29 May, 2017

NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

Dear Sir/Madam,

NSW LAW REFORM COMMISSION - REVIEW OF THE GUARDIANSHIP ACT 1987

These submissions relate primarily to the functions of NSW Trustee and Guardian ("NSWTG") in relation to its financial management and trustee services and focus on question papers four and six. The Public Guardian will make a separate submission regarding matters relating to its functions and related guardianship matters.

Question Paper 4 – Safeguards and Procedures

2. Enduring guardianship

Question 2.1: Witnessing an enduring guardianship appointment

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the eligibility requirements for witnesses
(b) the number of witnesses required, and
(c) the role of a witness?

NSWTG considers the current categories of witnesses as set out in section 5 of the *Guardianship Act 1987* ("the Guardianship Act") adequate. The current categories of witnesses have training and expertise in assessing capacity and ensuring the appointor understands the nature and implications of the enduring guardianship document. The extension of the number or categories of witnesses may include witnesses without the necessary experience or expertise or time available to make a proper assessment of the appointor's capacity and to ensure they understand the nature and effect of the document. The additional complexities of requiring two witnesses and associated costs may act as a disincentive to the making of enduring guardianship documents.

NSWTG supports the improvement of current practices by having witnesses certify that they have explained the effect of an enduring guardian document, including that appointers understand the prescribed matters contained in section 41(2) of the *Powers of Attorney Act 1998* (Qld). The prescribed from could also potentially include the prescribed matters to assist the witness verify the appointor understands the nature and effect of the document. NSWTG also supports witnesses to the potential guardian verifying they have explained the powers and responsibilities of the appointment.

Question 2.2: When enduring guardianship takes effect

Should the Guardianship Act 1987 (NSW) contain a procedure that must be followed before an enduring guardianship appointment can come into effect? If so, what should this process be?

NSWTG supports the idea of appointers being able to register their enduring documents. A register would assist guardians establish their authority to act on behalf of the appointor. It would also enable third parties, such as public sector bodies, private sector organisations and individuals readily verify the authority of a guardian. A register may also introduce an element of public visibility and accountability, and reinforce a greater understanding of the obligations and duties of guardians.

NSWTG considers the current procedures set out in the Guardianship Act regarding when an enduring guardian appointment takes effect adequate[1]. There are sufficient review mechanisms available under the Guardianship Act for the appointers or persons with a concern to seek a review in the NSW Civil and Administrative Tribunal ("the Tribunal") or Supreme Court if there are any concerns regarding the actions of the appointed guardian[2]. NSWTG does not support having to notify or obtain a declaration from the Tribunal or requiring notification of next of kin as this would complicate and delay the process of an appointment taking effect. An appointor could always provide direction in the appointment document requiring the guardian to notify certain persons on the appointment taking effect, or request other persons, to monitor the guardian and to seek a review in The Tribunal if such persons have a concern regarding the actions of the guardian.

Question 2.3: Reviewing an enduring guardian appointment

Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient? If not, what should change?

The Tribunal should have consistent powers of review whether reviewing enduring guardian appointments or powers of attorney. NSWTG supports the Tribunal having the same powers to review the "making, revocation or the operation and effect" of an enduring guardianship appointment as it has when reviewing powers of attorney[3].

Question 2.4: Ending an enduring arrangement

What changes, if any, should be made to the Guardianship Act 1987 (NSW) concerning

(a) the resignation of an enduring guardian, and

(b) the revocation of an enduring guardianship arrangement?

NSWTG considers the current provisions of the Guardianship Act dealing with the resignation of guardians adequate. NSWTG supports the proposal for appointors to be able to designate the guardianship appointment to continue if they subsequently marry and not have the automatic revocation provision, section 6HA of the Guardianship Act, apply. There are sufficient review mechanisms available in the Tribunal or Supreme

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[1] *Guardianship Act 1987* (NSW) s6A(1)(a)
[2] *Guardianship Act 1987* (NSW) s6L, s6J.
[3] *Powers of Attorney Act 2003* (NSW) s36(1)

Court to address any issues which may arise from the appointment continuing to have effect if the appointment is incompatible with the subsequent marriage or any other subsequent change in circumstances.

