

# NSW Trustee and Guardian Response to Draft Proposals



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## Overview

NSW Trustee and Guardian supports a new Act that provides for a framework for assisted, supported and (as a last resort) substitute decision making.

Detailed below are the comments/submissions that NSW Trustee and Guardian wish to have considered:

NSW Trustee and Guardian welcomes the suggested change to the organisation's name to clarify the nature of the decisions it makes. To that end the rest of the submission refers to the organisation as NSW Trustee.

### Focus on ability

NSW Trustee welcomes the focus on decision-making ability, the existence of a definition of decision-making ability (**Proposal 1.12**), the rebuttable presumption that a person has decision-making ability (**Proposal 1.13**) and the guidance on assessing decision-making ability (**Proposal 1.14-1.15**).

## Proposal 1 – A new framework

NSW Trustee acknowledges that the proposed framework, that of giving effect where possible to a person's "will and preference", is a departure from the "best interests" test. (**Proposal 1.9(a), 1.11**).

NSW Trustee suggests it would assist to have a definition of "personal and social wellbeing" or an enumeration of factors to be taken into account in determining what constitutes "personal and social wellbeing".

The impact of Chapter 1 on NSW Trustee will be one of resourcing. While currently NSW Trustee seeks to ascertain what a client requires to be considered during the decision making process the investigation of a person's will and preference would require intensive and regular interaction. Supporting a client to develop decision making skills would similarly require a level of personal interaction that NSW Trustee is currently not able to provide directly or indirectly. Where available, NSW Trustee works with case managers to assist with skill development. Many clients do not qualify for case managers. Funding for suitable resources to coach clients to develop and maintain these skills where relevant would be required. NSW Trustee is not resourced to provide this intensive support to clients.

NSW Trustee is primarily a self-funding government agency that must charge for its services. NSW Trustee's fees are set by Regulation. The contribution from government to fund the skill development required would need to be calculated.

Clients with the greatest need for intensive support can have very limited funds to pay for services. Any fee increase for intensive support required may be unaffordable.

# Proposal 2 – Personal support agreements

## 2.9 Responsibilities of supporters

NSW Trustee supports the introduction of the role of supporter to reflect the current informal arrangements that operate for many people in the community.

The proposal states:

**The new ACT should provide:**

**(1) Supporters must :**

**(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.**

NSW Trustee understands that in the proposed new framework, NSW Trustee would have no oversight function regarding personal support agreements.

NSW Trustee seeks clarification as to what action NSW Trustee is proposed to take when notification is received under (h) above from a supporter.

NSW Trustee is unable to analyse the impact of the proposal or have a view as to whether this action would achieve the desired outcome without understanding the intent of the notification.

# Proposal 3 - Tribunal support orders

## 3.1 Application for a tribunal support order

The proposal states:

**The new Act should provide:**

**(1) An application to the Tribunal for a support order may be made by :**

**(b) the Public Representative or the NSW Trustee**

NSW Trustee does not support **Proposal 3.1(1)(b)**.

NSW Trustee does not have an investigative function, nor would it have the necessary knowledge of the individual to make an informed application about their decision making ability or support needs.

It is not appropriate NSW Trustee be given standing as an applicant. It may be the intention of the Commission that NSW Trustee be alerted to the need for an application via the notification described in 2.9(1)(h), otherwise unless a member of the public informs NSW Trustee it is unlikely the need for such an application will be known.

NSW Trustee is primarily a self-funded government agency and must charge for services. The ability to identify an appropriate personal support person is not an area of specialisation that NSW Trustee is currently skilled or resourced to undertake. Cost recovery from parties who are not clients will require further consideration and government may need to consider alternate funding models for NSW Trustee under these circumstances.

NSW Trustee currently is not funded to make applications. Considerable resources would be required to investigate whether there is a genuine case. NSW Trustee does not have the power under the current Act to require information to be provided and would need such power if it was to adopt this role.

## 3.4 Eligibility for appointment as a supporter

**The new Act should provide:**

**(1) The Tribunal may appoint the Public Representative or the NSW Trustee to facilitate the development of a support agreement between parties.**

NSW Trustee submits that it is not appropriate for NSW Trustee to be appointed by the Tribunal to facilitate the development of a support agreement between parties.

This could place NSW Trustee in a potential or perceived conflict on the part of the parties. The conflict may arise where a support order is not achieved through the process of facilitation and negotiation and as a last resort the Tribunal appoints NSW Trustee as a representative.

