Council for Intellectual Disability

Response to NSWLRC Question Papers 4 - 6

May 2017

Contact

[redacted]

www.nswcid.org.au
www.facebook.com/NSWCID
1800 424 065

Who we are

For 60 years, NSWCID has been the peak advocacy group in NSW for people with intellectual disability. We have a diverse membership of people with intellectual disability, family members, advocates, professionals and advocacy and service provider organisations. Our Board must have a majority of people with intellectual disability and we actively involve people with an intellectual disability in all aspects of our work.

NSWCID has a long history of focusing on supported and substitute decision-making for people with intellectual disability. We were represented on the working parties that developed and implemented the Guardianship Act 1987 and have taken a very active ongoing interest in the legislation, for example taking a leading role in the development of the then Guardianship Tribunal's role in regulation of restrictive practices.

Especially in the last 10 years, we have had a heavy focus on the development of the capacity of people with intellectual disability to not only make their own decisions but also lead our organisation. The NSW government has funded our *My Choice Matters* project which is focused on developing the ability of people with intellectual disability to control their own lives in accordance with the principles of choice and control that are inherent in the National Disability Insurance Scheme.

We have two representatives on the Intellectual Disability Reference Group of the National Disability Insurance Agency which has provided advice to the NDIA on supported and substitute decision making arrangements in the NDIS.

www.nswcid.org.au

www.mychoicematters.org.au/

Due to time pressures, we have focused on questions of most relevance to people with intellectual disability and on which we feel we can contribute most.

QUESTIONS PAPER 4

3. Guardianship orders and financial management orders

Question 3.2: Time limits for orders

(1) *Are the time limits that apply to guardianship orders appropriate? If not, what should change?*

(2) Should time limits apply to financial management orders? If so, what should these time limits be?

Guardianship and financial management are fundamental deprivations of basic rights and those deprivations can be applied neglectfully or abusively.

There should be uniform time limits for guardianship and financial management orders along the lines of the current limits for guardianship orders (for initial orders, one year, but provision for up to 3 years in defined circumstances; for renewed orders, up to 3 years but provision for up to 5 years in defined circumstances.)

The defined circumstances should be that the Tribunal is satisfied that, until the end of the longer term, the person will lack capacity for relevant decisions and fulfil the other preconditions for making of an order.

Question 3.3: Limits to the scope of financial management orders

Should the Guardianship Act 1987 (NSW) require the NSW Civil and Administrative Tribunal to consider which parts of a person's estate should be managed?

The Tribunal should have the power to either specify included estate or specify excluded estate. The Tribunal should act within a context of minimum necessary intrusion.

Question 3.4: When orders can be reviewed

(1) *What changes, if any, should be made to the process for reviewing guardianship orders?*

(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?

As stated in 3.2 above, all financial management orders should be periodically reviewed. The order deprives the person of fundamental rights and the financial manager exercises extremely important authorities in relation to people with impaired capacity to recognise and act on violations of their rights and to act on situations where they have genuine grievances about the existence or exercise of financial management. Regular reviews are particularly important where the NSW Trustee is financial manager since it is a large bureaucracy which is not supervised in its role as manager in the way that the Trustee itself supervises private financial managers.

(3)*What other changes, if any, should be made to the process for reviewing financial management orders?*

Financial Management reviews should not just be about whether the financial management order should be revoked or changed. Particularly where the unsupervised NSW Trustee is financial manager, the Tribunal should also review the management of the person's estate by the manager. The person under management inherently will have difficulty knowing whether their estate has been properly managed.

Question 3.5: Reviewing a guardianship order

(1) *What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?*

(2) Should these factors be set out in the Guardianship Act 1987 (NSW)?

We support the Queensland approach whereby a guardianship order must be revoked on review unless the Tribunal is satisfied that it would appoint a guardian if a new application was being considered.

Question 3.6: Grounds for revoking a financial management order

(1) *Should the Guardianship Act 1987 (NSW) expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?*

(2) What other changes, if any, should be made to the grounds for revoking a financial management order?

Exactly what is meant by "need" in section 25G of the Guardianship Act is unclear. Does it basically flow automatically from incapability or does it include consideration of eg whether the use of power of attorney is sufficient? Alternatively, is the adequacy of a power of attorney more relevant to best interests? See Re R [2000] NSWSC 886 at 30.

We argue that the question of whether the order should be revoked should be determined by considering the same issues of incapacity and other preconditions for an order that applied at the initial hearing.