3. Guardianship orders and financial management orders

Question 3.1: Applying for a guardianship or financial management order
What are your views on the process for applying for a guardianship or a financial management order?

NSWTG considers the provisions under the Guardianship Act for applications for a guardianship or financial management order adequate. NSWTG receives a significant number of management orders resulting from applications from a wide range of persons with a genuine concern for the welfare of the person where there are no close next of kin whom might otherwise make an application, such as workers in the health care and aged care sector. These applications are often made in circumstances where forms of elder abuse have already occurred and NSWTG must respond to protect the legal rights and interests of clients. NSWTG undertakes community education to both encourage people to plan ahead to ensure their financial, legal, health and lifestyle decisions are respected, and to raise awareness of issues that may encourage timely referral of matters to the Tribunal.

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?

NSWTG acknowledges that financial management orders without time limitations appear inconsistent with the principles of the UN Convention on the Rights of Persons with Disabilities. NSWTG considers that the current provisions under the Guardianship Act for the Tribunal to make interim financial management orders[4] and also being able to specify that a financial management order should be reviewed within a certain time[5] provide some safeguards to ensure financial management orders are reviewed at appropriate stages where appropriate and do not unnecessarily restrict autonomy.

In the experience of NSWTG the Tribunal makes financial management orders for many people with significant decision making capacity issues, such as age-related dementia, who are unlikely to regain capacity and will have a need for ongoing management. The Tribunal may currently consider the need for future review at the time of making the financial management order, and regular ongoing reviews that may in some instances subject the subject person, manager and other interested persons to additional burdens.

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?

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[4] *Guardianship Act 1987* (NSW) s25H
[5] *Guardianship Act 1987* (NSW) s25N

NSWTG supports the proposal to amend the Guardianship Act to be consistent with the *NSW Trustee and Guardian Act 2009* and enable the Tribunal to make financial management orders for the whole or part of the estate of a person. In the experience of NSWTG the Tribunal in practice already considers this question and often uses its powers to exclude part of a person's estate from management[6]. NSWTG regularly receives financial management orders where it is appointed to manage specific parts of a managed person's estate or excluding certain parts of a managed person's estate, such as the managed person to manage their own pension.

NSWTG also encourages financially managed persons to exercise their legal capacity to the greatest extent possible and promotes as much as possible self-determination. This includes authorising clients to deal with all or such part of their estate themselves as they are capable of managing, under section 71(2) of the *NSW Trustee and Guardian Act* 2009.

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?

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

NSWTG considers the current provisions of the Guardianship Act for the review of financial management orders adequate. Were regular reviews of financial management orders introduced, NSWTG would support the Tribunal having the discretion to determine that a particular financial management orders does not need to be reviewed. We are mindful that there is a risk that the increased burden and complexities of regular reviews, exposure to scrutiny and potential criticism may increase reluctance of persons in the community to undertake the role of financial manager. Ongoing reviews of financial management orders may deplete the goodwill of interested parties and discourage the making of applications in favour of more informal arrangements. There are also many low value and low complexity matters that may not warrant the cost of ongoing review.

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)?

NSWTG supports the Guardianship Act setting out the factors required to be considered to provide greater certainty and consistency and understanding of decisions.

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?

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[6] *Guardianship Act 1987* (NSW) s25E(2)

NSWTG supports the proposal that the Guardianship Act provide for the Tribunal to revoke a management order if it is satisfied there is no longer a need for a person's affairs to be under management. In the experience of NSWTG there are cases where, whilst the person has not regained decision making capacity, there is no utility in continuing ongoing management because of the nature or size of the estate, or there are sufficient informal management mechanisms, such that a financial management order does not assist in any practical way and may even exacerbate estate management issues. We note that there arguably currently is capacity for this issue to be considered under the Tribunal's present powers to revoke where it is satisfied the person is capable of managing their financial affairs or revocation is in their overall best interests[7]. However, NSWTG supports the Guardianship Act expressly providing for revocation where there is no longer a need, in order to provide greater certainty and consistency in Tribunal proceedings.