As well as questioning the potential or perceived conflict which may arise NSW Trustee is not currently resourced to perform this function. NSW Trustee does not currently have resources or specialised skills to facilitate the development of support agreements.

As a self-funding government agency NSW Trustee would charge a fee for this service and this raises the issue of affordability for members of the public who require this service, as such an alternate approach to funding these services would need to be considered.

### **3.10 Responsibilities of supporters**

**The new Act should provide:**

**(1) Supporters must :**

**(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.**

NSW Trustee makes the same comments as in proposal 2.9. NSW Trustee seeks information on the proposed action to be taken when notification is received to enable assessment of impact and appropriateness of this proposal.

# Proposal 4 - Enduring representation agreements

## 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**

**(d) they are the Public Representative or the NSW Trustee**

This proposal is opposed by NSW Trustee. There are people in the community who need an independent and impartial representative or have no one suitable to be appointed as an enduring representative. In excluding the NSW Trustee from being eligible, it may limit the choices an individual can make to reflect their will and preferences. This may deprive/disadvantage those people in the community who have no one suitable in their lives to be appointed to this role. There are a range of reasons that members of the public appoint NSW Trustee. For example NSW Trustee is independent in circumstances where there is family conflict or the individual does not want the appointment of the Attorney to be seen as favouritism where there are adult children.

- Currently NSW Trustee is authorised under its governing legislation to provide power of attorney services to the people of NSW. Removing the proposed representative role will remove this equivalent service as an option for the people of NSW.
- Currently NSW Trustee prepares enduring powers of attorney and acts as a prescribed witness for the NSW public. If the legislation is amended to exclude NSW Trustee from having this function, legislation will also be amended to exclude NSW Trustee as being a prescribed witness. Therefore NSW Trustee could not provide this service to the people of NSW.

There is no similar restriction on the private trustee companies from acting in this role. Private trustee companies act predominantly for high net worth clients. Removing NSW Trustee from this market will prejudice those people in need of a representative who do not have substantial financial resources.

# Proposal 5 - Representation orders

## 5.3 Types of decisions a representation order may cover

The new Act should provide:

**The order should specify what decisions or types of decisions the representative may make as well as any conditions or limitations.**

In principle NSW Trustee supports this proposal and seeks a mechanism to address current difficulties experienced in the practical implementation of financial functions.

- Exclusion orders create practical problems.

Example: An order is made excluding all assets other than a client's pension with a direction that NSW Trustee pursues litigation on behalf of the client:

- Investigations required to be undertaken to determine whether or not there is a basis for litigation are costly
  - The client's pension is usually insufficient to pay for investigations
  - Without access to other assets or funds NSW Trustee has difficulty progressing litigation for the client.
- NSW Trustee seeks to be consulted prior to any appointment with a limited function or where conditions are imposed. Practical considerations and past experience has demonstrated to NSW Trustee that limited functions are not always capable of being carried out. Without prior consultation NSW Trustee may need to seek a review by the Tribunal to obtain wider authority. This consultation would also assist to provide a smoother transition for the management of finances. If additional reviews were required to obtain wider authority there would be resource implications for both NSW Trustee and the Tribunal.

## 5.6 When a representation order has effect

The new Act should provide:

**(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.**



NSW Trustee agrees with the desirability of having regular reviews to underpin the autonomy of the individual. NSW Trustee has concerns about the resource implications for both the Tribunal and NSW Trustee in conducting more frequent reviews of the ongoing need for the order.

## 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 no more than 30 days.**

In NSW Trustee's experience, based on past and current financial management orders, the above timeframes will seldom allow for anything constructive to be done. Accessing the information needed from clients, service providers, financial institutions and government agencies to assist NSW Trustee carry out its duties often takes longer than 30 days. NSW Trustee suggests 3 months is a more practical period.

## 5.9 Appointment of multiple representatives

The new Act should:

- (1) (c) ensure that the Public Representative and NSW Trustee are not appointed a joint representative with each other or with anyone else.**

NSW Trustee seeks clarification of the above.

NSW Trustee understands that the Public Representative can only be appointed as a representative in relation to personal, healthcare and /or restrictive practices decision-making functions and NSW Trustee can only be appointed in relation to financial decision-making functions. **(Proposal 5.4 (1)(b) and (c)).**

NSW Trustee interprets 5.9 (c) to mean where the Public Representative is appointed in relation to a personal decision-making function NSW Trustee cannot be appointed in relation to a financial decision-making function. Currently there are many clients who have the Public Guardian making health and lifestyle decisions for them and also have NSW Trustee appointed to make financial decisions. If the proposal is to put an end to such an arrangement in the new model there are members of the community who will not have their needs met.

