such orders as it thinks appropriate.

### 4.16 Possession or control of a represented person's property

The new Act should provide:

- (1) Nothing in the new Act operates to change the ownership of any part of a represented person's property.

- (2) An enduring representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to:
- (a) the formerly represented person, or
  - (b) any replacement representative who has functions in relation to that part of the represented person's property.

#### **4.17 Status of an advance care directive**

The new Act should provide that an advance care directive is valid notwithstanding that it is contained in an enduring representation agreement that has been suspended or revoked (unless revoked by the appointor) or has lapsed.

#### **4.18 Tribunal may declare appointment has effect**

The new Act should provide that the Tribunal may, on application by a person appointed as an enduring representative, declare that the appointment has effect if it is satisfied that:

- (a) the represented person does not have decision-making ability for a decision covered by the enduring representation agreement, and
- (b) the appointment is valid.

#### **4.19 Supreme Court may confirm any function of an enduring representative**

The new Act should provide that the Supreme Court may, on application by a person appointed as an enduring representative, confirm (in whole or in part) any function under the enduring representation agreement if:

- (a) it appears that the represented person does not have decision-making ability to affirm the function, and
- (b) affirming the function is in accordance with the represented person's will and preferences.

#### 4.20 Protection from liability for enduring representatives and third parties

The new Act should provide:

- (1) A person who acts as an enduring representative under an enduring representation agreement in good faith and without knowing the agreement does not have effect is entitled to rely on the agreement in any case.
- (2) A third party dealing with a person who acts as an enduring representative is entitled to rely on the enduring representation agreement, so long as the third party acts in good faith and without knowing that the agreement does not have effect.

## 5. Representation orders

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**Proposals 5.1–5.24** establish, as a last resort, a formal substitute decision-making system of “representation orders” that will effectively replace the current separate arrangements for guardianship and financial management under Parts 3 and 3A of the *Guardianship Act*.

We have decided on a single regime on the grounds that the current systems of guardianship and financial management, in substance, allow a person to make arrangements for others to act for them when they lose decision-making ability for particular decisions. There is, therefore, no reason why the majority of requirements and safeguards for the two current systems need to be different either in content or expression. We have not, however, proposed merging the roles of the Public Representative (in relation to personal decisions) or the NSW Trustee (in relation to financial decisions – see **Proposal 5.13**).

This proposal for a single regime of representation orders also aligns with our proposal for a single regime of enduring representation agreements (replacing the separate regimes of enduring guardianship and enduring powers of attorney – see **Part 4**). Many of the proposals, where relevant, are therefore mirrored in our proposals for enduring representation agreements, as well as Tribunal support orders and personal support agreements (see **Parts 2 and 3**). So, for example, we have extended some provisions that previously only applied to enduring agreements to representation orders, such as those relating to the resignation of representatives (**Proposal 5.17**), the lapsing or suspension of representation orders (**Proposal 5.18**), and the protection for representatives and third parties relying on representation agreements (**Proposal 5.24**).

We propose making it clear that the Tribunal can only make an order when there is no other available option. Under our proposals, the Tribunal must find that there is a need for an order, and less intrusive measures are either unavailable or not suitable. We also propose clarifying that there will not be a need for an order if the person has decision-making ability for the decisions to which the order will relate. We have excluded the requirement that the person has a disability, which currently applies to people under guardianship. We have also excluded the existing requirement that a financial management order be in the person’s “best interests” (**Proposal 5.2**).

Following the principle of least restriction, we are proposing that plenary orders are abolished, in favour of a requirement that every order specify the types of decisions it applies to, and any conditions or limitations on the decision-making authority (**Proposal 5.3**).

In framing the proposals for representation orders we have drawn on existing requirements and safeguards under both existing regimes. Our aim has been to avoid unnecessary requirements, to streamline procedures and to maintain and, where desirable, increase the safeguards that were previously available to either or both regimes.

For example, we have proposed adopting safeguards that currently apply only to guardianship orders in cases where the financial management provisions are inadequate or silent on the matter. On such safeguard is the automatic review of orders, a requirement that currently applies only to guardianship orders and not to financial management orders (**Proposal 5.6(3) and (4)**). In proposing that appointing the Public Representative or NSW Trustee should be an option of last resort, we are extending a provision that currently only applies to the appointment of the Public Guardian. (It is already current practice to appoint the NSW Trustee only as a last resort, but this has never been a statutory requirement) (**Proposal 5.4(3)**).

While requiring automatic review of orders that relate to financial matters, we have left open the option of the Tribunal ordering what supervision, if any, the NSW Trustee will have over a representative with financial functions (**Proposal 5.13**). We have proposed removing the Tribunal's power to make representation orders with financial functions in relation to people under 17 (**Proposal 5.2**).

We have also proposed adjustments to accommodate the principle that decision-making ability is specific to the decision being made and that decision-making ability may change over time (for example, **Proposal 5.6(2)**).

Other proposed safeguards include:

- the Tribunal must be satisfied that the actions authorised are the least restrictive option and are appropriate and proportionate in the circumstances
- the Tribunal must review any order if it is to have effect for more than 21 days, and
- a person authorised to use force may only use such force as is reasonably necessary in the circumstances (**Proposal 5.16**).

We have also proposed that the new Act make clear statements in areas where there is uncertainty because the existing provisions are inadequate or silent on the question. For example, we propose that:

- the NSW Trustee has express discretion, when supervising a representative with a financial function, to decide the nature and timing of any financial reporting. This ensures the NSW Trustee can effectively allocate resources (**Proposal 5.13**).
- the Tribunal can decide that a professional representative with financial functions is entitled to remuneration (**Proposal 5.14**).

- the new Act sets out the responsibilities of enduring representatives and requires the enduring representatives to acknowledge them (**Proposal 5.12**).

We have also reframed the “temporary orders” currently available under the guardianship provisions as “emergency orders” so as to reflect better the purpose of those orders, and made changes to the requirements that apply (**Proposal 5.7**).

### 5.1 Application for a representation order

The new Act should provide:

- (1) The following may apply to the Tribunal for a representation order:
  - (a) the person to whom the order will apply
  - (b) the Public Representative or the NSW Trustee, or
  - (c) a person with a genuine interest in the personal or social wellbeing of the person the subject of the application.
- (2) An application must specify the grounds upon which there is a need for an order.
- (3) As soon as practicable after making the application, the applicant must serve a copy of the application on each of the parties.
- (4) Before conducting a hearing into the application, the Tribunal must notify each party of the date, time and place of the hearing.
- (5) Failing to serve a copy of the application or a notice does not invalidate the Tribunal’s decision on the application.
- (6) The Tribunal may treat an application for a support order, or review of a support order, support agreement or enduring representation agreement as an application for a representation order.

### 5.2 Grounds for an order

The new Act should provide:

- (1) The Tribunal may, after conducting a hearing into an application, appoint a person to be a representative under a representation order if:
  - (a) the proposed represented person is of or above the age of 17
  - (b) there are one or more decisions to be made
  - (c) less intrusive and restrictive measures are either unavailable or not suitable, and
  - (d) there is a need for an order.
- (2) In considering whether there is a need for an order, the Tribunal should take into account, where relevant:
  - (a) the adequacy of existing or available formal or informal arrangements in meeting the person’s decision-making needs, and
  - (b) the availability and suitability of less restrictive and intrusive measures to meet the person’s needs, including but not limited to a support order or support agreement.

- (3) The onus is on the applicant to show that the person does not have decision-making ability in relation to the decision(s) the proposed order relates to. If this onus is not met, there will not be a need for an order.

### 5.3 Types of decisions a representation order may cover

The new Act should provide that a representation order may apply to decisions about personal matters, financial matters, healthcare and/or restrictive practices. The order should specify what decisions or types of decisions the representative may make as well as any conditions or limitations.

### 5.4 Eligibility for appointment as a representative

The new Act should provide:

- (1) The Tribunal can appoint as a representative under a representation order:
  - (a) an eligible person, or
  - (b) in relation to personal, healthcare and/or restrictive practices decision-making functions - the Public Representative
  - (c) in relation to financial decision-making functions - the NSW Trustee.
- (2) A person is an “eligible person” if they are:
  - (a) of or above the age of 18, or
  - (b) of or above the age of 16 and:
    - (i) they are the represented person’s primary carer, and
    - (ii) they are already supporting the person or making decisions on their behalf, and
    - (iii) the proposed functions are consistent with their decision-making abilities.
- (3) The Tribunal (other than in an emergency representation order) shall not appoint the Public Representative or the NSW Trustee as a representative if some other person can be appointed.

### 5.5 Suitability for appointment as a representative

The new Act should provide:

- (1) The Tribunal may only appoint a person as a representative if it is satisfied that they are suitable and the proposed representative consents to the appointment.
- (2) In deciding whether a person (other than the Public Representative or NSW Trustee) is suitable, the Tribunal must take into account:
  - (a) the will and preferences of the person in need of decision-making assistance (‘the person’)

- (b) the nature of the relationship between the proposed representative and the person
- (c) the abilities and availability of the proposed representative
- (d) whether the proposed representative is likely to act honestly, diligently and in good faith
- (e) whether the proposed representative has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts
- (f) whether the proposed representative would promote the person's personal and social wellbeing
- (g) the person's cultural identity
- (h) whether the proposed representative has been convicted of a serious indictable offence, and
- (i) where they will have a financial function, whether the proposed representative has been bankrupt or been convicted of a dishonesty offence.

### 5.6 When a representation order has effect

The new Act should provide:

- (1) A representation order has effect only if the represented person is aged 18 years or over.
- (2) Unless a representation order is revoked or suspended or has lapsed, it has effect in relation to a decision to which the order applies only when the represented person does not have decision-making ability for that decision.
- (3) The Tribunal must specify that an order (except for an emergency order) has effect for no more than:
  - (a) 1 year for an initial order, or
  - (b) 3 years for an order that is renewed following review.
- (4) However, if the Tribunal is satisfied that the represented person will never have the relevant decision-making ability, the Tribunal may specify that the order (except for an emergency order) has effect for no more than:
  - (a) 3 years for an initial order, and
  - (b) 5 years for an order that is renewed following review.
- (5) The Tribunal may specify that an order will not be reviewed at the end of the period for which it has effect, but only if the Tribunal is satisfied that, in all the circumstances, not reviewing the order promotes the personal and social wellbeing of the person.