5. Holding guardians and financial managers to account

Question 5.2: The supervision of private managers

What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the NSW Trustee and Guardian Act 2009 (NSW)?

We agree with the Intellectual Disability Rights Service that the Tribunal should be able to exempt a private manager from supervision. This would be important for example in relation to a clearly devoted parent of a person with intellectual disability who has limited means and with the parent finding the bureaucratic paperwork of being financial manager very daunting.

Question 5.8: Reviewing decisions and conduct of public bodies

What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

We argue that reviews should be by a three member panel similarly constituted as in the Guardianship Division rather than reviews being by a single NCAT lawyer. The decisions being reviewed can be as fundamental as whether a person should live in their own home or be required to live in an aged care facility.

Question 5.11: Offences, civil penalties and compensation orders

Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

The Tribunal should at least be empowered to issue compensation orders against financial managers. This would be an important complement to the Tribunal regularly reviewing financial management orders.

7. Advocacy and investigative functions

SUMMARY OF OUR VIEW – We support an independent statutory body being given a new function of investigating abuse, neglect and exploitation. Subject to safeguards, this should include powers to enter premises and require people to answer questions and provide documents.

We also support in principle the Public Guardian being able to advocate for individuals without a guardianship order and to undertake systemic advocacy. However, we do not see funding these roles as nearly as high a priority as maintaining the currently at risk funding of NSW community advocacy bodies.

Question 7.1: Assisting people without guardianship orders

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

We have no objection in principle to the Public Guardian being given this capacity.

However, from June 2018, community based advocacy is under grave threat with the whole of its NSW Government budget being transferred to the NDIS which is not responsible for funding advocacy. Maintaining NSW Government funding for community advocacy is a higher priority than funding the Public Guardian to do advocacy or the like. Community based advocacy is more grounded in the lived experience of people with intellectual disability than the Public Guardian can be. Also, it offers greater cost efficiency due to being outside public service structures.

Question 7.2: Potential new systemic advocacy functions

What, if any, forms of systemic advocacy should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to undertake?

The Public Guardian should be explicitly empowered to advocate with government agencies, service providers and others on issues that it's guardianship of individuals showed a need for systemic solutions, either for those specific individuals and/or for people with disability generally.

However, as in 7.1 above, we strongly argue that NSW Government funding for community based systemic advocacy is a higher priority than funding the Public Guardian to do systemic advocacy. Community based advocacy is more grounded in the lived experience of people with disability than the Public Guardian can be. Also, it offers greater cost efficiency due to being outside public service structures. Unless the NSW Government provides a new budget allocation for systemic advocacy, the vital role taken by NSW systemic advocacy bodies will cease in June 2018.

Question 7.3: Investigating the need for a guardian

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

We do not support the Public Guardian investigating the need for guardianship in relation to an existing application that has been made to the Tribunal. In some other jurisdictions, the Public Guardian/Advocate does have this role whereas in NSW the role has been fulfilled by Tribunal staff. It is more appropriate for Tribunal staff to carry out this function as the Public Guardian has a conflict of interest in that the results of its investigation will influence its own caseload.

Question 7.4: Investigating suspected abuse, exploitation or neglect

Should the *Guardianship Act 1987* (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

We see a very strong case for an independent statutory body having broad powers to investigate suspected abuse, exploitation or neglect of a person with decision-making disability and then bring an application to the Tribunal or take other appropriate action.

Careful consideration is needed about whether this function should sit with the Public Guardian or the Ombudsman.

Question 7.5: Investigations upon complaint or "own motion"

If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?

In view of the common isolation and limited capacity to self advocate of many people with disability, the statutory body should be able to investigate matters on its own motion.

Question 7.6: Powers to compel information during investigations

What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

The statutory body should have the power to enter and inspect premises and require people to provide documents and answer questions. The form of this power needs to be carefully considered taking account of the privacy of people with disability.

Question 7.7: Powers of search and entry

What powers of search and entry, if any, should the Public Guardian or a public advocate have when conducting an investigation?

The relevant statutory body should be able to obtain a warrant to allow search and entry. It will be much better qualified to consider the circumstances of a person with disability than is the Police Force.

The form of this power needs to be carefully considered taking account of the privacy of people with disability.

Question 7.8: A new Public Advocate office

Should NSW establish a separate office of the "Public Advocate"? If so, what functions should be given to this office-holder?