Question 3.7: Procedures that apply if a guardian or financial manager dies

What procedures should apply if a guardian or a financial manager dies?

NSWTG supports the recommendation of the Standing Committee that *NSW Trustee and Guardian Act* 2009 should provide for "the NSWTG to assume management of the estate of a person under a financial management order upon the death of a private manager previously appointed and until a new manager is appointed by the relevant court or tribunal". In the experience of NSWTG there have been cases where a financially managed person has experienced hardship following the death or incapacity of a financial manager and cessation of the management of the estate. The proposed provision would enable NSWTG to ensure the financially managed has continued access to funds, services are maintained and accounts paid, and able to give instructions in any legal or other significant matters that might not be able to await the appointment of a new manager.

4. A registration system

Question 4.1: Benefits and disadvantages of a registration system

(1) What are the potential benefits and disadvantages of a registration system? Do the benefits outweigh the disadvantages?

(2) Should NSW introduce a registration system?

(3) Should NSW support a national registration system?

The primary benefit of a register would be to assist guardians and financial managers to establish their authority and third parties, such as health care providers, financial institutions and interested individuals, readily verify same. A register may potentially introduce an element of public visibility and accountability, and reinforce a greater understanding of the obligations and duties of financial administrators and guardians.

However for many people the preparation of a pre-planning instrument, such as an enduring guardianship or power of attorney, is an essentially private function. A public register and potential oversight by a public institution or third party may discourage people making enduring documents. The potential increased complexity and cost may

[7] *Guardianship Act 1987* (NSW) s25P(2)

further reduce the appeal of making enduring documents and encourage people to adopt more informal arrangements, which may be open to a greater risk of elder abuse.

In the experience of NSWTG the majority of financial related elder abuse does not occur through the fraudulent making of pre-planning instruments, but rather the misuse of enduring powers of attorney or other authorities that have been validly made. The register of itself would not stop elder abuse perpetrated through validly made and registered enduring documents. Registration would also not necessarily operate to verify that the enduring attorney has obtained independent medical evidence authorising them to activate the power of attorney.

Question 4.2: The features of a registration system

If NSW was to implement a registration system, what should be the key features of this system?

For a register to enable guardians and financial managers to establish their authority and third parties readily verify same, the register would probably need to be mandatory. However, were an enduring document to not be regarded as valid until registered, there may be cases where the enduring document is deliberately not registered until such time as it is needed to be acted upon to preserve privacy. Consideration would also need to be given to the effect of registration on active and inactive pre-existing enduring documents. There may be cases where people may want to have multiple instruments, such as powers of attorney appointing different persons to manage differing aspects of their affairs. Whilst the register may record the enduring documents, it would not necessarily be able to verify that the enduring guardian has medical evidence that they can proceed to act on the appointor's behalf when the appointor is unable to give proper instructions.

Courts and tribunals, medical and financial organisations would need to have access to a register. There may be a wide range of private persons with an interest in accessing the national register. Section 54 of the *NSW Succession Act 2006* provides for certain categories of persons, such as spouses and children, to have access to the will of a deceased person. Similar categories of people may also consider they have an interest and wish to access the national register to ascertain what arrangements are in place. It is often these categories of persons who are best placed to identify concerns for the welfare of the principal and make an application to the Tribunal to seek a review. However, wide access to the register may exacerbate privacy concerns and discourage the making of enduring documents under certain circumstances. Referring access requests to a public body like the Tribunal may have significant resource implications.