### 5.7 Emergency orders

The new Act should provide:

- (1) The Tribunal may, where it considers it appropriate by reason of urgency,
  - (a) make an order it considers appropriate in the circumstances in respect of a person that remains in effect for a specified period of no more than 30 days, and
  - (b) renew the order for a further specified period of not more than 30 days.
- (2) The Tribunal may make the order on its own motion, or at the request of the person to whom the order relates, or at the request of a person with a genuine interest in the personal and social wellbeing of the person to whom the order relates.
- (3) In making an emergency order, the Tribunal may, if the person is not a represented person, and it considers that there may be grounds for making a representation order, appoint the Public Representative (in relation to personal, healthcare and/or restrictive practices decisions) and/or the NSW Trustee (in relation to financial decisions) as representative.
- (4) In making an emergency order, the Tribunal is not required to:
  - (a) find a “need for a representation order” as required by **Proposal 5.2**, or
  - (b) give notice to any person, or
  - (c) hold a hearing, but the Tribunal must make such inquiries or investigations as it thinks appropriate.
- (5) In making an emergency order, the Tribunal must specify the extent (if any) to which the representative has custody of the person.
- (6) The Tribunal cannot make an emergency order if:
  - (a) it is not the least restrictive option
  - (b) there is a valid advance care directive that expressly prohibits the decision for which the order is sought, or
  - (c) another order would be more appropriate.

### 5.8 Orders to be forwarded to Public Representative and/or NSW Trustee

The new Act should provide that if the Tribunal makes a representation order appointing a person other than:

- (a) the Public Representative as a representative in relation to a personal, healthcare or restrictive practices decision-making function, and/or
- (b) the NSW Trustee as a representative in relation to a financial decision-making function,

it should forward a copy to the Public Representative and/or the NSW Trustee as the case may require.

### **5.9 Appointment of multiple representatives**

The new Act should:

- (a) allow the Tribunal to appoint two or more representatives to act jointly or severally, in relation to one or more functions
- (b) provide for situations where one or more representatives cannot act (by reason of death, resignation, or loss of decision-making ability), and
- (c) ensure that the Public Representative and NSW Trustee are not appointed as joint representative with each other or with anyone else.

### **5.10 Reserve representatives**

The new Act should allow the Tribunal to appoint a reserve representative to act if an original representative dies, resigns or does not have the decision-making ability (temporarily or permanently) to act under the order.

### **5.11 Functions of representatives**

The new Act should provide:

- (1) A representative's decision-making functions (and any limits or conditions on them) are determined by the representation order.
- (2) A representative may sign and do all such things as are necessary to give effect to any decision-making function.
- (3) A representative can access, collect or obtain personal information (including financial information and health records) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.

### **5.12 Responsibilities of representatives**

The new Act should provide:

- (1) Representatives must:
  - (a) observe the Act's general principles
  - (b) act honestly, diligently and in good faith and not coerce, intimidate or unduly influence the represented person
  - (c) act within any conditions and limitations of the order
  - (d) ensure that they identify and respond to situations where their interests conflict with those of the represented person, ensure the represented person's interests are always the paramount consideration, and seek external advice where necessary
  - (e) communicate with the represented person when making decisions on their behalf and explain the decisions as far as possible

- (f) treat the represented person and important people in their life with dignity and respect
  - (g) if they are assisting with financial decision-making, keep accurate records and accounts, and
  - (h) respect the represented person's privacy and confidentiality by:
    - (i) only collecting personal information to the extent necessary for carrying out the representative's role, and
    - (ii) only disclosing such information when permitted by **Proposal 10.5**.
- (2) Representatives must, where possible:
- (a) develop a person's decision-making ability
  - (b) promote and maximise a person's autonomy, and
  - (c) provide decision-making support.
- (3) Representatives must sign an acknowledgement that they have read and understood these responsibilities.

### 5.13 Supervision of representatives with a financial function

- (1) The new Act should provide:
- (a) The Tribunal may require the NSW Trustee to supervise a representative with a financial function, but only if the Tribunal considers it necessary.
  - (b) In considering whether supervision is necessary, the Tribunal must take into account:
    - (i) the size and complexity of the represented person's property
    - (ii) whether there are other measures to protect the represented person
    - (iii) any potential conflicts of interest between the represented person and the representative, and
    - (iv) any other relevant matters.
  - (c) The Tribunal must always require NSW Trustee supervision when appointing a professional representative with a financial function. (see **Proposal 5.14**).
  - (d) If the order requires NSW Trustee authorisation for the representative to make financial decisions, the representative can do what is necessary to protect the property pending authorisation.
- (2) The *NSW Trustee and Guardian Act 2009* (NSW) should provide that the NSW Trustee, when supervising a representative with a financial function, may decide the nature and timing of any financial reporting.

#### **5.14 Remuneration of professional representatives with financial functions**

The new Act should provide:

- (1) The Tribunal may determine that a representative with financial functions who carries on a business that includes the administration of estates, is entitled to remuneration out of the represented person's estate for their work in administering that estate.
- (2) The NSW Trustee should decide the amount of any remuneration as part of any oversight and direction of representatives with financial functions.

#### **5.15 Effect of order on other appointments**

The new Act should provide that a representation order (including an order of the Supreme Court to like effect) suspends any enduring representation agreement, support agreement, or support order in its entirety, unless the court or Tribunal order expressly allows a limited continuing operation.

#### **5.16 Enforcing representatives' decisions**

The new Act should provide:

- (1) A Tribunal order may specify the actions which:
  - (a) a representative
  - (b) a specified person or a person of a specified class, or
  - (c) a person authorised by the representativemay take, including the use of force, to ensure that the represented person complies with any decision of the representative in the exercise of the representative's functions.
- (2) However, the Tribunal may not make such an order unless the Tribunal is satisfied that:
  - (a) the person will be exposed to harm, including by way of neglect, abuse or exploitation, if the order is not made
  - (b) allowing such action is the least restrictive option for ensuring the person is not exposed to harm, and
  - (c) the actions authorised by the order are appropriate and proportionate to the circumstances.
- (3) If the part of the order is to have effect for longer than 21 days, the Tribunal must review the order within 21 days.
- (4) A person permitted in the order to use force may use such force as is reasonably necessary in the circumstances.
- (5) A person acting in accordance with such a permission, in good faith, is not liable to any action, liability, claim or demand arising from the action.

**5.17 Resignation of a representative**

The new Act should provide that a representative may resign with the approval of the Tribunal.

**5.18 End or suspension of a representation order**

The new Act should provide:

- (1) A representation order does not lapse when a representative dies, if there is a joint or reserve representative to carry out the functions.
- (2) A representation order is suspended, so far as it appoints a representative, when the representative does not have the decision-making ability to act under the order.

**5.19 Assessment of represented people**

The new Act should provide that the Tribunal may, in a representation order, require the Tribunal, or someone else on behalf of the Tribunal, to assess the decision-making ability of the represented person and the operation of the order at a specified time during the order's operation.

**5.20 Tribunal review of representation orders**

The new Act should provide:

- (1) The Tribunal may review a representation order on its own motion.
- (2) The Tribunal must review a representation order:
  - (a) at the end of the period for which the order has effect (unless the order provides there is to be no review at the end of the period), or
  - (b) if requested to do so by:
    - (i) the represented person
    - (ii) a person with genuine interest in the personal or social wellbeing of the represented person
    - (ii) the representative, or
    - (iii) the Public Representative, the NSW Trustee or the Public Advocate,
 unless the request does not disclose grounds that warrant a review or the Tribunal has previously reviewed the order.
- (3) The Tribunal must, before carrying out the review, notify each party of the date, time and place of the review (although failure to do so will not invalidate any decision).

### **5.21 Tribunal action on review**

The new Act should provide:

- (1) The Tribunal should, when reviewing an order, consider, where relevant:
  - (a) whether there is still a need for the order
  - (b) whether eligibility and suitability criteria for a representative are still met, and
  - (c) whether the representative is meeting their responsibilities and carrying out their required functions.
- (2) The Tribunal may, on reviewing a representation order:
  - (a) at the end of the period for which the order has effect, renew it, renew and vary it, or decide that it may lapse
  - (b) confirm, vary, suspend (in whole or in part) or revoke the order, or
  - (c) make a support order in accordance with the new Act.

### **5.22 Supreme Court review of a representation order**

The new Act should provide that the Supreme Court may review the appointment (or purported appointment) of a representative under a representation order and may make such orders as it thinks appropriate.

### **5.23 Possession or control of a represented person's property**

The new Act should provide:

- (1) Nothing in the new Act operates to change the ownership of any part of a represented person's property.
- (2) A representative, upon ceasing to act as such, must ensure that possession or control of any part of a represented person's property in relation to which they have functions, is transferred, as the case may require, to:
  - (a) the formerly represented person, or
  - (b) any replacement representative who has functions in relation to that part of the represented person's property.

### **5.24 Protection from liability for representatives and third parties**

The new Act should provide:

- (1) A person who acts as a representative under a representation order in good faith and without knowing the order does not have effect is entitled to rely on it in any case.

- (2) A third party dealing with a person who acts as a representative is entitled to rely on the representation order, so long as the third party acts in good faith and without knowing that the order does not have effect.

## 6. Healthcare decisions

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**Proposals 6.1–6.27** relate to healthcare decision-making in situations currently covered by Part 5 of the *Guardianship Act*.