We do not object to a "Public Advocate" being established, with extensions to the functions of the Public Guardian. We are inclined to think that any public advocate should be an extension of the existing Public Guardian rather than being a separate organisation.

However, as outlined above, we see maintenance of the threatened funding of community advocacy bodies as a higher priority than such extensions to the Public Guardian.

8. Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal

Question 8.1: Composition of the Guardianship Division and Appeal Panels

(1) *Are the current rules on the composition of Guardianship Division and Appeal Panels appropriate?*

(2) If not, what would you change?

We would be extremely oposed to any relaxation on the current requirements for three member panels to hear initial guardianship and financial management applications. As experience in other States shows, any discretion to allow smaller panels inevitably leads to budget restrictions driving the Tribunal to predominant use of single member panels.

We are also uncomfortable with the current capacity to have single members hearing reviews of orders. The danger is that budget limitations leads to far more reviews being heard by single member panel than is appropriate in view of the gravity of the matters being considered.

To the extent that single member hearings do occur, we strongly argue that those members should come from all three classes of the Division's membership and mainly comprise lawyers. Unless they have considerable disability experience and aptitude, lawyers are not well qualified to sit alone on guardianship matters.

We are also uncomfortable with the current provisions in relation to make up of appeal panels for appeals from the Guardianship Division. In our view, the appeal panel should have similar parameters as for the Guardianship Division itself - a legal member, a professional member and a community member. If there are two lawyers on the appeal panel, there is a danger that decisions will be inadequately based on consideration of the disability and social circumstances of the person with disability

Question 8.2: Parties to guardianship and financial management cases

(1) *Are the rules on who can be a party to guardianship and financial management cases appropriate?*

(2) If not, who should be a party to these cases?

A former carer of a person in supported accommodation should only be a party if they have a close and continuing relationship with the person (as is required for a spouse to be a party).

Question 8.3: The requirement for a hearing

When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

We are strongly opposed to any relaxation on the requirement for a hearing of substantive matters in the Guardianship Division. Each matter is dealing with fundamental rights of the individual and contemporary principal requires that the person with disability has maximum opportunity to participate in the determination of his or her rights. Participating by written submission is extremely difficult for a high proportion of people subject of guardianship proceedings.

Further, once legislation gives a discretion in relation to a hearing, what has happened interstate is that budget restrictions have led to that discretion being used in a high proportion of review matters.

Question 8.4: Notice requirements

(1) *Are the current rules around who should receive notice of guardianship and financial management applications and reviews adequate? If not, what should change?*

(2) If people who are not parties become entitled to notice, who should be responsible for notifying them?

We strongly support what has been the long-standing practice of the Tribunal to write to a range of interested people to give them notice of the hearing and invite them to contribute views personally or in writing. This is a very important safeguard since:

- The person with disability generally has a an impaired capacity to gather evidence and witnesses.
- It cannot be assumed that other parties will notify relevant people of the hearing. This may be because it does not occur to parties or it may be that they would prefer the Tribunal not to hear from people who do not share their views.

Question 8.5: When a person can be represented

When should a person be allowed to be represented by a lawyer or a non-lawyer?

We strongly support the requirement of leave for representation. In the absence of this, Tribunal proceedings would be more formal and legal to the detriment of the maximum participation of the person with disability in the hearing. Also, the person with disability would often be disadvantaged if wealthy parties could bring lawyers when the person could not afford them.

If there was to be any relaxation of the rule, it should be to allow the person with disability an absolute right of representation. However, this would be complex in

view of the issues of capacity to instruct and susceptibility to manipulation that arise in some hearings.

Question 8.6: Separate representatives

How should separate representation be funded?

A person with disability should not be required to pay for representation that he or she has not personally engaged. Legal aid should cover this field.

Question 8.7: Representation of a client with impaired capacity

Should the Guardianship Act 1987 (NSW) or the Civil and Administrative Tribunal Act 2013 (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

We support inclusion in the Guardianship Act of a presumption of capacity to instruct similar to that in the Mental Health Act. Alternatively, capacity to instruct could be defined at a minimal level.

Guardianship proceedings are about the fundamental rights of an individual. If the person has views that he or she wants argued, it is important that he or she is not denied representation on the basis of a high standard of capacity being required.

Question 8.9: Appealing a Guardianship Division decision

(*1*) *Is the current process for appealing a Guardianship Division case appropriate and effective?*

(2) If not, what could be done to improve this process?