5. Holding guardians and financial managers to account

Question 5.1: A statement of duties and responsibilities

(1) Should the Guardianship Act 1987 (NSW) and/or the NSW Trustee and Guardian Act 2009 (NSW) include a statement of the duties and responsibilities of guardians and financial managers?

(2) If so:

(a) what duties and responsibilities should be listed in this statement?

(b) should guardians and financial managers be required to sign an undertaking to comply with these duties and responsibilities?

(c) what should happen if guardians and financial managers fail to observe these duties and responsibilities?

NSWTG supports the Guardianship Act including a statement of duties and responsibilities to provide guidance to guardians and financial managers in their roles. NSWTG considers the recommendations of the VLRC that the statement of duties include that the guardian or financial administrator should not exceed the powers of the appointment, act honestly, diligently and in good faith, avoid acting where there is a conflict of interest, communicating with the represented person and explain as far as possible decisions and treating the person and important people in their life with dignity and respect, are appropriate[8].

NSWTG also supports the Guardianship Act including provisions for financial managers to keep records of their administration and to keep their property separate from the represented person's property. The existing Enduring Power of Attorney form in NSW requires attorneys to accept that they must keep their property separate from the principal's property (unless jointly owned) and keep reasonable accounts and records.

NSWTG supports the prohibition of transactions where there may be a conflict between the attorney's duty and interests of the appointor similar to section 63 of the *Powers of Attorney Act 1998* (Qld) and section 64 of the *Powers of Attorney Act 2014* (Vic). The provision may address the evidentiary burden referred to earlier that often prevents recovery action, by creating a presumption of undue influence that places the onus of proof on to the attorney to establish that the transaction was proper.

Question 5.3: Reporting requirements for private financial managers

Should the NSW Trustee and Guardian Act 2009 (NSW) be amended to allow the NSW Trustee and Guardian to decide how often private managers should lodge accounts?

NSWTG provides private financial managers with Directions and Authorities to administer the managed person's estate[9]. These Directions and Authorities include the requirement to lodge accounts to enable oversight of administration of the managed person's estate. Whilst the legislation does not prescribe how often accounts should be lodged the practice has been to require accounts on an annual basis.

NSWTG supports the NSW trustee and Guardian Act being amended to expressly give it the discretion to vary the requirement to lodge accounts. For example, where a financial manager is performing reliably it might be reasonable to extend the reporting period to every two or three years, or where a manager is not performing well or there is a risk of exploitation an earlier reporting schedule may be warranted. The discretion to vary accounts would reduce ongoing compliance burdens on performing financial managers, and enable NSWTG to focus its resources on matters where there is greater risk of mismanagement.

Question 5.4: Removing private financial managers from their role

(1) When should a private financial manager be removed from their role?

(2) Should the Guardianship Act 1987 (NSW) set out the circumstances in which a private financial manager can or must be removed from their role more clearly?

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[8] Victorian Law Reform Commission, Guardianship, Final Report 24 (2012)

[9] *NSW Trustee and Guardian Act 2009* (NSW) s66

NSWTG considers the current provisions of the Guardianship Act dealing with the removal of private financial managers adequate. NSWTG does not interfere with the decision making of the private financial administrator unless the administrator has exceeded their authority or NSWTG considers the decisions contrary to the interests of the managed person. NSWTG in its supervisory role on occasions needs to seek a review of a financial management order where the manager is non-compliant with directions, or if it identifies a breach of duties and responsibilities, such as a failure to lodge accounts. In the experience of NSWTG the scope of the current processes and powers of the Tribunal when reviewing a financial management order are sufficient to consider the necessary factors to determine whether a private financial manager should be removed from their role.

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?

NSWTG supports the proposal to enable the Tribunal to order enduring guardians and financial managers compensate a loss caused by their failure to comply with their duties and responsibilities. NSWTG is often appointed as financial manager by the Tribunal in situations where financial abuse has already occurred, and it must respond to protect the legal rights and interests of clients. NSWTG must often expend significant resources investigating prior dealings with the estate to identify any improper transactions and obtain the necessary evidence to support any recovery action. There are many cases where recovery action is not possible because the assets have already been dissipated.