The key changes we are proposing are as follows:

- The general statutory objects (**Proposal 1.8**) will apply to the healthcare decision-making provisions, replacing the specific statutory objects that currently apply to Part 5 of the *Guardianship Act* (**Proposal 6.1**).
- The healthcare provisions will apply to patients who do not have “decision-making ability” for a healthcare decision, rather than patients who are “incapable of giving consent”. A person’s “decision-making ability” will be assessed in the same way it is assessed across all other areas covered by the new Act. A majority of submissions supported a single definition of “decision-making ability” (or “capacity”) that applies across all areas (**Proposals 6.2 and 6.4**).
- Where decision-makers were previously required to consider a patient’s views, they will now be required to give effect to their will and preferences, to be determined as set out in **Proposal 1.11**.
- We have expanded the scheme to include healthcare given by all registered health practitioners as defined in the Health Practitioner Regulation National Law, in addition to medical practitioners and dentists. This will bring a range of healthcare decisions under the processes and safeguards of the new Act. In particular, it will ensure coverage of healthcare given by nurses and paramedics (**Proposal 6.3**).
- The Tribunal or a person responsible will be able to consent to withholding or withdrawing a life-sustaining measure where starting or continuing the measure would be inconsistent with good medical practice, and the decision gives effect to the patient’s will and preferences (**Proposal 6.14**).
- We have reclassified some major treatments under the current Act as minor treatments: administering HIV tests, oral and injectable contraceptives, and the contraceptive implant. Several submissions commented that these treatments are not considered to be major treatment in the clinical environment. Reclassifying HIV testing is also consistent with efforts to promote testing and decrease the stigma around HIV (**Proposal 6.12**).
- We explicitly recognise advance care directives in the new Act, as favoured by a majority of submissions. Our proposal aims to preserve the existing common law requirements and formally recognise advance care directives within the substitute decision-making process (**Proposal 6.5**).
- We have clarified that the person responsible will be the first person in the hierarchy who is reasonably available to make a decision, has decision-making ability, and has not, if asked, declined to make a decision. This is drawn from similar approaches in Victoria and Western Australia and is consistent with

existing NSW provisions. We also propose that any disputes about the person responsible be referred, if necessary, to the Public Advocate (**Proposal 6.18**).

- We have clarified that a relative according to an indigenous kinship system falls within the definition of “close friend or relative” (**Proposal 6.21**).
- We have inserted additional safeguards into the consent process for sterilisation procedures and clarified that “serious damage to the patient’s health” can arise from serious health issues associated with menstruation (**Proposal 6.8**).
- We have proposed making it an offence to take, attempt to take, or knowingly assist a person to take overseas to obtain a sterilisation procedure, a child or an adult who does not have decision-making ability (**Proposal 6.27**).
- In proposing that the current offences in the medical and dental treatment provisions be included in the new Act, we are also proposing a defence for registered health practitioners who act in good faith and without negligence and believe on reasonable grounds that they have complied with the requirements of the Act. This is based on a similar provision in Victoria (**Proposal 6.27**).
- We have proposed a departure from s 46(4) of the *Guardianship Act*, which allows a patient’s objection to be disregarded if the patient has minimal or no understanding of what the treatment involves and the treatment will cause the patient no distress or “reasonably tolerable” and “transitory” distress. This standard does little to protect a patient’s autonomy and right to bodily integrity and does not align with the principles of the UN Convention. Under our proposals, if the patient objects, the Tribunal can authorise a representative to override the objection where there would be an unacceptable risk to the patient if the healthcare was not given. However, the Tribunal cannot make such an authorisation if the patient has refused the healthcare in a valid advance health care directive (**Proposal 6.17**).

### 6.1 Statutory objects

The new Act should not have separate statutory objects for healthcare decision-making. The provisions in **Proposal 1.8** should apply.

### 6.2 Application of healthcare provisions

The new Act should provide that its healthcare provisions apply to a patient:

- (a) who is of or above the age of 16 years, and
- (b) who does not have decision-making ability for a healthcare decision.

### 6.3 Definition of “healthcare”

The new Act should provide:

- (1) “**Healthcare**” includes
  - (a) any care, service, procedure or treatment provided by, or under the supervision of, a registered health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person
  - (b) in the case of healthcare in the course of a medical research procedure – the giving of placebos, and
  - (c) any other act declared by the regulations to be healthcare.
- (2) “**Healthcare**” does not include:
  - (a) any non-intrusive examination for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears)
  - (b) first-aid
  - (c) administering a pharmaceutical drug for which a prescription is not required and which is normally self-administered in accordance with the manufacturer’s recommendations as to purpose and dosage level
  - (d) mental health treatment given to a patient or affected person under the *Mental Health Act 2008* (NSW) or *Mental Health (Forensic Provisions) Act 1990* (NSW), or
  - (e) anything else that the regulations declare is not healthcare for the purposes of these provisions.
- (3) “**Registered health practitioner**” means a person who practises in:
  - (a) a health profession within the meaning of the *Health Practitioner Regulation National Law* (NSW), and/or
  - (b) any other profession or practice as declared by the regulations.

### 6.4 Decision-making ability

The definition of decision-making ability outlined in **Proposal 1.12** should apply to the new Act’s healthcare provisions.

### 6.5 Advance care directives

The new Act should provide:

- (1) A patient may consent to healthcare in a valid advance care directive.
- (2) Healthcare must not be given if it would be strictly against a patient’s will and preference as expressed in an advance care directive that is clear and extends to the situation at hand.
- (3) An advance care directive can be made in any form, including orally.
- (4) The provisions do not limit the common law about advance care directives.

- (5) A requirement to consider a person's will and preferences includes considering any valid advance care directive (see also **Proposal 1.11**).
- (6) A registered health practitioner must make a reasonable effort in the circumstances to find out if a patient has an advance care directive before treating them or seeking another person's consent to treat them.
- (7) Notwithstanding an advance healthcare directive, a registered health practitioner is not under any obligation to deliver a life-sustaining measure if to do so would be inconsistent with standard medical practice.

### 6.6 Urgent healthcare

The new Act should provide:

- (1) Healthcare may be provided to a patient without consent if the registered health practitioner carrying out or supervising the healthcare considers the healthcare is necessary, as a matter of urgency:
  - (a) to save the patient's life, or
  - (b) to prevent serious damage to the patient's health, or
  - (c) except in the case of special healthcare —to prevent the patient from suffering or continuing to suffer significant pain or distress.
- (2) In urgent circumstances, a registered health practitioner is not required to search for an advance care directive that is not readily available.

### 6.7 Definition of “special healthcare”

The new Act should provide that “**special healthcare**” means:

- (a) any healthcare that is intended, or is reasonably likely, to render the patient permanently infertile
- (b) any healthcare that is not supported by a substantial number of registered health practitioners specialising in the relevant practice area, or
- (c) any healthcare that the regulations declare to be special healthcare.

### 6.8 Tribunal consent to special healthcare

The new Act should provide:

- (1) The Tribunal may consent to special healthcare for a patient if it is satisfied that it is necessary:
  - (a) to save the patient's life, or
  - (b) to prevent serious damage to the patient's health.
- (2) In the case of healthcare intended or reasonably likely to render the patient permanently infertile:

- (a) “**serious damage to the patient’s health**” includes serious and persistent health problems associated with menstruation (for example, seizures or anaemia)
  - (b) the Tribunal must be satisfied that the patient will not regain decision-making ability in the foreseeable future, and
  - (c) the Tribunal must not take into account:
    - (i) the risk of pregnancy as a result of sexual abuse
    - (ii) the patient’s current or hypothetical capacity to care for children, or
    - (iii) a desire to prevent inheritable disability.
- (3) In the case of healthcare that is not supported by a substantial number of health practitioners specialising in the relevant practice area, the Tribunal may give consent only if:
- (a) the treatment is the only or most appropriate way of treating the patient, and
  - (b) it is satisfied that any relevant National Health and Medical Research Council guidelines have been or will be complied with.

*For matters that the Tribunal must consider before giving consent, see **Proposal 6.24**.*

### **6.9 Representative’s consent to continuing or further special healthcare**

The new Act should provide:

- (1) The Tribunal may, when consenting to special healthcare, authorise the patient’s representative to consent to:
  - (a) continuing the special healthcare, or
  - (b) further special healthcare of a similar nature.
- (2) The Tribunal may only give such an authority if the representative requests it or consents to it.
- (3) The Tribunal may at any time:
  - (a) impose conditions or give directions as to the exercise of such an authority, or
  - (b) revoke such an authority.
- (4) If the representative has such an authority, any person may ask the representative for their consent to give the relevant special healthcare.
- (5) In considering a request for consent to further or continuing healthcare, a representative must give effect to the will and preferences of the patient (to be determined as set out in **Proposal 1.11**).

### 6.10 Definition of “major healthcare”

The new Act should provide that **major healthcare** means healthcare that the regulations declare to be major healthcare.

### 6.11 Consent to major healthcare

The new Act should provide that the person responsible or the Tribunal may consent to major healthcare for a patient.

*For matters that the person responsible must consider before giving consent, see **Proposal 6.22**.*

*For matters that the Tribunal must consider before giving consent, see **Proposal 6.24**.*

### 6.12 Definition of “minor healthcare”

The new Act should provide that **minor healthcare** means healthcare that is not special healthcare or major healthcare and is declared by the regulations to be minor healthcare, including:

- (a) testing for HIV, and
- (b) administering oral or injectable contraceptives or the contraceptive implant.

### 6.13 Consent to minor healthcare

The new Act should provide:

- (1) The person responsible may consent to minor healthcare for a patient.
- (2) If there is no person responsible, minor healthcare may be carried out on a patient without consent provided that the registered health practitioner carrying out, or supervising the minor healthcare certifies in writing in the patient’s clinical record that:
  - (a) the healthcare is necessary and is in a form that will most successfully promote the patient’s health and personal and social wellbeing, and
  - (b) the patient does not object to the healthcare.
- (3) The Tribunal may consent to minor health care for a patient in any case.