We recommend abolition of the right of appeal to the Supreme Court. It is illogical that a decision of a three member Tribunal who are grounded in the disability field should be subject to overturn by one eminent lawyer who may have no grounding in the disability field.

Question 8.10: Privacy and confidentiality

What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?

We see the issue addressed by the legislative Council standing committee is adequately addressed by section 64 of the CAT Act.

QUESTION PAPER 5

4. Consent to medical and dental treatment

Question 4.1: Special treatment

(*1*) *Is the definition of special treatment appropriate? Should anything be added? Should anything be taken out?*

(2) Who should be able to consent to special treatment and in what circumstances?

The existing definition of special treatment should be extended to include tubal occlusions and vasectomies that are currently included via regulation. The existing requirements of Tribunal consent for sterilisations should continue and with the same serious damage to health or life test as a present. This test has worked well over time.

Question 4.6: Person responsible

(1) Is the "person responsible" hierarchy appropriate and clear? If not, what changes should be made?

(2) Does the hierarchy operate effectively? If not, how could its operation be improved?

The "person responsible" hierarchy is largely appropriate. However, a rider should be added to the provision that a former carer of a person living in supported accommodation remains carer and therefore person responsible (and a party to various proceedings). As is the existing requirement for a spouse, a former carer should be required to have a close and continuing relationship with the person if they are to continue to be person responsible and a party to proceedings.

For greater clarity, the label "person responsible" should be changed to "health decision maker" to reflect its roles under the Guardianship Act and Health Records and Information Privacy Act.

Question 4.9: Supported decision-making for medical and dental treatment decisions

(1) Should NSW have a formal supported decision-making scheme for medical and dental treatment decisions?

(2) If so, what should the features of such a scheme be?

Supported decision-making should be developed and encouraged for medical decisions in the same way as for other life decisions. However, we are inclined to think this should largely occur outside any statutory framework.

Question 4.10: Consent for sterilisation

(*1*) *Who, if anyone, should have the power to consent to a sterilisation procedure?*

(2) In what ways, if any, could the Guardianship Act 1987 (NSW) better uphold the right of people without decision-making capacity to participate in a decision about sterilisation?

See 4.1 above.

Question 4.11: Preconditions for consent to sterilisation

What matters should the NSW Civil and Administrative Tribunal be satisfied of before making a decision about sterilisation?

See 4.1 above.

7. Restrictive practices

This is a complex field

There are complex issues in deciding an appropriate authorisation scheme for restrictive practices. We recommend that, when the Commission has some tentative thinking about a restrictive practices authorisation regime, it brings together a focus group of behaviour support practitioners, psychiatrists and advocates to discuss this issue. We could recommend people suited to such a discussion.

Question 7.1: Problems with the regulation of restrictive practices

What are the problems with the regulation of restrictive practices in NSW and what problems are likely to arise in future regulation?

The current regulation of restrictive practices in NSW is based on the interplay between the general provisions of the Guardianship Act, the common law of false imprisonment, assault and detinue, policy requirements of government service provision and funding agencies and some other forms of regulation for example in relation to aged care.

Our focus in this submission is on the situation for people with intellectual disability, the group for whom the current guardianship system has most commonly been used in relation to authorisation of restrictive practices.

For people with intellectual disability, ADHC as the provider and funder of disability services has had policy and procedure requirements for guardianship applications to be made in relation to some restrictive practices. These requirements will cease in June 2018 and the NDIS Quality and Safeguards Framework will come into play. This framework provides promise in relation to standards, compulsory reporting

and monitoring of restrictive practices used by NDIS support providers. The framework explicitly says that authorisation will be a matter for state and territory jurisdictions. Hence, the current LRC review is timely.

Question 7.2: Restrictive practices regulation in NSW

(1) Should NSW pass legislation that explicitly deals with the use of restrictive practices?

(2) If so, should that legislation sit within the Guardianship Act or somewhere else?

(3) What other forms of regulation or control could be used to deal with the use of restrictive practices?

For people with intellectual disability, the NDIS Quality and Safeguards Framework means that it is very important for NSW to legislate in relation to restrictive practices. We favour that legislation occurring within the Guardianship Act or its successor in view of the existing expertise in relation to restrictive practices in both the Tribunal and the Public Guardian.