Where assets can be traced, the high evidentiary burden, cost and delay associated with court proceedings means it is often not possible to undertake recovery action unless the case is exceptionally strong. Even where the Tribunal has identified suspected elder abuse there can be difficulties obtaining sufficient evidence to support legal proceedings to recover misappropriated assets. The affected person also often has insufficient assets to fund the legal costs, and even obtaining legal representation can be difficult.

Enabling the Tribunal to consider compensation may provide a more efficient and effective means of addressing the effects of the loss on the affected person. Tribunal proceedings would alleviate some of the evidentiary, cost and risk considerations that sometimes prevent recovery action being undertaken. The Tribunal would also be able to consider a wide range of matters and creative solutions to issues that might work in the interests of all affected parties that might not be available to the court. Tribunal proceedings may also lessen the emotional toll on the affected person and impact on family relationships.

6. Safeguards for supported decision-making

Question 6.1: Safeguards for a supported decision-making model

If NSW introduces a formal supported decision-making model, what safeguards should this model include?

NSWTG considers the Tribunal would need to have the power to review on a regular basis or on an application by an interested person any supported-decision making or co-decision making authority. We also note that the decision making capacity of the person

being supported may also change over time and consideration may at times need to be given to the appointment of substitute decision making arrangements where the person may be no longer able to reach a decision even with support.

7. Advocacy and investigative functions

NSWTG supports the Public Guardians submissions for the establishment of a Public Advocate to represent the interests of people with a cognitive impairment, investigate complaints of suspected abuse, exploitation or neglect and community education functions. NSWTG supports a Public Advocate having the power to investigate complaints regarding suspected elder abuse, including the power to compel the provision of information and search and enter relating to an investigation. NSWTG also supports a Public Advocate having the ability to assist and represent persons under a cognitive impairment where there is no guardianship order to support and assist accessing services that may prevent the need for formal guardianship. The Public Advocate would also have an enhanced community education role to play to provide education and training in relation to any supported decision making regime introduced.

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?

NSWTG considers the current rules on the composition of the Guardianship Division and Appeals Panels are appropriate. The current rule ensure there is broad range of collective professional and community expertise available when considering matters raised in the course of Tribunal proceedings.

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?

NSWTG considers the current rules on who can be a party to guardianship and financial management cases are adequate. NSWTG has not experienced any persons with an interest in the person not being able to present their views to the Tribunal.

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?

NSWTG considers the conducting of hearings important in Guardianship Division cases. The requirement of hearings represent an important safeguard and reflect the principles of the UN Convention of the Rights of Persons with Disabilities that persons with disabilities are entitled to enjoy legal capacity on an equal basis with others, including equal recognition before the law. Hearings enable the Tribunal and interested parties to raise and explore a wide variety of relevant issues that might not otherwise be available. The matters explored during the hearing and available in the published reasons for decision can be important reference points for managers and guardians.

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?

NSWTG considers the current rules around who should receive notice of guardianship and financial management applications and reviews are adequate. NSWTG's experience is that the Tribunal generally ascertains and gives notice to the appropriate interested persons. Any requirement to identify, locate and notify certain categories of relatives or interested persons may delay the process and impact Tribunal resources.

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?

NSWTG considers the current rules regarding a party needing to seek leave to be represented by a lawyer are adequate. The right to legal representation reflects the principles of the UN Convention of the Rights of Persons with Disabilities and right to equal representation before the law. In NSWTG's experience legal representation can often assist parties participate effectively and ensure relevant matters are put before the Tribunal.

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?

NSWTG supports the Guardianship Act being amended to allow a person to be represented by a lawyer when their capacity is in question in proceedings before the Tribunal. Consideration would also need to be given whether this would also apply in other related proceedings, such as reviews of NSWTG decisions sought under sections 62 and 70 of *NSW Trustee and Guardian Act 2009* (NSW).