*For matters that the person responsible must consider before giving consent, see **Proposal 6.22**.*

*For matters that the Tribunal must consider before giving consent, see **Proposal 6.24**.*

### 6.14 Consent to withdrawing or withholding life-sustaining measures

The new Act should provide:

- (1) The person responsible or Tribunal may consent to withholding or withdrawing a life-sustaining measure, but only if:
  - (a) starting or continuing the measure would be inconsistent with good medical practice, and
  - (b) the decision gives effect to the patient's will and preferences, as set out in **Proposal 1.11**.
- (2) Death as a result of withdrawing or withholding life-sustaining measures is not necessarily incompatible with promoting a patient's personal and social wellbeing.

### 6.15 Patient objections to healthcare

The new Act should provide that a patient shall be taken to object to healthcare:

- (a) if the patient indicates (by whatever means) that they do not want the healthcare, or
- (b) if the patient:
  - (i) has previously indicated, in similar circumstances, that they did not then want the healthcare (including in an advance care directive that is clear and extends to the situation at hand), and
  - (ii) has not subsequently indicated otherwise.

### 6.16 Effect of consent and objections

The new Act should provide:

- (1) A healthcare consent has effect as if:
  - (a) the patient had the ability to consent to the healthcare, and
  - (b) the healthcare had been given with the patient's consent.
- (2) A consent given by person responsible has no effect:
  - (a) if the person giving or supervising the healthcare knows, or ought reasonably to know, that the patient objects to the healthcare, or
  - (b) if the healthcare is to be carried out for any purpose other than that of promoting the patient's health and personal and social wellbeing.
- (3) A consent given by the patient's representative has effect even if the patient objects when the representative is authorised by the Tribunal under **Proposal 6.17**.
- (4) Nothing in the healthcare provisions stops the Tribunal or the person responsible from consenting to healthcare that is specifically excluded from the definition of "healthcare" and any such consent applies as if that healthcare were not excluded from the definition.

### 6.17 Overriding a patient's objection to major or minor healthcare

The new Act should provide:

- (1) The Tribunal may authorise a representative (at their request or with their consent) to override the patient's objection to major or minor healthcare if satisfied that:
  - (a) the patient has not refused the healthcare in an advance care directive that is clear and extends to the situation at hand
  - (b) there would be an unacceptable risk to the patient if the healthcare was not given, and
  - (c) receiving the healthcare would promote the patient's health and personal and social wellbeing.
- (2) The Tribunal may at any time:
  - (a) impose conditions on or give directions about exercising the authority, or
  - (b) revoke the authority.
- (3) The patient's representative may exercise the authority only if satisfied that the healthcare promotes the patient's health and personal and social wellbeing.

### 6.18 Identifying the person responsible

The new Act should define the “**person responsible**” as follows:

- (1) The person responsible for a young person aged 16 or 17 is:
  - (a) the person with parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*)
  - (b) the Minister for Family and Community Services, if the young person is in the care of the Minister, or
  - (c) the Secretary of the Department of Family and Community Services, if the young person is in the care of the Secretary.
- (2) The person responsible for an adult in the care of the Secretary of the Department of Family and Community Services is the Secretary.
- (3) In all other cases, the person responsible for an adult is the first person in the person responsible hierarchy who:
  - (a) has decision-making ability for the decision
  - (b) is reasonably available to make a decision, and
  - (c) has not, if asked, declined to make a decision.
- (4) A record should be made in accordance with the regulations if a person in the hierarchy declines to make a decision.
- (5) Disputes concerning the person responsible may be referred to the Public Advocate for mediation.

### 6.19 The person responsible hierarchy

The new Act should provide:

- (1) The person responsible hierarchy is:
  - (a) a person who can make the relevant decision under an enduring representation agreement or representation order
  - (b) the spouse of the person, if they have decision-making ability for the decision and the relationship is close and continuing
  - (c) a person who has the care of the person,
  - (d) a close friend or relative of the person.
- (2) The “spouse” of an Aboriginal person or a Torres Strait Islander includes spouses married according to customary law.

### 6.20 When a person “has the care of another person”

- (1) The new Act should provide that a person may be regarded as ***having the care of another person*** where, for example, they, on a regular basis:
  - (a) provide domestic services and support for another person
  - (b) arrange such services and support for another person, or
  - (c) provided or arranged such services and support immediately before the other person moved to a place where they receive care (such as a hospital, nursing home, group home, boarding-house or hostel),  
provided they are or were not paid for the services and support by the other person or from any other source (except for a carer’s pension).
- (2) The definition of “has care of another person” should appear in the same section or part of the new Act as the person responsible hierarchy.

### 6.21 Definition of “close friend or relative”

The new Act should provide:

- (1) A ***close friend or relative*** of another person is a friend or relative (including a member of the extended family or kin of an Aboriginal person or a Torres Strait Islander according to their culture) who maintains:
  - (a) a close personal relationship with the other person through frequent personal contact, and
  - (b) a personal interest in the other person’s welfare,  
provided they are not paid by the other person or from any other source (except for a carer’s pension) for, or have a financial interest in, any care services that they perform for the person.
- (2) The Tribunal may issue guidelines specifying the circumstances in which a person is to be regarded as a close friend or relative of another person.

- (3) The definition of “close friend or relative” should appear in the same section of the new Act as the person responsible hierarchy.

### 6.22 Consent of person responsible

- (1) The new Act should provide:
  - (a) Any person may ask a person responsible to consent to a course of healthcare for a patient.
  - (b) The request must explain:
    - (i) how the person does not have decision-making ability for the decisions that need to be made
    - (ii) the patient’s condition that requires healthcare
    - (iii) the courses of healthcare that are available for that condition
    - (iv) the general nature and effect of each of those courses
    - (v) the nature and degree of any significant risks associated with those courses, and
    - (vi) the reasons why any particular course should be carried out.
  - (c) In considering such a request, the person responsible must:
    - (i) give effect to the patient’s will and preferences (to be determined as set out in **Proposal 1.11**), and
    - (ii) have regard to the matters referred to in the request.
- (2) The regulations should provide when a consent or request for consent must be in writing.

### 6.23 Application to Tribunal for consent

The new Act should provide:

- (1) Any person can apply to the Tribunal for consent for healthcare for a patient.
- (2) The application shall state:
  - (a) how the person does not have decision-making ability for the decision or decisions that need to be made
  - (b) the patient’s condition that requires healthcare
  - (c) the courses of healthcare that are available for that condition
  - (d) the general nature and effect of each of those courses
  - (e) the nature and degree of any significant risks associated with those courses, and
  - (f) the reasons why any particular course should be carried out.

- (3) The Tribunal need not consider an application if it is not satisfied that the applicant has a sufficient interest in the patient's health and personal and social wellbeing.
- (4) Whenever an application is made for consent to healthcare and the healthcare cannot be given without that consent, the Tribunal may:
  - (a) order the person who is to give the healthcare not to start it, or
  - (b) if the healthcare has already started—order the person who is carrying out the healthcare to stop it,
 at least until the Tribunal has determined the application.
- (5) The existing service arrangements set out in s 43 of the *Guardianship Act 1987* (NSW) continue to apply.

#### 6.24 Tribunal consent to healthcare

The new Act should provide:

- (1) In considering an application for consent to healthcare, the Tribunal must:
  - (a) have regard to the views of:
    - (ii) the person proposing the healthcare, and
    - (iii) the person responsible and
  - (c) have regard to the matters that must be stated in the application.
- (2) After conducting a hearing, the Tribunal may consent to the healthcare if it is satisfied that it is the most appropriate form of healthcare and gives effect to the patient's will and preferences (as set out in **Proposal 1.11**).

#### 6.25 Liability for healthcare

The new Act should provide that nothing in the Act relieves a person from liability in respect of giving healthcare to a patient, if they would have been liable:

- (a) had the patient been able to consent to the healthcare, and
- (b) had the healthcare been given with the patient's consent.

#### 6.26 Clinical records

The new Act should provide that the regulations may make provision about keeping records of a patient's healthcare carried out under the Act.

### 6.27 Offences

The new Act should provide:

- (1) A person must not give healthcare to a patient unless:
  - (a) consent for the healthcare has been given in accordance with the new Act, or
  - (b) the healthcare provisions authorise the healthcare without consent, or
  - (c) the healthcare is given in accordance with an order of the Supreme Court in the exercise of its inherent jurisdiction.
- (2) A registered health practitioner has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a patient and believes on reasonable grounds that the requirements of the Act have been complied with.
- (3) A person must not take another person without decision-making ability outside Australia to obtain an unauthorised sterilisation procedure.

## 7. Medical research procedures

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**Proposals 7.1–7.8** relate to medical research procedures, referred to under existing provisions as “clinical trials”.

The *Guardianship Act* sets out two distinct approval processes for clinical trials involving participants who lack decision-making capacity:

- the approval of the clinical trial itself, and
- the substitute consent arrangements for a participant in that trial.

The Tribunal has a role in both processes.

Under our proposals the Tribunal would not have a role in approving the medical research procedure. This reflects the approach to tribunal involvement taken in both Victoria and the ACT, and addresses feedback that:

- given the already rigorous approval process before an ethics committee, there is no need for a tribunal to approve medical research procedures, and
- having two separate approval processes creates substantial delays, slowing down research projects and deterring practitioners from conducting research in NSW. This has indirect disadvantages for people who do not have decision-making ability, who might otherwise benefit from the resulting advances in medical research into their medical condition.

We have adopted Victoria’s ‘medical research procedure’ terminology and definition (**Proposal 7.1**). We consider it is preferable to the current ‘clinical trial’ terminology because the generally understood meaning of ‘clinical trial’ does not align with the areas of medical practice or research that the legislation regulates.

We propose that, when a participant cannot consent to participate in a medical research procedure, a person who can consent to healthcare should be able to do so (**Proposal 7.4**).

If the participant does not have a person responsible to consent to the medical research procedure, the Tribunal would need to appoint a representative (or supporter, if appropriate) for them to participate. Alternatively, the Tribunal may give consent on the patient's behalf (**Proposal 7.4**).

