

Review of the Guardianship Act 1987: Question Paper 6

Legal Aid NSW submission to
New South Wales Law Reform
Commission

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NEW SOUTH WALES

Table of Contents

Chapter 2: Objectives, principles and language	3
Chapter 3: Relationship with Commonwealth laws	4
Chapter 5: Age.....	5
Chapter 7: Orders for guardianship and financial management.....	5
Chapter 9: Enforcing guardians' decisions	6
Chapter 10: Handling personal information	7

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides civil law services to some of the most disadvantaged and vulnerable members of our society. Currently we have over 150 civil lawyers who provide advice across all areas of civil law.

The specialist Mental Health Advocacy Service of Legal Aid NSW provides representation to clients in the Guardianship Division of the NSW Civil and Administrative Decisions Tribunal (**the Tribunal**) on a direct representation basis and when the Tribunal orders that the client be separately represented. Solicitors in Legal Aid NSW regional offices also provide representation in guardianship matters.

The Legal Aid NSW Children's Civil Law Service (**CCLS**), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS also facilitates representation of its clients in matters before the Tribunal, either through liaising with the young person's separate representative to ensure the young person's views are heard, or directly representing the young person in the proceedings.

Legal Aid NSW provided 614 advice and minor assistance services relating to guardianship to clients in 2015–2016. We also provided 264 representation services in guardianship matters, through both in-house and private practitioners.

Legal Aid NSW welcomes the opportunity to respond to *Question Paper 6: Remaining Issues*.

Should you have any questions about the submission, please contact:

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Chapter 2: Objectives, principles and language

Q2.1 Statutory objects

If the Guardianship Act is to have statutory objects, they should refer (at a minimum) to:

- the human rights of people with disability, including the rights safeguarded by the United Nations Convention on the Rights of Persons with Disabilities (**the Convention**), and
- the principle that the measure that least restricts a person's freedom of decision and action, while promoting their rights and wellbeing, should be adopted.

Q2.2 General principles

In our responses to Question Papers 1 and 3 we supported modernising the *Guardianship Act* so its principles better reflect the social model of disability and are more consistent with the human rights-based approach of the Convention. We also supported a structured approach to substitute decision making that sets out in some detail the way a substitute decision maker should act in order to promote the wellbeing and rights of the person. These decision-making requirements should be drafted in plain English so that private guardians and people with cognitive disability are more likely to be able to understand them. Among other things, decision makers should be required to

- (a) have paramount regard to making the judgments and decisions that the person would make themselves after due consideration if able to do so
- (b) act in consultation with the person, giving effect to their wishes
- (c) support the person to make or participate in decisions
- (d) act as an advocate for the person, and promote and protect their rights and dignity
- (e) encourage the person to be independent and self-reliant
- (f) encourage the person to participate in the life of the community
- (g) respect the person's supportive relationships, friendships and connections with others
- (h) recognise and take into account the person's cultural and linguistic circumstances, and
- (i) protect the person from abuse, neglect and exploitation.¹

There is value in making separate provisions for guardians and financial managers, as their responsibilities are different. Separate provisions would help make clear, for example, that the responsibility of a financial manager is to ensure proper management

¹ VLRC *Guardianship* at 399.

of the person's assets, but not to influence the person's lifestyle choices.² However some of the requirements will be the same, in that a financial manager should make the decision that the person would have made, if able to do so; act in consultation with the person; and support them to participate in decision making.

Q2.5 Language of disability

Legal Aid NSW supports a move away from the language of disability, and towards a focus on the decision-making capacity of the person. The legislation could refer to people with 'impaired decision-making capacity' rather than 'persons with disabilities', given the more targeted application of the legislation.

Q2.6 Language of guardianship

Legal Aid NSW considers that the term 'supporter' is appropriate to describe a person who supports someone in their decision making. Legal Aid NSW also does not object to the term 'representative' to describe substitute decision makers. The term 'representative' is arguably more readily understandable to lay people, and less paternalistic, than the term 'guardian', for instance. However, we are mindful that there are different types of substitute decision-makers (powers of attorney, guardians and financial managers), and as long as these different roles exist, it may be necessary to have different terms to distinguish between them.

Q2.7 Aboriginal people and Torres Strait Islander concepts of family

Legal Aid NSW supports a definition of 'relative' that includes a person who is related according to Aboriginal or Torres Strait Islander customary law or tradition

Chapter 3: Relationship with Commonwealth laws

Legal Aid NSW agrees with the Victorian Law Reform Commission that Commonwealth schemes for decision making under social security, aged care and National Disability Insurance Scheme (**NDIS**) legislation can provide useful alternatives to guardianship and financial management orders. We support the Tribunal's practice of not appointing a guardian if the person's interests are sufficiently protected by the appointment of a nominee or representative under a Commonwealth scheme.

We would be comfortable with a presumption that an existing NSW appointed decision maker with comparable powers should be appointed as a representative under a Commonwealth law, at least where that decision maker is the Public Guardian or the NSW Trustee and Guardian. These authorities are likely to develop expertise in navigating the NDIS.

