Review of the *Guardianship Act 1987*

Question Paper 1: Preconditions for alternative decision making

Legal Aid NSW submission to the NSW Law Reform Commission

October 2016

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Legal Aid NEW SOUTH WALES

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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 private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 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 (**NCAT**) on a direct representation basis and when NCAT orders that the client be separately represented. The service assisted 328 clients in 2014-2015, through in-house or private practitioners. 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 Guardianship Division of NCAT, 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 welcomes the opportunity to respond to *Question Paper 1 for the Review of the Guardianship Act 1987: Preconditions for alternative decision-making arrangements*.

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The concept of capacity

Qu 3.1 Elaboration of decision-making capacity

Should the Guardianship Act provide further detail to explain what is involved in having, or not having, decision-making capacity?

If the Guardianship Act were to provide further detail to explain what is involved in having, or not having, decision-making capacity, how should this be done?

As a preliminary point, Legal Aid NSW would endorse NSW guardianship legislation referring to a person's "decision-making capacity". We consider this term preferable to the current tests which look at whether a person is "incapable of managing his or her person" or "incapable of managing [his or her] affairs".[1]

Legal Aid NSW would also be supportive of guardianship legislation explaining what is involved in having, or not having, decision-making capacity. The *Guardianship Act 1987* ("Guardianship Act") affects and is used by a wide range of community members. The Legal Aid NSW Mental Health Advocacy Service (**MHAS**) regularly receives requests for advice on its terms. We therefore consider it important that the legislation explain, as simply and clearly as possible, what is meant by capacity.

Legal Aid NSW also considers it important that NSW guardianship legislation promote a "functional" approach to capacity, rather than a "status" or "outcomes" approach.[2] That is, the meaning of capacity and its assessment should be focused on what the person can do, rather than their disability, circumstances or the merits of their decisions. In this regard, the Legal Aid NSW CCLS observes that young people in care who are approaching adulthood appear to be the subject of routine applications for guardianship and/or financial management orders on the basis of their disability or circumstances, rather than on the basis of an evidence-based assessment of their capacity to make a decision on particular subject matter. A legislative definition of capacity may help address this issue.

Legal Aid NSW considers the *Mental Capacity Act 2005* (UK), the *Guardianship and Administration Act 2000* (Qld) [3] and the Guardianship and Administration Bill 2014 (Vic)[4] all to be good bases for a legislative definition of capacity.

[1] *Guardianship Act 1987*, ss3, 14 and 25G.
[2] See the discussion of this issue in the report of the NSW Legislative Council Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity* (February 2010), Chapter 4.
[3] *Guardianship and Administration Act 2000* (Qld), sch 4; *Powers of Attorney Act 1998* (Qld), sch 3.
[4] See clause 4.

Qu 3.2: Disability and decision-making capacity

How, if at all, should a person's disability be linked to the question of his or her decision-making capacity?

Legal Aid NSW acknowledges the competing considerations that are raised by this question. On the one hand, we recognise the need to avoid conflating disability with decision-making incapacity, and arbitrarily subjecting people with disability to guardianship legislation. On the other hand, we are cautious of any amendments that would unintentionally widen the scope of the Guardianship Act and heighten the risk that people making "poor decisions" will be caught by the Act. We appreciate the observation of the Victorian Law Reform Commission that the requirement to establish a disability can provide an "objective safeguard" and mitigate the risk of more subjective assessments of capacity.[5]

At this time, Legal Aid NSW has not formed a strong or fixed view on the role of disability as a precondition under any new alternative decision-making legislation. However, we note that our practitioners have not raised any concerns about the current requirement to establish disability in order to make a guardianship order.

As discussed in response to Question 3.7 below, we would also support an express legislative statement that the fact that a person has a disability should not, in and of itself, lead to a finding of a lack of capacity.

Qu 3.3: Defining disability

If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?

Legal Aid NSW considers the current definition of disability in the Guardianship Act to be outdated. If disability continues to have a role in new alternative decision-making legislation, Legal Aid NSW would support a definition of disability along the lines of the Victorian Guardianship and Administration Bill 2014, which provides (cl 3):

> Disability, in relation to a person, means a neurological impairment, intellectual impairment, mental illness, brain injury, physical disability or dementia.