We propose an exception to the general consent provisions where a medical research procedure involves the administration of accepted emergency treatment that is needed as a matter of urgency to save a patient's life or prevent serious damage to their health – for example, a procedure whose research element involves comparing two kinds of intensive care treatments that are already known to be safe and effective (**Proposal 7.5**).

These proposals seek to strike a balance between safeguarding the rights of patients who cannot consent to medical research procedures and ensuring that people who do not have decision-making ability can access healthcare and research on an equal basis with the broader community.

Some new healthcare is only available in Australia through clinical trials. Notably, the UN Convention requires that people with disability have access to the same range, quality and standard of healthcare as other people and requires that states prevent “discriminatory denial of health care or health services...on the basis of disability.” In addition, people with disability have the right to “full and effective participation and inclusion in society”, which could include participating in research if that is their wish.

The proposed regime incorporates a number of safeguards to maximise patient autonomy. The person responsible and the Tribunal will be required to give effect to a patient's will and preferences wherever possible in accordance with **Proposal 1.11**. They must also be satisfied of some additional matters – for example, that the trial will not involve any substantial risk to the participant (or no material risks greater than those associated with existing treatments). Medical researchers will be required to:

- make reasonable efforts to ascertain whether the participant has an advance care directive before they administer a medical research procedure
- respect a participant's objection regardless of their decision-making ability
- not carry out a medical research procedure if the participant is likely to regain decision-making ability within a reasonable time, and
- file a record with the Public Advocate when a participant who lacks decision-making ability is included in medical research.

Finally, we propose that an interested person should be able to apply to the Tribunal if they are concerned that participating in research does not align with a participant's will and preferences, or promote their personal and social wellbeing.

### 7.1 Definition of “medical research procedure”

The new Act should define a “**medical research procedure**” as:

- (a) a procedure carried out for the purposes of medical research, including (as part of a clinical trial or otherwise):
  - (i) administering pharmaceuticals, or
  - (ii) using equipment or a device, or
- (b) anything prescribed by the regulations as a medical research procedure, but it should not include any of the following:
- (c) any non-intrusive examination including:
  - (i) a visual examination of the mouth, throat, nasal cavity, eyes or ears; or
  - (ii) the measurement of a person’s height, weight or vision;
- (d) observing a person’s activities
- (e) administering a survey
- (f) collecting or using information, including:
  - (i) personal information within the meaning of the *Privacy and Personal Information Protection Act 1998* (NSW)
  - (ii) health information within the meaning of the *Health Records and Information Privacy Act 2002* (NSW), and
- (g) any other procedure prescribed by the regulations as not being a medical research procedure.

### 7.2 Limitations on administering a medical research procedure

The new Act should provide:

- (1) If a person does not have decision-making ability but is likely to recover it within a reasonable time to make a decision about a medical research procedure, a researcher must not administer the procedure to that person.
- (2) A “**reasonable time**” is the time by which, given the nature of the relevant research, the procedure would need to be administered, having regard to:
  - (a) the person’s medical or physical condition
  - (b) the stage of medical treatment or care, and
  - (c) other circumstances specific to the person.

### 7.3 Requirement to find advance care directives and persons responsible

The new Act should provide:

- (1) Before a researcher administers a medical research procedure to a participant who does not have decision-making ability, they must make reasonable efforts in the circumstances to ascertain if the participant has:
  - (a) an advance care directive, and/or

- (b) a person responsible.
- (2) Failure to take these steps is unprofessional conduct.

#### 7.4 Approval and consent to a medical research procedure

The new Act should provide:

- (1) A person can consent to a medical research procedure in an advance care directive.
- (2) A researcher must not administer a medical research procedure to a participant who does not have decision-making ability for that procedure unless the relevant human research ethics committee has approved the research; and
  - (a) the participant has consented to the medical research procedure or medical research procedures of a similar nature in a valid advance care directive
  - (b) if there is no relevant advance care directive, the person responsible has consented to the procedure, or
  - (c) if there is no person responsible, the Tribunal has consented to the procedure.
- (3) The person responsible or the Tribunal may consent to the medical research procedure only if they are satisfied the decision gives effect to the participant's will and preferences (to be determined as set out in **Proposal 1.11**) and that:
  - (a) the drugs or techniques being tested are intended to cure or alleviate a particular condition the participant has or has had or to which the participant has a significant risk of exposure
  - (b) the medical research procedure will not involve any known substantial risk to the participant (or, if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments)
  - (c) the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to participants with that condition even if those participants cannot consent to taking part, and
  - (d) having regard to the potential benefits and risks of participating in the medical research procedure, taking part will promote the participant's personal and social wellbeing.
- (4) Before approving medical research involving participants who do not have decision-making ability, a human research ethics committee must be satisfied that the consent material gives sufficient information in a clear enough form to enable the person responsible to make an informed decision about participating.
- (5) The fact that a research procedure may involve administering placebos should not necessarily prevent the person responsible or the Tribunal from being satisfied that taking part would promote the participant's personal and social wellbeing.

- (6) A researcher cannot administer a medical research procedure if they know that the participant has refused the particular procedure in an advance care directive.
- (7) An interested person can apply to the Tribunal to review the decision of a person responsible and whether it gives effect to a participant's will and preferences or promotes their personal and social wellbeing. This may include interpreting a participant's will and preferences as expressed in an advance care directive.

### 7.5 Emergency treatment

The new Act should provide:

- (1) A human research ethics committee may approve a research project that involves the administration of emergency medical treatment (involving participants who do not have decision-making ability) without prior consent in accordance with Chapter 4.4 of the National Statement on Ethical Conduct in Human Research.
- (2) Once approved, a researcher may carry out a medical research procedure without seeking consent from the participant or the person responsible if the procedure involves administering accepted emergency treatment.
- (3) **"Accepted emergency treatment"** means urgent treatment that aligns with standard clinical practice.
- (4) A researcher cannot administer a medical research procedure if they are aware that the participant has refused the particular procedure or a procedure of a similar nature in an advance care directive. However, a practitioner is not required to search for an advance care directive not readily available in urgent circumstances.
- (5) A researcher must notify the participant or the person responsible that they have been included in a medical research project as soon as reasonably possible. The patient or the person responsible must have the opportunity to stop the procedure and withdraw from the research without compromising the person's ability to receive any available alternative medical treatment or care.

### 7.6 Records to be filed with the Public Advocate

- (1) The new Act should require medical researchers to file a record with the Public Advocate when a person who does not have decision-making ability is enrolled as a participant in a medical research procedure, including in relation to emergency treatment.
- (2) The Public Advocate should use these records to monitor and report on medical research in NSW that involves participants who do not have decision-making ability.

### 7.7 Effect of a participant's objection

The new Act should provide that nothing may be done to a patient in the course of a medical research procedure if the participant objects orally or by conduct. This includes an objection given in an advance care directive that is clear and extends to the situation at hand.

### 7.8 Offences

The new Act should provide:

- (1) It is an offence for a researcher to administer a medical research procedure to a person who does not have decision-making ability, unless:
  - (a) a human research ethics committee has approved the procedure, and
  - (b) consent has been obtained in accordance with the new Act.
- (2) A researcher has a defence if they have, in good faith and without negligence, administered or not administered healthcare to a participant and believes on reasonable grounds that the Act's requirements have been complied with.

## 8. Restrictive practices

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Under our proposals, the new Act (unlike the *Guardianship Act*) will expressly provide that assisted decision-making arrangements can include decision-making about the use of restrictive practices.

Our new general principles mean that the decision-maker, when making a decision about the use of restrictive practices must, among other things, give effect to a person's will and preferences; maintain their personal and social wellbeing; recognise their right to live free from neglect abuse and exploitation; and recognise their right to have their autonomy restricted as little as possible. (**Proposal 1.9**)

When considering further possible proposals about restrictive practices decision-making, we are mindful that from July 2018, the Commonwealth will be responsible for regulating the use of restrictive practices in the disability services sector. The Commonwealth Quality and Safeguarding Framework, and National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 signal an intention to introduce a registration process for NDIS-funded service providers that use restrictive practices, linked to assessment processes, monitoring, practice standards and a code of conduct. The Bill also provides for penalties for non-compliance, infringement notices, compliance notices, banning orders, enforceable undertakings and injunctions.

The framework envisages that within the NDIS a restrictive practice can only be used when it is part of a behaviour support plan developed by a registered support practitioner and authorised by the state or territory. The Explanatory Memorandum to the Bill states:

Participants with identified complex behaviour support needs will be assessed by an approved positive behaviour support practitioner, funded through their plans, who will then use the information from the assessment, together with information from other sources (including the participant, family and key providers), to develop a positive behaviour plan for the participant.

In the aged care, out of home care, education and mental health sectors, the use of restrictive practices is regulated by separate, sector-specific government policies.

Given the Commonwealth's intention to introduce a comprehensive regulatory scheme for the disability sector through the NDIS, we are not proposing that NSW introduces separate regulatory requirements for the disability sector. The specific and complex considerations that apply to the use of restrictive practices in mental health and education settings take the task of considering an appropriate regulatory framework for these sectors beyond the scope of this review. We also note that there are ongoing reviews by the Education Department and NSW Health about the use of restrictive practices.

In principle, we support consistent regulation of restrictive practices across NSW while recognising that certain differences in clinical contexts might lead to justifiable variations in regulation. Given the broad reach of the NDIS, and the fact that it is the only scheme with a statutory framework guiding the use of restrictive practices, we propose that NSW closely monitor the implementation of the framework; first, to judge its effectiveness, and second, to consider if NSW should apply comparable regulation in state-regulated sectors, such as education and mental health (**Proposal 8.1(1)**).

We support the standing recommendation from the Australian Law Reform Commission that the Commonwealth should regulate restrictive practices in residential aged care, and that the regulations should be consistent to those operating under the NDIS.