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?

NSWTG considers the current process for appealing a Guardianship Division case appropriate and effective.

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?

NSWTG considers the current processes of the Tribunal for dealing with the privacy and personal information adequate. NSWTG supports all parties having access to any evidence before the Tribunal.

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?

NSWTG considers the current processes of the Tribunal for dealing with access to documents adequate.

Question Paper 6 – Remaining Issues

2. Objectives, principles and language

Question 2.1: Statutory objects

What, if anything, should be included in a list of statutory objects to guide the interpretation of guardianship law?

NSWTG supports the inclusion of statutory objects to guide the interpretation of the Guardianship Act to better reflect the principles adopted under the UN Convention on the Rights of Persons with Disabilities. NSWTG considers the objects could include matters such as the recognition of the presumption of capacity, the principle of least restriction and promotion of assisted decision making where possible.

Question 2.2: General principles

(1) What should be included in a list of general principles to guide those who do anything under guardianship law?

(2) Should there be multiple statements of principles that are tailored to particular decision-making situations**?** What are those situations and what principles should be included?

NSWTG considers the language of the current general principles adequate but could be better expressed to reflect the principles adopted under the UN Convention on the Rights of Persons with Disabilities. The principles could also better reflect more recent thinking on the meaning of disability and emphasise the importance of the will and preferences of a person, including consulting and supporting the person to participate in decisions, and promotion of the person's social wellbeing. NSWTG supports one statement of general principles to guide guardians and financial managers as separate and decision specific principles for may further complicate and lead to greater uncertainty in decision making.

Question 2.3: Accommodating multicultural communities

How should multicultural communities be accommodated in guardianship law?

NSWTG notes the current general principles under the Guardianship Act include the recognition of the importance of preserving family relationships and the cultural and linguistic environments.

Question 2.4: Accommodating Aboriginal people and Torres Strait Islanders

How should Aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

NSWTG supports the adoption of specific principles under the Guardianship Act to recognise and accommodate the needs of Aboriginal people and Torres Strait Islanders in guardianship matters.

Question 2.5: Language of disability

(1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?

(2) What conceptual language should replace it?

NSWTG submits the term "decision making capacity" more appropriately reflects the spectrum of decision making capacity and principles adopted under the UN Convention on the Rights of Persons with Disabilities. Disability itself does not necessarily indicate a lack of capacity, and the term "decision making capacity" reflects the spectrum of decision making capacities at different times, and the ability to make decisions with support.

Question 2.6: Language of guardianship

What terms should be used to describe participants in substitute and supported decision-making schemes?

NSWTG supports the use of the term 'representative' to reinforce the representative nature of guardian and financial manager roles, and that they are acting on behalf of and in the best interests of the principal. NSWTG supports the terms "supported" and "supported person" signals the nature of the appointment and role, and designates that the supported person retains the decision making capacity.

6. Interstate appointments and orders

Question 6.1: Interstate court or tribunal appointments

(1) Are the arrangements in relation to interstate appointments in the Guardianship Act 1987 (NSW) operating well?

(2) Should the legislation clarify what the effect of registration of interstate appointments is and when it is required?

(3) Should the NSW Civil and Administrative Tribunal have the discretion not to recognise an appointment in certain circumstances?

(4) What, if any, other changes should be made?

Under the current regime, recognition of an interstate financial management order brings the manager under the supervision of NSWTG. This could result in the duplication of supervision between the originating state and NSW, with the financial manager potentially subject to additional supervision and fees. NSWTG submits that the Guardianship Act should clarify when recognition is required and the effect of same. The Tribunal should have discretion whether to recognise an interstate order, but when considering recognition also be required to consider whether or not recognition of the order require supervision of NSWTG. This may well not be the case when the financial manager is already under the supervision of a public body in the originating state.

Question 6.3: Interstate enduring appointments

(1) Should interstate enduring appointments be reviewable in NSW?