For restrictive practices used outside the context of NDIS service provision, for example in aged care, there needs to be consideration of what quality and safeguards frameworks are required to complement authorisation requirements that may be implemented in a reformed Guardianship Act.

Question 7.3: Who should be regulated?

Who should any NSW regulation of the use of restrictive practices apply to?

Authorisation requirements in a reformed Guardianship Act should apply to the use of restrictive practices on any person who lacks capacity to give or withhold consent to the practice. The requirement should not be confined to use in any particular setting or by any particular class of persons. And so the requirement would apply to the use of restrictive practices in the family home as it would to funded supported accommodation.

Question 7.4: Defining restrictive practices

How should restrictive practices be defined?

There is a strong argument for restrictive practices to be defined consistently with the National Framework for Reducing and Eliminating Restrictive Practices in the Disability Service Sector and the NDIS Quality and Safeguarding Framework. However, all definitions are imprecise and there should be scope to both add categories of restrictive practices and vary their definitions by regulation.

Question 7.6: Consent and authorisation mechanisms

(1) Who should be able to consent to the use of restrictive practices?

(2) What factors should a decision-maker have to consider before authorising a restrictive practice?

(3) What should be the mechanism for authorising restrictive practices in urgent situations?

(4) What changes, if any, should be made to NSW's consent and authorisation mechanisms for the use of restrictive practices?

Except in emergency situations, restrictive practices should only be permissible with the consent of an independent person or Tribunal. We favour this consent occurring within the context of the guardianship system. Consent should be required from a guardian with specific authority over the restrictive practice.

In view of the complexity of restrictive practices decisions and the difficulty family guardians may experience in saying no to a service provider, the Tribunal will often need to appoint the Public Guardian in relation to restrictive practices decisions.

The guardian should be required to act within the same basic decision making principles as the new legislation will require for all substitute decisions. In our previous submission, we recommended that this either be

- substitute decision-makers being required to act in accordance with the person's personal and social well-being, or

- a structured will and preferences model along the lines of that in the My Health Records Act 2012. This model includes that a representative can depart from the person's will and preferences if they will "pose a serious risk" to the person's "personal and social well-being". Then, the representative must instead "act in the manner that promotes the personal and social well-being" of the person.

It could be argued that this approach does not accommodate the way that some restrictive practices are used to prevent harm to other people. However, as with the way in which the existing restrictive practices work of the guardianship system operates, our argument is that restrictive practices should only be permissible when there is a net benefit to the person. That net benefit can arise from factors including requiring a context of positive behaviour support and avoiding the negative effects that may flow to the person from them causing harm to other people.

Guardians should be required to consider a range of factors in making decisions. Without setting out an exhaustive list, these should include:

- the will and preferences of the person being restricted
- data in relation to the prevalence and nature of the behaviour
- an assessment of the reasons for and functions of the behaviour
- a medical assessment of whether there is any physical or mental health condition contributing to the behaviour
- person centred active support
- a positive behaviour support program and evidence of its implementation and periodic review

In view of the restrictions on a person's rights and freedom involved with restrictive practices, the Tribunal should only be permitted to make an order for a maximum of one year at a time.

The complexity of chemical restraint

In Victoria, chemical restraint makes up 95% of reported restrictive practices (Office of The Senior Practitioner 2011). Assuming a specifically empowered guardian is required in all these situations, this would be a very large caseload for the Tribunal and the Public Guardian. This would need to be specifically factored into the budgets of those bodies.

A problem for any system of regulation is that there is not a clear distinction between chemical restraint and the use of psychotropic medication to address a mental disorder:

- Mental disorders are very hard to diagnose in a person with intellectual disability and limited verbal communication.
- There are very limited skills in intellectual disability mental health in GPs and psychiatrists.
- The distinction can be in the eye of the beholder. What one doctor may call chemical restraint, another may call treatment for anxiety.
- Because the distinction is unclear, it is open to abuse.
- There can be pressure on doctors to specify a mental disorder diagnosis so that medication is available under the PBS.

See www.nswcid.org.au/images/pdf/nrmhpwid_background_paper.pdf

At present in NSW, consent for psychotropic medication, whether or not it is perceived to be chemical restraint, is obtained from a "person responsible", usually

a family member. This is a much lesser safeguard than requiring a specifically authorised guardian.

If this authority is ultimately left with family members, there need to be specific safeguards including a responsibility for the NDIS senior practitioner to apply for a guardianship order if the practitioner's reporting and monitoring indicates concerns about inappropriate use of psychotropic medication.