In addition to these sectors, restrictive practices are sometimes used in informal settings, such as in the family home. Apart from criminal sanctions, there is no regulation of restrictive practices in informal settings. We are not persuaded that it is appropriate for regulations governing restrictive practices to apply to informal carers who lack training and support to implement positive behaviour supports. However, greater education of families, carers and community groups could lead to greater awareness of restrictive practices and the need for their reduction and eventual elimination (**Proposal 8.1(2)**).

### 8.1 Regulation of restrictive practices

- (1) The NSW Government should closely monitor the implementation of the NDIS restrictive practices regulatory scheme with a view to considering whether to apply comparable regulation in the sectors that NSW regulates, including education and mental health.
- (2) The new Act should provide that the Public Advocate has the function of educating families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination.

## 9. Advocacy and investigative functions

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**Proposal 9.1** recommends the introduction of new advocacy and investigative functions to be carried out by a proposed new entity, called the Public Advocate.

Some of the proposed functions are drawn from functions undertaken by public advocates and public guardians in other states and territories and that have proved useful and effective. Some are designed to ensure that appropriate safeguards and services are maintained after the transition to the NDIS. Others specifically support elements of the new proposed framework; for example, the function of setting standards and guidelines for supporters.

The proposed mediation and systemic advocacy functions, and the functions relating to the provision of decision-making advice and assistance, are designed to reduce the need for formal assisted decision-making arrangements, and if formal arrangements are required, to ensure the least restrictive option (for example, a personal support agreement rather than a representation agreement) is pursued.

Under existing law, before the Public Guardian can investigate a complaint or allegation of abuse, neglect or exploitation, the Public Guardian must make an application for a guardianship order. This can delay action and may not be the least restrictive option for the person who is the subject of the application.

The proposed investigative functions enable the Public Advocate to commence an investigation without an application for a representation order. They empower the Public Advocate to require people and organisations to provide documents, answer questions and attend compulsory conferences. The Victorian Public Advocate has these powers. The search and entry powers are based upon existing powers in the *Guardianship Act* with some changes (**Proposals 13.1–13.2**).

Submissions were divided on the question of whether a Public Advocate should be separate from the Public Representative or whether a new entity should perform both the new proposed functions and the representative functions that the Public Guardian currently performs. Some argued that certain functions should be kept separate to avoid conflict. For example, some envisaged a situation where an entity with both investigative powers and representation responsibilities might allow concerns about a high representation workload to influence its investigative decisions.

On balance, we are persuaded that the new proposed functions should be carried out by the Public Representative (to be renamed the Public Advocate) in addition to its representative functions. That way, the full range of response options is available depending on the situation at hand. A second advantage is that the knowledge and skills needed to exercise each set of functions overlap. We are confident that structures can be put in place to manage potential conflicts. The Victorian Law Reform Commission reviewed its state's combined model in 2012 and found it to operate effectively, despite the potential for conflict between its functions. Finally, a combined model is more cost effective than maintaining two separate agencies.

Two important and pre-existing safeguards will apply to the Public Advocate. The NSW Ombudsman would have the power to investigate complaints about the Public

Advocate in keeping with its current functions in relation to public authorities. In addition, the current provision allowing a person to apply for administrative review of a representation decision should be maintained (**Proposal 9.2**).

### 9.1 New advocacy and investigative functions

- (1) The new Act should introduce new advocacy and investigative functions.
- (2) The new Act should provide that these functions are to be carried out by the Public Representative.
- (3) The new functions should be to:
  - (a) mediate disputes about assisted decision-making, including between:
    - (i) parties to a court or tribunal application
    - (ii) enduring representatives, representatives and/or persons responsible, and
    - (iii) informal supporters and/or informal representatives.
  - (b) undertake systemic advocacy for people in need of decision-making assistance through:
    - (i) educating the community and public agencies about the decision-making framework and the role of family and friends
    - (ii) educating and advising families, carers and community groups about restrictive practices and the need for their reduction and eventual elimination
    - (iii) supporting the establishment and continued operation of organisations that promote advocacy and undertake community education
    - (iv) monitoring, investigating, researching, reporting, making recommendations and advising on any aspect of the system the relevant Minister refers to it, and
    - (v) having standing in court and tribunal matters of general interest to people who need decision-making assistance.
  - (c) provide decision-making advice and assistance to people who do not have access to formal decision-making support, including:
    - (i) seeking help for people who need decision-making assistance from government agencies (including the NDIS), institutions, welfare organisations and service providers, and negotiating of their behalf to resolve issues
    - (ii) advising people on making applications for support and representation orders
    - (iii) advising people on and facilitating the development of support and representation agreements, and
    - (iv) administering and/or promoting decision-making assistance services and facilities (including its own)
  - (d) providing information and training to supporters appointed under a support agreement or support order
  - (e) setting standards and guidelines for supporters

- (f) investigating suspected abuse, neglect and exploitation on its own motion or in response to a complaint, with powers to:
  - (i) seek a warrant from a Magistrate, Local Court registrar or the Tribunal to search and enter property when there are reasonable grounds for believing that there is a person in need of decision-making assistance living there who is being unlawfully detained or is likely to suffer serious damage to their personal or social wellbeing unless immediate action is taken
  - (ii) require people, departments, authorities, service providers, institutions and organisations to provide documents, answer questions, and attend compulsory conferences
  - (iii) refer complaints or allegations of abuse and neglect to Public Advocates (or equivalent) outside NSW for investigation or other appropriate action in response to alleged victims and/or alleged abusers moving across borders
  - (iv) exchange information with the relevant state/territory and national bodies (including the Tribunal, the NSW Ombudsman's office, the NDIA, and the NDIS Quality and Safeguarding Commissioner) on matters affecting the safety of a person with disability – such as information relating to allegations of abuse and neglect, and
  - (v) have read-only access to the police (COPS) and child protection (KiDS) databases
- (g) when an application for a support or representation order is before the court or Tribunal, investigate, on its own motion or by request from the court or Tribunal, whether there is a need for a support or representation order and if it is the least restrictive option being taken, and
- (h) intervene in court or Tribunal proceedings in certain cases (for example, if the Public Advocate has been closely connected with the person subject to the hearing).

## 9.2 The Public Representative

In addition to incorporating the changes proposed in **Proposal 9.1**, the new Act should incorporate the provisions currently in Part 7 (the Public Guardian) of the *Guardianship Act* insofar as they are consistent with the new framework.

## 10. Provisions of general application

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**Proposals 10.1–10.7** are provisions of general application.

Currently, if someone wants to make a claim or take action against an appointed decision-maker for abuse or misuse of power or failure to perform their duties, they have to go to the Supreme Court. **Proposal 10.1** seeks to provide a simpler and cheaper option by giving the District Court the jurisdiction to hear such matters.

Under **Proposal 10.2**, formal decision-making agreements need not be registered. Although many submissions supported a registration system, opinion was split on whether it should be optional or mandatory, and a number argued that a register would not adequately address cases of misuse or false representation. Privacy concerns were also raised. Our research into comparable registration schemes in other jurisdictions did not convince us that the potential benefits of a registration scheme outweighed the likely problems.

**Proposal 10.3** incorporates the existing provisions that allow a guardian to apply to the Tribunal for directions about exercising their functions, and extends these provisions to all representatives and supporters.

**Proposal 10.4** clarifies that a representative, person responsible or supporter is entitled to access any information that the person they are representing or assisting would be able to access provided that it is also relevant to and necessary for carrying out their functions.

**Proposal 10.5** incorporates the existing provisions that prohibit anyone disclosing information obtained in connection with the administration or execution of the Act, but expands the list of exceptions to this rule to include some of the express exceptions in the Queensland legislation. In particular, allowing a person to authorise the disclosure of information about them accommodates the principle that a person may have capacity to make some decisions but not others. It also accommodates supporters on the basis that a supported person continues to have decision-making ability. We note that permitting disclosure to prevent serious harm or to report a serious offence is a regular exception to privilege and confidentiality provisions in other areas.

Under our proposals for enduring representation agreements (see **Part 4**) and representation orders (see **Part 5**), disputes may arise between joint representatives or between representatives with different decision-making functions relating to a proposed course of action. An example of such a case could be a representative with an accommodation function and a representative with a financial function needing to decide on an affordable care facility for a person. We propose a provision that encourages representatives to resolve their disputes informally, with the option that they may apply to the Tribunal for directions to help resolve the dispute (**Proposal 10.6**). A number of submissions supported this approach. The Tribunal, under s 37 of the *Civil and Administrative Tribunal Act 2013* (NSW), can already require parties otherwise before it to use resolution processes. Both the informal resolution and any processes directed by the Tribunal could involve mediation conducted or arranged by the Public Advocate (see **Proposal 9.1**).

**Proposal 10.7** incorporates the miscellaneous provisions in Part 9 of the *Guardianship Act* that have not otherwise been the subject of a proposal. These include provisions about service of notices, the offences of obstruction and false or misleading statements, and procedural matters.

### 10.1 Causes of action

The new Act should provide that the District Court has jurisdiction in relation to any cause of action, or claim for equitable relief that is available against a

supporter or representative in the Supreme Court for abuse or misuse of power or failure to perform duties, and has the power to order any remedy available in the Supreme Court.

### 10.2 No registration required

The new Act should not require registration of support agreements, support orders, enduring representation agreements or representation orders. However, this should not limit the requirement for registration for the purposes of any other Act.

### 10.3 Directions to supporters and representatives

The new Act should provide:

- (1) Supporters and representatives can apply to the Tribunal for directions about the exercise of their functions.
- (2) In giving directions, the Tribunal should be guided by the general principles.

### 10.4 Access to personal information

The new Act should provide:

- (1) A representative, person responsible or supporter should be entitled to access, collect or obtain personal information (including financial information) about a person that that person would be entitled to access and that is relevant to and necessary for carrying out their functions.
- (2) A person holding that information, on being satisfied that a person is entitled to access that information, must allow them to access that information.