However, it should be possible to override this presumption if a person is subject to guardianship but has a friend or relative who is willing and able to act as a nominee or

² See further Legal Aid NSW submission to Guardianship Question Paper 3 at 11-12.

representative under a Commonwealth scheme. The wishes of the person, and the suitability of the proposed nominee or representative, should be the decisive factors. This is consistent with the policy preference in the *Guardianship Act* to appoint a private person as guardian if possible.³

Chapter 5: Age

Q5.3 Appointing young people as guardians

Legal Aid NSW considers that where a young person has taken primary responsibility for the care of another, it should be possible for the young person to be appointed as their guardian. It is not ideal for a young person to have so much responsibility. However if the young person is in fact making decisions on behalf of a parent or another person, it should be possible for this responsibility to be formally recognised.

Q5.4 Young people in Tribunal proceedings

Young people should have standing in the Tribunal when the young person is the primary carer of the person subject to proceedings. In other cases, if the order or proposed order is likely to have an effect on a young person, the Tribunal should be required to obtain and consider the views of the young person.

Q5.5 Process for appointing parents as guardians

Legal Aid NSW supports the introduction of a streamlined method for parents of adult children with profound intellectual disability to be appointed their guardian when they turn 18. The model proposed in the Victorian Guardianship and Administration Bill 2014, where a parent can present medical and other evidence in support of the application and the Tribunal could make the order without a hearing, appears suitable.

Chapter 7: Orders for guardianship and financial management

Q7.1 A single order for guardianship and financial management

Legal Aid NSW considers that there should continue to be separate orders for guardianship and financial management, in order to promote the principle that persons with disabilities should have their freedom of decision and freedom of action restricted as little as possible. It is often the case that only a financial management order, or a guardianship order, is needed. We have submitted (in response to Question Paper 1) that the preconditions for these orders should be more closely aligned. However the responsibilities, duties and qualifications for the representative are different (even if the same person is able to fulfil both roles). Requiring the Tribunal to consider the need for

³ *Guardianship Act 1987* (NSW) s 15(3), s 17(3)

each order separately will increase the likelihood that the Tribunal will only make orders that are necessary.

Q7.3 Resolving disputes between decision makers

It would be useful for the *Guardianship Act* to provide that decision makers (whether Tribunal appointed or privately appointed) should consult with each other where necessary to manage any overlap of their roles, and that disagreement should be resolved informally or by mediation where possible. If these processes are unsuccessful, the disputants should be able to seek a direction from the Tribunal to resolve the disagreement.

Chapter 9: Enforcing guardians' decisions

Q9.1 Enforcing guardians' decisions

Legal Aid NSW acknowledges that it will sometimes be necessary for a guardianship order to include an enforcement power. Such a power should only be included in an order when the Tribunal is satisfied that the health or safety of the person would be seriously at risk or that the action is necessary to protect the wellbeing of the person. We support the approach taken by the Tribunal in *NIQ*:

Given their draconian nature, in the absence of requisite evidence, the Tribunal is loath to authorise the use of force by a guardian to enforce a substitute decision which is made by the guardian but not supported by the person themselves. Only in circumstances whereby a person's decision making incapacity is such that it results in them making decisions which expose them to neglect, abuse or exploitation (or they are incapable of making important decisions and others make decisions on their behalf which cause neglect, abuse or exploitation) does the Tribunal contemplate the application of coercive authority.⁴

However, we are also aware of situations which do not fall neatly into those described in *NIQ*, but nonetheless may call for a guardianship order with an enforcement power. In particular, Legal Aid NSW has seen clients for whom such an order would provide a less restrictive option than other alternatives, such as being held as a forensic patient. For instance, we refer to our discussion of the case of *Attorney General v HRM* in our response to Question Paper 5. In that case, a guardianship order would have been a useful transitional measure for HRM, whose risk of committing further sex offences could have been managed by a guardianship order including an enforcement power. Arguably, it can be in the interests of people such as HRM to be subject to guardianship orders with appropriate enforcement powers so that they do not reoffend and require incarceration.

⁴ [2014] NSWCATGD 28

We reiterate our submission in response to Question Paper 4 that an important safeguard for the rights of people with disabilities is the right to legal representation in guardianship proceedings. People who are subject to an application for a guardianship order should not have to seek leave to be represented. When the Tribunal is considering making an order with an enforcement power, the Tribunal should take steps to ensure that the person proposed to be subject to the order is aware of their right to legal representation.

We also reiterate our submission in response to Question Paper 5 that coercive powers under guardianship orders should not be available to force a person to undergo mental health treatment, either in the community or as an in-patient. The coercive powers available under the *Mental Health Act* are the appropriate powers to use for such purposes.

Chapter 10: Handling personal information

Q10.1 Access to personal information

The *Guardianship Act* should provide that a guardian is entitled to access information that is relevant to and necessary for the carrying out of his or her duties.

Q10.2 Disclosure of personal information

Legal Aid NSW does not have concerns about the existing provision in section 101.