(2) Should NSW introduce a system of registration for interstate appointments? If so, should there be a process for confirming the powers confirmed by the interstate instrument or order?

NSWTG supports interstate enduring appointments being reviewable in NSW.

7. Orders for guardianship and financial management

Question 7.1: A single order for guardianship and financial management

(1) Should there continue to be separate orders for guardianship and financial management?

(2) What arrangements would be required if a single order were to cover both personal and financial decisions**?**

NSWTG supports the retention of separate orders for guardians and financial managers. Separate orders for guardians and financial manager appointments reinforces the differing considerations when considering appropriate persons as differing skills may be required. Even where the same person is appointed guardian and financial management separate orders may reinforce in what capacity they are acting and the differing responsibilities and powers being exercised and guard against undue weight being given to one appointment over the other.

Separate orders for financial management and guardianship also align with the differing methods for preparing enduring guardian and powers of attorney and separate public bodies that oversee their management. With enduring guardianships and powers of attorney many people appoint different persons with different skill sets and also to act as a check and balance on each appointment. The making of combined orders may also encourage unnecessary financial management orders being made where really only a guardian is required, and vice versa.

Question 7.2: Effect of orders on enduring appointments

What arrangements should be made for the operation of enduring appointments when the NSW Civil and Administrative Tribunal or Supreme Court of NSW has also appointed a guardian or financial manager?

NSWTG supports the Guardianship Act being amended to expressly suspend the authority of an enduring attorney for the period of the financial management order. NSWTG does not support allowing enduring powers of attorney continuing to have any form of limited operation as it can be difficult to separate different parts of a managed estate. It would introduce unnecessary complexity administering the estate with potential conflict between the Tribunal appointment and enduring attorney over differing interpretations of the differing powers and parts of the estate being administered.

Question 7.3: Resolving disputes between decision-makers

(1) How should disputes between decision-makers be resolved?

(2) Who should conduct or facilitate any dispute resolution process?

(3) What could justify preferring the decision of one substitute decision-maker over another?

NSWTG supports decision makers resolving differences informally or through mediation. NSWTG considers the current mechanisms available under the Act for parties to seek a review if there are unresolvable disputes are adequate. Mediation by a public agency, such as the Public Guardian or Tribunal, may be effective in resolving disputes without the delay and resources required for a review hearing.

10. Handling personal information

Question 10.1: Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

NSWTG supports the VLRC recommendation that substitute decision-makers be specifically entitled to access personal information about an individual relevant to and necessary to the carrying out of their functions.

Question 10.2: Disclosure of personal information

(1) In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?

(2) In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?

NSWTG supports the retention of the existing provision under section 101 of the Guardianship Act prohibiting the disclosure of information obtained in connection with the Act except under the prescribed circumstances.

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?

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?

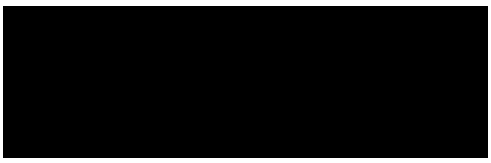
Question 11.3: Supervision, review and appeals

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

NSWTG submits that the Supreme Court's inherent protective jurisdiction should remain and not be limited by guardianship legislation. In the experience of NSWTG the Supreme Court exercises its inherent jurisdiction in accordance with the current principles under the Guardianship Act. NSWTG would support the express preservation of the courts inherent

jurisdiction similar to that provided under the *Guardianship and Administration Act 2000* (QLD) that the whole of the Act does not affect the court's inherent jurisdiction, including its "parens patriae" jurisdiction. NSWTG considers the current provisions that deal with the interaction between the Supreme Court of NSW and the NSW Civil and Administrative Tribunal adequate. However, consideration might be given to allow financial management orders made by the Supreme Court to be subsequently reviewed by the Tribunal as a more accessible and cost effective means of review.

Yours sincerely



Damon Quinn
Acting Chief Executive officer
NSW Trustee and Guardian