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21 March 2016

Law Reform Commission  
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### **Submission to the Law Reform Commission's Review of the *Guardianship Act 1987***

I am pleased to have the opportunity to provide a brief, preliminary submission to the Law Reform Commission's review of the *Guardianship Act 1987* (the Act). As Greens NSW spokesperson for Disability and Ageing, I am greatly concerned about the rights of people with disability and older people, particularly those who are subjected to the Act. I welcome the review of the Act by the Law Reform Commission.

My key concerns centre on the compatibility of the Act with the Convention on the Rights of Persons with Disabilities (the Convention). Many people with a disability and organisations representing people with a disability argue that guardianship orders remove basic freedoms of those subjected to them, and that this conflicts with the Convention. The Convention states that State Parties:

- 'Recognise the importance for persons with disabilities of their autonomy and independence, including the freedom to make their own choices', and
- 'Consider that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programs, including those directly concerning them'.
- Article 12 of the Convention states that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" and that State Parties "shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".
- Article 15 states that people with a disability shall "enjoy the right to liberty and security of person" and not be "deprived of their liberty unlawfully or arbitrarily". It further states that  
"if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation".<sup>1</sup>

It would appear that the Act fails to ensure that people with a disability enjoy the same rights afforded to others. People with a disability or older people under guardianship are often prevented from making basic decisions about their lives. For example, they often have no say about where

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<sup>1</sup> United Nations *Convention on the Rights of Persons with Disabilities*  
<http://www.un.org/disabilities/convention/conventionfull.shtml>

they live, whether they are institutionalised or not, what they do from day-to-day, and who provides them support and care. The Act does not encourage supported-decision making models and instead focuses on an individual's capacity to make decisions. Many stakeholders have called for investment in a supported-decision making model to move away from substitute-decision making. Given the importance of supporting and promoting the rights of people with a disability and older people, investment should be made into supported-decision making to mitigate the risk of abuse and/or exploitation by third parties.

There is concern in the community about the use of restrictive practices against people with a disability and older people. The use of physical and chemical restraint appears to be a problem in aged and disability care institutions as well as in the community. In an Inquiry into Registered Nurses in NSW Nursing Homes I chaired last year, we heard from witnesses who told the committee that restraint was used in some residential aged care facilities because of a lack of staff. Similar evidence is being presented to the current Inquiry into Elder Abuse, of which I'm also part. People who are under guardianship seem to be at greater risk of being subjected to restrictive practices, not least because decisions about their treatment are being made by a third party. There is also a problem of carers and workers being stressed and resorting to using restraint because it appears to be the only option available to them.

This Inquiry should investigate the processes used to authorise restraint against someone who is under both private and public guardianship. It should also look into whether these decisions can ever be made in 'the best interests' of the person concerned and what can be done to minimise and, ideally, eliminate the use of restraint.

In a similar vein, this review should consider the management of people's finances, particularly those whose finances are managed by the NSW Trustee. Although the NSW Trustee's management of people's financial affairs is governed by the *NSW Trustee and Guardian Act 2009*, cases have been brought to my attention whereby financial decisions made by the NSW Trustee have not been in the best interests of the individual and family concerned. I hold concerns about the oversight processes in place to monitor the management of people's finances and assets and I encourage this review to consider the safeguards in place to protect people's rights and best interests.

Some stakeholders have raised concerns regarding of the experience of the NSW Civil and Administrative Appeals Tribunal in reviewing guardianship and financial management orders. There is concern that some members do not have expertise in the area of disability and that this is having a negative impact on the review process. Given that the NCAT offers an affordable and accessible appeal avenue for people wishing to appeal a decision, it is critical that NCAT has an excellent understanding of disability and this area of law.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Barham', written in a cursive style.

**Jan Barham MLC**