### 10.5 Non-disclosure of personal information

The new Act should provide that it is an offence for a person, including a representative or supporter, to disclose any information obtained in connection with the administration or execution of the Act unless it is:

- (a) for the purpose of acting as the person's representative, including, where relevant, to seek legal or financial advice, or counselling, advice or other treatment
- (b) in connection with the administration or execution of the Act
- (c) necessary for proceedings under the Act
- (d) authorised by law
- (e) authorised by the person to whom the information relates

- (f) authorised by a court or tribunal in the interests of justice, or
- (g) necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

### 10.6 Resolving disputes between representatives

The new Act should provide that, if there are 2 or more representatives and the representatives cannot agree on one or more decisions that need to be made, after attempting to resolve the disagreement (whether informally or through mediation), the representatives may apply to the Tribunal for directions to resolve any such disagreement.

### 10.7 Miscellaneous provisions

The new Act should incorporate the substance of the provisions contained in Part 9 of the *Guardianship Act*, except where to do so would contradict another proposal, and with adjustments to ensure consistency with the new framework.

## 11. Tribunal procedures and composition

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**Proposals 11.1–11.6** relate to Tribunal procedures and composition.

We carefully considered the arguments in favour of a streamlined process for parents seeking to be representatives for their children who are turning 18 and who do not have decision-making ability, including the possibility of allowing a hearing “on the papers”. However, we have concluded that, on balance, and in light of the UN Convention, the safeguards that the current procedures provide are too important to be dispensed and should apply in all cases (**Proposal 11.3**).

Key features of the other proposals include:

- ensuring that the appropriate parties are notified of hearings while making sure the requirements are not so onerous as to cause delay (**Proposal 11.4**)
- clarifying when a young person may be a party to a proceeding (**Proposal 11.2**)
- providing that the legal representative of a person the subject of an application in the Tribunal may appear without applying for leave (**Proposal 11.5**)
- ensuring that anyone who is making decisions on behalf of a person or is acting “in the interests of” a person follows the new general principles (**Proposal 11.5**), and
- addressing concerns about false evidence being given in the Tribunal. While not intending to change the current law, **Proposal 11.6** seeks to ensure that the Tribunal places parties under oath in appropriate cases to minimise instances of false evidence being given.

### 11.1 Composition of the Assisted Decision-Making Division and Appeal Panels

The new Act should provide that the composition of the Assisted Decision-Making Division and Appeal Panels should continue to be determined by the provisions of Schedule 6 of the *Civil and Administrative Tribunal Act 2013* (NSW).

### 11.2 Parties to proceedings

The new Act should:

- (a) retain the definition of a party to Tribunal proceedings set out under the current s 3F of the *Guardianship Act* with amendments to reflect the new framework (including the addition of the Public Advocate as a party in all cases)
- (b) expressly provide that a child or young person is a party to proceedings before the Tribunal if:
  - (i) they are the person to whom the application relates
  - (ii) they are the primary carer of the person to whom the application relates, or
  - (iii) they would be directly affected by any support or representation order.

### 11.3 The appointment process for representatives who are parents

Under the new Act, the appointment process for parents of people who do not have decision-making ability where this has been the case since before the person turned 18 should continue to be the same process as the appointment process for other representatives.

### 11.4 Notice and service requirements

The Tribunal should review its procedures to ensure that its registry staff:

- (a) take reasonable efforts to determine and notify people with a genuine interest in the person who is the subject of a hearing
- (b) have regard to any family violence considerations evident on the face of the available materials when deciding whether to notify family members,
- (c) afford same-sex and de facto relationships the same consideration with notice as heterosexual and marital relationships, and
- (d) advise all people notified of a hearing of the outcome of the hearing.

### 11.5 Representation of parties

The new Act should provide:

- (1) A legal representative of the person who the subject of an application before the Tribunal may appear without seeking leave.
- (2) Separate representatives must act according to the general principles set out in **Proposal 1.9**.

### 11.6 Requirement to give evidence under oath

The new Act should require parties to a Tribunal hearing to give their views and evidence under oath or on affirmation where the Tribunal considers there are material factual matters in dispute.

## 12. Supreme Court

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**Proposals 12.1–12.2** consolidate and align existing provisions in the *Guardianship Act* that set out what happens where the Tribunal and the Supreme Court make orders and receive applications about the same matters.

In the *Guardianship Act* the provisions for guardianship orders and financial management orders are inconsistent. For example, there is no provision for the Tribunal to make a financial management order where a Supreme Court order exists. **Proposal 12.1**, therefore, sets out all of the circumstances contemplated by the existing provisions and applies them to representation orders (which, under the new framework, incorporate both guardianship and financial management orders).

**Proposal 12.2** aims to ensure that review proceedings in relation to the same matter are not pursued at the same time in both the Supreme Court and the Tribunal. It also provides a mechanism to refer applications for review between the two bodies. This fills gaps in the existing law, which makes no express provision of this sort in relation to Supreme Court or Tribunal reviews of enduring guardianships and makes only limited provision in relation to Supreme Court or Tribunal reviews of powers of attorney.

### 12.1 Interactions between the Supreme Court and the Tribunal

The new Act should provide:

- (1) Where an application to the Supreme Court in respect of anything that can be the subject of a support order or representation order is on foot (or an appeal resulting from such an application is on foot), the Tribunal does not have jurisdiction to make a support order or representation order.
- (2) Where the Supreme Court has made an order, a subsequent representation order by the Tribunal in respect of the same subject matter will take effect only in accordance with an order of the Supreme Court. The Supreme Court order then ceases to have effect with respect to that subject matter.

- (3) Where the Tribunal has made a representation order, a subsequent order by the Supreme Court will cause the Tribunal order to have no effect to the extent that it covers the same subject matter.
- (4) The Supreme Court may, on application by the Tribunal or by a party to proceedings before the Tribunal, order that proceedings before the Tribunal be transferred to the Supreme Court.

## 12.2 Supreme Court and Tribunal review of agreements and orders

The new Act should provide:

- (1) The Supreme Court may review:
  - (a) part or all of a support agreement
  - (b) part or all of a support order
  - (b) part or all of a representation order, or
  - (c) part or all of an enduring representation agreement (or purported agreement),

provided that an application for review of the same matter is not on foot before the Tribunal.
- (2) The Tribunal may review:
  - (a) part or all of a support agreement
  - (b) part or all of a support order
  - (b) part or all of a representation order, or
  - (c) part or all of an enduring representation agreement (or purported agreement),

provided that an application for review of the same matter is not on foot before the Supreme Court.
- (3) An application for review may be withdrawn with the leave of:
  - (a) the Supreme Court (if the application was made to the Supreme Court), or
  - (b) the Tribunal (if the application was made to the Tribunal).
- (4) If an application for review is made:
  - (a) to the Supreme Court, the Supreme Court may (on its own motion, or on request) refer the application to the Tribunal
  - (b) to the Tribunal, the Tribunal may (on its own motion, or on request) refer the application to the Supreme Court.

## 13. Search and removal powers

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**Proposals 13.1–13.3** relate to search and removal powers.

Submissions supported retaining the search and removal powers in the *Guardianship Act* because they provide protection for people in need of decision-making assistance.

**Proposal 13.1** draws on s 11 of the *Guardianship Act*, which grants the Tribunal power to order the removal of a person from any premises where the person is subject to an application for a guardianship order.

We propose extending the scope of this power to include cases where there is a review application before the Tribunal. This recognises that there may be cases where people who are already under a representation order may be subject to abuse or neglect.

**Proposal 13.2** draws on s 12 of the *Guardianship Act*, which allows a Tribunal employee or police officer to apply for a search warrant to remove from premises a person in need of guardianship and at risk.

We propose that the Tribunal (in addition to a police officer) should be able to issue a warrant, and that the power should be available not only where people who are in need of decision-making assistance are at risk, but also where people who are already receiving decision-making assistance are at risk.

Arguably, it is not appropriate for an employee of the Tribunal to execute a search warrant. The Public Guardian has submitted that its employees are better placed to fulfil this function. We propose that the “employee” in the current provision should instead be an employee of the Public Advocate (see also **Proposal 9.1**).

**Proposal 13.3** would incorporate existing provisions that require a person who has been removed from premises to be placed in the custody of the relevant government department prior to a Tribunal making a support or representation order.

### 13.1 Where an application is before the Tribunal

The new Act should provide:

- (1) If an application for a representation order or for the review of a representation order is made to the Tribunal:
  - (a) the Tribunal may, if it considers it appropriate in the circumstances, to order that the person the subject of the application or the order be removed from any premises, and
  - (b) an authorised person or police officer acting under such an order, may enter and search premises and remove the person from the premises, using such force as is reasonably necessary in the circumstances.
- (2) A person acting in accordance with such an order, in good faith, is not liable to any action, liability, claim or demand arising from the action.

### 13.2 Under a search warrant

The new Act should provide:

- (1) An employee of the Public Advocate or a police officer who has reasonable grounds for believing that a person in need of or receiving decision-making assistance:
  - (a) is being unlawfully detained against his or her will, or
  - (b) is likely to suffer serious damage to his or her physical, emotional or mental health or wellbeing unless immediate action is taken,
 may apply to the Tribunal or an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) for the issue of a search warrant.
- (2) The Tribunal or authorised officer, if satisfied there are reasonable grounds, may issue a search warrant authorising a named employee of the Public Advocate or named police officer to enter specified premises, search the premises and remove the person from the premises.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), relating generally to warrants, applies to a search warrant issued under this provision.
- (5) A person acting in accordance with the search warrant may use such force as is reasonably necessary in the circumstances.
- (6) Without limiting s 71 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), a police officer or medical practitioner, or both, may accompany an employee of the Public Advocate acting under a search warrant and they may take all reasonable steps to assist the employee.

### 13.3 Care of people pending proceedings

The new Act should provide that a person is removed in accordance with the search and removal powers, the person should be placed in the care of the Secretary of the relevant government department, but that the Secretary must make an application for a support order or representation order within 3 days.

