



THE LAW SOCIETY  
OF NEW SOUTH WALES

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4 April 2016

Mr Alan Cameron AO  
Chairperson  
NSW Law Reform Commission  
DX 1227 SYDNEY

By email: [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

Dear Chair

### **Review of the Guardianship Act 1987 – preliminary submission**

Thank you for meeting with representatives of the Law Society of NSW on 8 March 2016.

The purpose of this preliminary submission is simply to follow up on the broad issues that arose at the meeting that the Law Society considers relevant to the terms of reference.

#### **1. Model or models of decision making that could be employed for persons who cannot make decisions for themselves**

The Law Society does not object, in principle, to a model of supported decision making rather than the current substituted decision making model, but notes that there may be issues in practice that will require further consideration. These issues include:

- (a) Any proposal to apply a formal legal framework to informal family arrangements should not necessarily replace informal arrangements, unless appropriate. At present, the Guardianship Division of the NSW Civil and Administrative Tribunal avoids making a guardianship order, if possible. This recognises the benefits of informal arrangements for many people with disability and their families.
- (b) Supported decision making models should enhance the decision making capacity of people with disability, not expose people to potential abuse.
- (c) The practical aspects of the structure of such a decision making model. Issues relating to how a person would be supported in practice need to be determined.
- (d) A model of supported decision making is likely to be resource intensive and costly. In order for its practical implementation to work, there must be adequate supports and funding allocated.
- (e) A legal framework for the appointment of a support person and the scope of the powers of such an appointment need to be determined. What is the role of legal practitioners in this framework and what is their exposure to liability? What is the exposure of the support person to liability?

- (f) The model of decision making to be employed for people whose will and preferences cannot be determined because of cognitive impairment or serious mental illness, particularly in relation to decision making about financial management. Given the complexities of financial management and the realities of elder financial abuse, the Law Society is reluctant to entirely abandon the “best interests” model that currently operates in NSW in these circumstances.

## **2. The benefits of harmonisation and uniformity of existing laws**

The Law Society supports the harmonisation of powers of attorney and guardianship laws in each State and Territory. At present there is no consistency in State and Territory laws and instruments of powers of attorney and enduring guardianship.

The Law Society considers that uniformity would reduce the current complexity in the law in NSW with powers of attorney and enduring guardianship.

## **3. The recognition of legal instruments made in other jurisdictions**

The Law Society supports the development of a legal framework for the recognition of powers of attorney and guardianship instruments made in other jurisdictions both in Australia and overseas, particularly in common law countries.

## **4. Review of nomenclature and the need for consistent terms and concepts**

The Law Society supports a review of defined terms and concepts in the legislation to promote consistency and the use of plain language. Such terms and concepts include “person responsible”, “alternative enduring guardian”, and “capacity”.

## **5. Role of private protected estate managers**

The Law Society considers that the role of private and public protected estate managers should be considered by the Review, with particular reference to *Ability One Financial Management Pty Ltd v JB by his Tutor AB* [2014] NSWSC 245.

Should you have any queries in regard to this submission, please contact Emma Liddle, policy lawyer on (02) 9926 0212 or by email to [emma.liddle@lawsociety.com.au](mailto:emma.liddle@lawsociety.com.au)

Yours sincerely,



Gary Ulman  
**President**