Qu 3.4: Acknowledging variations in capacity

Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?

How should such acknowledgements be made?

If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?

[5] Victorian Law Reform Commission, *Guardianship*, Final Report 24 [12.104].

If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

Legal Aid NSW would support legislative acknowledgment that decision-making capacity can vary over time and depend on the subject matter of the decision. As set out in the Question Paper, it is now widely recognised that capacity exists on a "spectrum" and is time and context specific.

Legal Aid NSW would be comfortable with the legislative approach taken to this issue in the Victorian Guardianship and Administration Bill 2014. Clause 4 of that Bill, under the heading "Meaning of capacity", provides:

> In determining whether or not a person has decision making capacity, regard should be had to the following—
>
> (a) a person may have decision making capacity in relation to some matters and not others;
>
> (b) if a person does not have decision making capacity in relation to a matter, it may be temporary and not permanent;

Clause 5 in that Bill is also relevant, as it provides:

> A person who is assessing whether a person has decision making capacity in relation to a matter must take reasonable steps to conduct the assessment at a time at, and in an environment in, which the person's decision making capacity can be assessed most accurately.

This provision also recognises that time and environment can impact upon capacity. Both provisions ensure that these factors are taken into account in the assessment of a person's decision-making capacity.

Legal Aid NSW would also endorse a statutory principle or provision to confirm that capacity is specific to the decision to be made, and may fluctuate from time to time.

Qu 3.5: Should the definitions of decision-making capacity be consistent?

Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements?

If the definitions of decision-making capacity were to be aligned, how could this be achieved?

Legal Aid NSW cannot see any strong arguments why the definitions of capacity for alternative decision-making arrangements should not be aligned. In this regard, Legal Aid NSW notes that the definition of capacity found in the guardianship and trustee legislation of other jurisdictions, such as Alberta, Canada, and the United Kingdom, are general and flexible. They would appear to be adaptable to different decisions and contexts in the civil law. We would, however, be cautious about any extension of this principle to involuntary

mental health treatment. We submit that on this issue, the *Mental Health Act 2007* (NSW) (**MHA**) does and should cover the field.[6]

Qu 3.6: Statutory presumption of capacity

Should there be a statutory presumption of capacity?

Legal Aid NSW would support a statutory presumption of capacity.

Qu 3.7: What should not lead to a finding that a person lacks capacity

Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?

If capacity assessment principles were to include such statements, how should they be expressed?

Legal Aid NSW considers that it would be worthwhile to expressly state that certain factors will not or should not, by themselves, lead to a conclusion that a person lacks capacity.

These factors should include the fact that a person has a disability, illness or other medical condition. The MHAS often provides advice to members of the public who mistakenly assume that a relative with a mental illness does not have capacity. The CCLS is also concerned that young people with a disability under the parental responsibility of the Minister for Community Services are routinely the subject of applications for guardianship and/or financial management orders as they approach the age of 18. An express legislative statement countering this assumption therefore seems warranted. Such a statement may also counter concerns if new legislation retains a definition of capacity which has a nexus with disability.

Other factors that Legal Aid NSW would endorse as not conclusive of capacity include:

- the person's age
- the person's appearance
- the person's method of communication
- that the person takes or has taken drugs, including alcohol (though we also acknowledge the effects of alcohol may be taken into account)
- that the person engages or has engaged in illegal or immoral conduct
- that the person makes decisions with which other people do not agree
- that the person chooses a living environment or lifestyle with which other people do not agree.

[6] On this issue see *QCM* [2015] NSWCATGD 38 (26 October 2015).

Legal Aid NSW would also have no objection to including the other factors mentioned in the legislation of jurisdictions such as the Australian Capital Territory and the Northern Territory, mentioned in the Question Paper.

Qu 3.8: The relevance of support and assistance to assessing capacity

Should the availability of appropriate support and assistance be relevant to assessing capacity?

If the availability of such support and assistance were to be relevant, how should this be reflected in the law?