## 14. Interaction with mental health legislation

**Proposals 14.1–14.6** seek to clarify the relationship between the new Act, the *Mental Health Act 2007* (NSW) (“*MH Act*”) and the *Mental Health (Forensic Provisions) Act 1990* (NSW) (“*MH(FP) Act*”).

Key features include:

- Making clear that matters addressed by orders under the *MH Act* and *MH(FP) Act* prevail over orders or agreements for supported decision-making or representation (**Proposals 14.1** and **14.2**). Importantly, the proposals expressly provide that orders or agreements for support or representation continue to function in areas that are not the subject of orders pursuant to the *MH Act* or *MH(FP) Act*.

- Establishing that the authorised medical officer of a mental health facility makes decisions in relation to the “mental health treatment” of a patient in need of decision-making assistance, while all other decision-making, including non-mental health medical treatment decisions, follow the provisions of the new Act (**Proposal 14.3**).
- Implementing a uniform regime for special treatment of people under the *MH Act* and for supported or represented people under the new Act. Submissions noted the inconsistency between provisions in the *Guardianship Act* and the *MH Act* with respect to special treatment, and many indicated a preference for the regime in the *Guardianship Act*. Accordingly, under **Proposal 14.4**, the Tribunal (and not the Mental Health Review Tribunal) will have jurisdiction to make any relevant decisions.
- Clarifying the process of admission and discharge for voluntary patients including prohibiting voluntary admission of patients at the request of their representatives where the patient objects (**Proposal 14.5**).
- Removing the Mental Health Review Tribunal’s jurisdiction over financial matters of a detained patient and leaving arrangements for financial decision-making to the procedures in the Tribunal (**Proposal 14.6**). This is not due to any criticism of the Mental Health Review Tribunal’s handling of such matters but rather to streamline the application of the new Act.

### 14.1 The Mental Health Act

The new Act should provide:

- (1) An order or agreement for support or representation may be made in respect of a patient or affected person within the meaning of the *MH Act*.
- (2) An order or agreement for support or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the *MH Act*.
- (3) If a supported or represented person is, or becomes, subject to orders under the *MH Act*, any order or agreement for support or representation made under the new Act is only effective to the extent it does not conflict with orders made under the *MH Act*.

### 14.2 The Mental Health (Forensic Provisions) Act

The new Act should provide:

- (1) An order or agreement for supported decision-making or representation may be made in respect of a forensic patient or a correctional patient within the meaning of the *MH(FP) Act*.
- (2) An order or agreement for supported decision-making or representation made under the new Act is not suspended or revoked if the supported or represented person becomes subject to the *MH(FP) Act*.
- (3) If a supported or represented person is, or becomes, subject to orders under the *MH(FP) Act*, any order or agreement for supported decision-making or representation made under the new Act is only effective to the extent it does not conflict with orders made under the *MH(FP) Act*.

### 14.3 Decision-maker for healthcare decisions

- (1) The new Act should provide as follows:
  - (a) An authorised medical officer (as defined in the *MH Act*) may give, or authorise, any “mental health treatment” which he or she considers appropriate, to a supported or represented person who is detained in a mental health facility (as defined in the *MH Act*), subject to any orders under the *MH Act* or *MH(FP) Act*. An authorised medical officer may also give, or authorise, any healthcare that is incidental to “mental health treatment.”
  - (b) “**Mental health treatment**” is a course of action taken to:
    - (i) remedy a mental illness
    - (ii) diagnose a mental illness
    - (iii) alleviate or manage the symptoms or reduce the effects of the illness
    - (iv) reduce the risks posed by or to the person with the mental illness, or
    - (v) monitor and evaluate a person’s mental health.
  - (c) “**Mental illness**” refers to a mental illness or mental disorder as defined in the *MH Act* or a mental condition as defined in the *MH(FP) Act*.
  - (d) Any decisions relating to healthcare other than mental health treatment for supported or represented people, are subject to the new Act.
- (2) The *MH Act* should be amended to include an identical definition for “mental health treatment”.

### 14.4 Consent for special healthcare

- (1) The provisions in the new Act relating to special healthcare should apply universally, including to people subject to the *MH Act*.
- (2) The *MH Act* should refer to the new Act for matters relating to special healthcare and all provisions relating to “special medical treatment” in the *MH Act* should be repealed. The *MH Act* should continue to regulate Electro-Convulsive Treatment.

### 14.5 Voluntary patients

- (1) The new Act should provide as follows:
  - (a) In cases where a representative has relevant healthcare and/or personal functions:
    - (i) a represented person may be admitted to a mental health facility as a voluntary patient if their representative makes a request to an

authorised medical officer and the represented person does not object to this request being made

- (ii) a represented person must not be admitted as a voluntary patient if they, or their representative, objects to the admission to the authorised medical officer
  - (iii) an authorised medical officer must discharge a represented person who has been admitted as a voluntary patient if the represented person requests to be discharged, and
  - (iv) an authorised medical officer must give notice of the discharge of a voluntary patient who is a represented person to the person's representative.
- (b) A supporter with relevant healthcare and/or personal functions may assist the supported person to make decisions relating to voluntary admission and discharge from a mental health facility (as referred to in s 5 and 8 of the *MH Act*).
- (2) The *MH Act*, specifically s 7 and 8, should be amended to reflect this proposal.

### 14.6 Financial arrangements for involuntary patients

- (1) The provisions of the *NSW Trustee and Guardian Act 2009* (NSW) that relate to Mental Health Review Tribunal orders for management of estates of mental health patients (s 43-51 and 88) should be repealed so as to remove the Mental Health Review Tribunal's jurisdiction over a detained patient's financial matters.
- (2) The new Act should provide that the Tribunal has the power to revoke any orders relating to financial management that were made by the Mental Health Review Tribunal pursuant to the *NSW Trustee and Guardian Act 2009* (NSW) or a by a magistrate conducting a mental health inquiry.

## 15. Adoption information directions

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**Proposal 15.1** relates to the provisions within the *Guardianship Act* that make arrangements for a person without decision-making ability who is adopted, or is the biological parent of someone given up for adoption, to obtain information about their birth parents or biological child.

It appears that these provisions have never, or rarely, been used, and we have had no submissions about them. However, in our view the provisions provide an important pathway for people to obtain information and, in the absence of identified problems, we propose they are incorporated into the new Act with minor adjustments to ensure consistency with the new framework. Such adjustments would include requiring the Tribunal to give effect to the person's will and preferences when considering an application, instead of merely considering their views.

### 15.1 Retain the existing provisions

The new Act should incorporate the substance of the provisions contained in Part 4A of the *Guardianship Act* with adjustments to ensure consistency with the new framework.

## 16. Recognition of interstate appointments

**Proposals 16.1–16.4** relate to the question of how NSW deals with formal assisted decision-making arrangements made in other states and territories of Australia and overseas.

Currently in NSW, the *Guardianship Act* automatically gives effect to the appointment of an enduring guardian appointed in another state or territory. However, guardians or financial managers who have been appointed by a tribunal or court in another state or territory must apply to the Tribunal to have their status formally recognised. This process is consistent with other state jurisdictions and we think it should remain (**Proposal 16.1**).

The remaining proposals:

- clarify the effect of recognition of an interstate appointment (**Proposal 16.2**)
- give the Tribunal a new power to review interstate enduring guardians, including where there is an allegation of abuse of powers (**Proposal 16.3**). All submissions that addressed this question supported the Tribunal having this power. The proposed powers of review, modelled on Victorian legislation, would allow the Tribunal to appoint a new representative or supporter in circumstances of abuse, and
- recommend against a register for interstate orders and personal appointments. (**Proposal 16.4**) It would be unfair to impose the burden on interstate guardians or managers when NSW does not have a system of registration for NSW appointed substitute decision-makers.

### 16.1 Recognition of appointments made in other jurisdictions

(1) The new Act should:

- (a) continue to provide for automatic recognition of valid enduring personal appointments that confer personal, healthcare and/or restrictive practices decision-making functions (often called ‘enduring guardianship’ appointments) made in other jurisdictions
- (b) extend automatic recognition to valid enduring personal appointments that confer financial decision-making functions (often called ‘power of attorney’ appointments) made in other jurisdictions
- (c) continue to allow people appointed to have personal, healthcare, restrictive practices, and/or financial decision-making functions under an interstate court or tribunal order listed in the regulations to apply to the Tribunal to have their status recognised, and
- (d) continue to allow people appointed to have personal, healthcare, restrictive practices, and/or financial decision-making functions under

the corresponding law of another country, which is listed in the regulations, to apply to the Tribunal to have their status recognised.

- (2) The regulations should be updated to recognise all forms of personal appointments and orders made outside of NSW that grant powers substantially similar to those that can be lawfully granted in NSW, including support arrangements.

### 16.2 Effect of recognition

The new Act should provide:

- (1) Recognition does not affect the validity of the original appointment in its originating jurisdiction.
- (2) Recognition gives the applicant the same powers as if they had been appointed in NSW. The applicant can only exercise functions authorised by their original appointment and only if those functions can be authorised in NSW.
- (3) Automatic recognition of a personal enduring appointment made in another jurisdiction will not bring a representative with financial functions under the supervision of the NSW Trustee.

### 16.3 Tribunal review

The new Act should provide:

- (1) The Tribunal should have the power to review, vary, revoke, replace or confirm an order or personal appointment made in another jurisdiction as it operates in NSW. This does not affect the operation of the personal appointment or order in its originating jurisdiction.
- (2) It should be at the discretion of the Tribunal to order that a person with a financial decision-making function under an appointment or order made in another jurisdiction be subject to supervision by the NSW Trustee in relation to their operations in NSW.
- (3) Where the Tribunal reviews, varies, revokes, replaces or confirms an order in NSW, it should notify the relevant court or tribunal in the state or territory in which the original order or personal appointment was made.

### 16.4 Registration

NSW should not introduce a compulsory register for appointments made in other jurisdictions.



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