It is unclear in the proposal what mechanism would be in place to cover these circumstances.

NSW Trustee agrees it is practical and prudent not to be appointed as joint representative with anyone else for financial functions.

## **5.12 Responsibility of representatives**

**(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.**

NSW Trustee does not currently have the funding for resourcing or the necessary capability to provide the daily support required to do the above. This would require support workers to individually tailor programs for each client. This raises affordability and personal suitability challenges. This would require the government to consider alternative funding models for NSW Trustee.

## **5.13 Supervision of representatives with a financial function**

**(1) The new Act should provide:**

**(a) The Tribunal may require NSW Trustee to supervise a representative with a financial function, but only if the Tribunal considers it necessary.**

**(c) The Tribunal must always require NSW Trustee supervision when appointing a professional representative with a financial function.**

NSW Trustee seeks clarification.

- The current framework provides for NSW Trustee to monitor all managers. NSW Trustee has taken this proposal to mean that there will be no supervision function at all unless specified in the order. Where NSW Trustee is appointed to supervise will the order specify the functions to be reported? If the reporting includes whether they are assisting the individual to develop decision making skills NSW Trustee would need a mechanism to assess this.
- Where NSW Trustee supervises a professional representative, is the focus on supervision a mechanism of reviewing the charges or the full function of the order?
- It would be helpful if the Commission provided a definition of 'a professional representative'.

If NSW Trustee is to have a supervision function only if the Tribunal makes a supervision order NSW Trustee would like clarification on what action is required when notified of an appointment **(Proposal 5.8.)**.

## 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.**

What is the position of a representative who wants to be remunerated but is not carrying on a business that includes the administration of estates?

Currently such a representative can approach the Supreme Court for a remuneration order. Is the intent that this remains the appropriate avenue in these circumstances?

# Proposal 10 - Provisions of general application

## 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.

NSW Trustee is concerned that extending the District Court's jurisdiction to hear these matters may not provide a "simpler and cheaper option ". The same rules of evidence apply to the District Court so the originating process and supporting affidavits must still be drafted and filed. The nature of these matters requires legal representation and the costs will not be less just because the proceedings are in the District Court.

There are advantages to filing proceedings in the Supreme Court:

1. The Supreme Court has its inherent jurisdiction to call upon if appropriate and required.
2. The Supreme Court also has section 23 *Supreme Court Act 1970* NSW:

23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

3. There is an interconnectedness between the protective, probate and family provision jurisdictions of the Supreme Court and the Court's oversight of enduring appointments, the full extent of which is not exercisable in the District Court. An example of this overlap occurs when a judge dealing with a protected estate matter must also consider an application for a statutory will. This is not possible in the District Court.

Due to administrative necessity probate, protective and family provision cases sit within the Supreme Court's Equity jurisdiction. Again due to administrative necessity the judges of the Supreme Court specialise and those in the Equity jurisdiction will share and support with the particular list judges the caseload of probate, protective and family provision cases. This means that the judges develop specialist knowledge which leads to streamlining and efficiency in hearing cases and delivering judgments. Costs arising out of litigation where a party is seeking an equitable remedy often relate to the conduct of the litigating parties. If a case is managed in a Court with experience of such cases, costs can be contained.

## 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.**

NSW Trustee supports the change that the Tribunal is the issuer of all directions.

## 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:**  
**(e) authorised by the person to whom the information relates**

NSW Trustee appreciates the reason for this proposal is that it “accommodates the principle that a person may have capacity to make some decisions but not others”.

Based on experience in dealing with the media and others, NSW Trustee is concerned that although the individual gives their permission to engage with the media, the consequence of media attention is not fully understood and may be as a result of third party interests.

The proposed change appears to be in conflict with section 65 of the *Civil and Administrative Tribunal Act 2003 NO.2*.

NSW Trustee seeks clarification as to the effect of the proposed change and how it operates in conjunction with section 65.

NSW Trustee appreciates the opportunity to give such extensive feedback on the proposals being considered by the NSW Law Reform Commission in the Review of Guardianship legislation and congratulates all involved on their efforts.

Adam Dent

Chief Executive Officer, NSW Trustee and Guardian

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