In our view, the availability of appropriate support and assistance is relevant to assessments of capacity. We note that article 12 of the *Convention on the Rights of Persons with Disabilities*, ratified by Australia, enshrines the rights of people with disabilities to the "support and assistance necessary for them to exercise their legal capacity". Similarly, Queensland guardianship legislation enshrines the right of adults to participate, to the best of their ability, in decisions that affect their life.[7] Relevantly, this includes giving the adult any necessary support and access to information to enable them to participate in such decisions.[8] Legal Aid NSW would be comfortable with similar principles being reflected in NSW legislation.

Legal Aid NSW would also endorse statutory confirmation that the availability of support and assistance should be taken into account in assessments of capacity. For instance, in relation to young people exiting care, this would include life skills courses and financial counselling that they have completed or can access, or disability support services that will be available to the young person. Measures such as these can strengthen the capacity of young people with disabilities and support them to make decisions independently.

As the Question Paper notes, the availability of appropriate support and assistance is also relevant to the requirement of communication as a component of capacity. In this regard, Legal Aid NSW would support a definition of capacity which refers to the person being able to communicate a decision, regardless of the means (for instance, whether through speech, writing, sign language, assistive technology or other means).

Qu 3.9: Professional assistance in assessing capacity

Should special provision be made in NSW law for professional assistance to be available for those who must assess a person's decision-making capacity?

How should such a provision be framed?

Legal Aid NSW notes that professional evidence of a person's capacity is essential in order to make an application for a guardianship or financial management order; NCAT will not list a matter unless such evidence is provided. Legal Aid NSW practitioners find it

[7] See principle 7(1) and (2) in Sch 1 to the *Guardianship and Administration Act 2000* (Qld).
[8] See principle 7(3) in Sch 1 to the *Guardianship and Administration Act 2000* (Qld).

relatively easy to obtain such evidence, but we acknowledge that the community does not necessarily know where to go. A training and certification system, with a published list of certified assessors, may help address this issue.

The CCLS has also observed that in some guardianship matters involving young people, the evidence relied upon to establish incapacity is old. For instance, FaCS may rely on old diagnoses of mental health conditions, which is particularly problematic for young people. A training and certification system may also address this issue and, more generally, bring about a higher quality and more consistent standard of capacity assessments.

Legal Aid NSW's preliminary view is that law reform is not necessary in order to establish such a scheme or otherwise facilitate access to professional assistance for those who must assess a person's capacity. However, we would be open to further consideration of, and consultation on, this issue.

Other preconditions that must be satisfied

Qu 4.1: The need for an order

Should there be a precondition before an order is made that the Tribunal be satisfied that the person is "in need" of an order?

If such a precondition were required, how should it be expressed?

Legal Aid NSW would support a continuing requirement to show that the person is "in need" of the relevant order (guardianship or financial management).

In addition or instead of such a provision, we recommend that the legislation specify that other less restrictive or intrusive measures have been considered or implemented and are not sufficient to meet the needs of the person. This is the course taken in jurisdictions such as Alberta, Canada.[9]

Such a provision may guard against an overly paternalistic interpretation of the legislation, and ensure that guardianship and financial management orders are used as a last resort. For instance, as noted in our response to Question 3.3, FaCS appears to routinely make applications for guardianship and financial management orders for young people who are about to exit the care system or have recently done so. These young people do not necessarily have a disability or lack capacity, but are perceived to be vulnerable to abuse, exploitation or simply poor decision-making. We are concerned that FaCS makes these applications instead of taking measures to build the young person's capacity, such as providing them with financial counselling or budgeting courses to help them manage money independently. A precondition that other less restrictive or intrusive measures have been considered or implemented may help address this concern.

[9] See *Adult Guardianship and Trusteeship Act 2008* (Alberta), ss 26(7) and 46(7).

Case study: BL

BL is a young Aboriginal woman who has recently left care. When she was 12 years old, BL was removed from the care of her parents after being subjected to childhood trauma, neglect and domestic violence. She has been diagnosed with Post Traumatic Stress Disorder, depressive disorder and panic disorder which are reflective of this trauma.

BL, like many young people in care, was awarded a victims' compensation payment. Shortly after BL turned 18, BL's Family and Community Services' (**FaCS**) caseworker made an application for a financial management order in respect of this money. The application was based on BL's mental illnesses, risk of homelessness, previous drug use and that she had previously run out of money while on Centrelink to purchase other non-essential items. At the hearing, the application was broadened to encompass BL's Centrelink payments as well as the victims' compensation payment.