In our submission on the NDIS quality and safeguarding framework, we argued that any prescription of psychotropic medication to a person with intellectual disability should be made by a doctor with specific competencies in the mental health of people with intellectual disability and as part of a collaborative decision-making approach with a behaviour support practitioner. Also, whenever psychotropic medication is used with a person with intellectual disability, it should be complemented by positive behaviour support.

Our comments have been focused on people with intellectual disability. Similar issues would arise for people with dementia and people with acquired brain injuries.

All of these issues need careful consideration in deciding how to deal with chemical restraint in a NSW authorisation regime.

Question 7.8: Requirements about the use of behaviour support plans

(*1*) *Should the law include specific requirements about the use of behaviour support plans?*

(2) If so, what should those requirements be?

Restrictions should only be permissible within the context of the demonstrated implementation of a positive behaviour support plan.

QUESTION PAPER 6

Question 1.1: Other issues

Are there any issues you would like to raise that we have not covered in Question Papers 1–6?

Following the decision of the Supreme Court in *Re managed estates remuneration orders* [2014] NSWSC 383, a private financial manager can only be remunerated if this is specifically authorised by the court. This imposes an unwieldy system where the financial management order is made by the Tribunal. The new legislation should make it clear that the Tribunal may authorise remuneration with the amount of remuneration tend to be determined by the NSW Trustee as part of its oversight and direction of financial managers.

Question 5.5: Process for appointing parents as guardians

(*1*) *Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need for a NSW Civil and Administrative Tribunal hearing?*

(2) What other mechanisms could be made available for parents to make decisions for an adult with profound decision-making incapacity?

We strongly oppose the idea of a streamlined process for parents of adult children with profound intellectual disability becoming guardians. This would run counter to the underlying philosophy of the UN CRPD and modern guardianship law. It also includes an assumption that parents can be presumed to be appropriate guardians. This will very often be the case.

However, there are also many instances where parents with the best of intentions are overprotective of people with intellectual disability so that they have very limited life opportunities and limited opportunities to develop life skills.

Also, in a small but very important number of cases, parents mistreat or exploit their children with disability, and this is not necessarily readily apparent.

11. Supreme Court

Question 11.1: Supreme Court's inherent protective jurisdiction

What, if anything, should legislation say about the relationship between the Supreme Court of NSW's inherent protective jurisdiction and the operation of guardianship law?

The Supreme Court's inherent protective jurisdiction is inconsistent with the kind of modernised supported and substitute decision jurisdiction that we would anticipate coming out of the current review. The Court's jurisdiction is paternalistic and we argue that it is inappropriate for a single eminent lawyer to have parallel jurisdiction with an expert multimember Tribunal that is grounded in the disability community.

We would favour legislatively abolishing the Court's inherent protective jurisdiction. If there is a legitimate concern that this would leave a potential gap in the law, we would favour the inherent jurisdiction being transferred to the Tribunal and to be used within the context of legislative principles that apply to the Tribunal.

Question 11.2: Interactions between the Supreme Court and the Tribunal

(1) Are the provisions that deal with the interaction between the Supreme Court of NSW and the NSW Civil and Administrative Tribunal adequate?

(2) What changes, if any, should be made to these provisions?

Question 11.3: Supervision, review and appeals

Are there any issues that should be raised about the Supreme Court of NSW's supervisory, review and appellate jurisdictions?

We have argued that the right of appeal direct to the Supreme Court from the Guardianship Division of the Tribunal should be abolished. Appeals should go to the Appeals Panel of NCAT and then to the Court of Appeal.

We are less clear about abolishing the Court's parallel jurisdiction with the Tribunal under the NSW Trustee and Guardian Act. There may be some financial management cases involving interplay with other financial applications to the Court where the matter could be more effectively resolved by the Court hearing all applications.

Question 8.11: Access to documents

(1) Who should be allowed to access documents from Guardianship Division cases?

(2) At what stage of a case should access be allowed?

The privacy interests of people with disability which are reflected in the limits on publication of guardianship proceedings, call for major limits on public access to guardianship division documents

Question 8.12: Other issues

Would you like to raise any other issues about the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal?

We see the requirement for written reasons for decision in guardianship matters as an essential piece of accountability and an essential explanation to those who will be involved in implementation of decisions made by the Tribunal and to those who will be subsequently reviewing Tribunal orders.