At the hearing, BL's representative submitted that BL's circumstances had changed significantly since earlier in the year. BL was attending school to complete year 10, had demonstrated her ability to live off her modest Centrelink payments and had sourced stable accommodation with Housing NSW. Her representative argued that these circumstances demonstrated her current capacity to make decisions around her finances, and in particular her Centrelink payments. The representative also submitted that it would be in BL's best interests to give her access to her Centrelink payments as it would allow her to further develop and participate in society.

A financial management order was ultimately made in respect of BL's victims' compensation payment, but not in relation to her Centrelink payments, with a review of the orders to occur in 6 months' time.

Qu 4.2: A best interests precondition

Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person's "best interests"?

If such a precondition were required, how should it be expressed?

What other precondition could be adopted in place of the "best interests" standard?

Legal Aid NSW acknowledges that the term 'best interests' has paternalistic overtones, but we do not support removing this precondition to the making of a financial management order. Legal Aid NSW uses this provision to protect clients from financial management orders being made in inappropriate circumstances. Legal Aid NSW also argues for the revocation of enduring guardian appointments on the grounds that they are not in the

client's best interests.[10] We would also be open to inserting a similar precondition for the making of a guardianship order.

To mitigate any concerns about the subjective and paternalistic nature of the 'best interests' concept, the legislation could expressly state what must be considered in determining a person's best interests, as occurs in Alberta, Canada.[11] These considerations could include:

- any wishes or preferences expressed by the person, if ascertainable
- the consequences of making or not making the order, including any negative impacts of making the order on the person.

If the Commission favours the introduction of a replacement precondition, Legal Aid NSW would be open to a more positive, strengths-based term. For instance, the legislation could require that an order would promote the person's "personal and social well-being", as the Victorian Guardianship and Administration Bill 2014 proposed, or that an order would promote the person's "rights and interests". Again, such broad terms would benefit from a statutory list of factors to consider when they are determined.

Qu 4.3: Should the preconditions be more closely aligned?

Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?

If so, in relation to what orders or appointments and in what way?

Legal Aid NSW is generally supportive of reform to more closely align the preconditions for the making of alternative decision-making orders and appointments in NSW. In relation to both orders and appointments, we can see the benefit of using a common definition of capacity. For guardianship and financial management orders, we would also support common preconditions that:

- other less intrusive and less restrictive measures have been considered or implemented and are not sufficient to meet the needs of the person, and
- it is in the person's best interests, or an analogous strengths-based term, to make the order.

As noted in our response to Question 5.1 below, we would also support the Tribunal considering the same general principles and other factors (such as the view of family members), when making both guardianship orders *and* financial management orders.

[10] See *Guardianship Act 1987* (NSW), s6K.
[11] *Adult Guardianship and Trusteeship Act 2008* (Alberta), ss 26(7) and 46(7).

Qu 4.4: Other issue: Interaction with mental health legislation

Are there any other issues you want to raise about the preconditions for alternative decision-making arrangements?

The MHAS has raised an issue in relation to the preconditions for alternative decision-making arrangements for forensic patients under the *Mental Health (Forensic Provisions) Act 1990* (**MHFP Act**). The concern is that NCAT is reluctant to make guardianship orders in respect of forensic patients. The Guardianship Act does not expressly deal with this issue, or the interrelationship of its provisions and the MHFP Act. This contrasts with the MHA: section 3C of the Guardianship Act expressly confirms that a guardianship order may be made in respect of a patient within the meaning of the MHA. Section 3C also clarifies the relationship between such an order and the MHA, namely the guardianship order is effective only to the extent its terms are consistent with any determination or order made under the MHA in respect of the patient.

The Guardianship Division of NCAT appears to take the view that it is possible to make guardianship orders in respect of forensic patients, but that it may be difficult to establish the need for, or utility of, orders in those circumstances. For instance, in *ERC* [2015] NSWCATGD 14, the Tribunal stated:

> … it [is] …a matter for the Guardianship Division of NCAT to decide on a case by case basis whether to make a guardianship order for a person who is also a 'forensic patient' as defined in section 42 of the *Mental Health (Forensic Provision) Act*.
>
> As a matter of practicality, however, when an order is made under the *Mental Health (Forensic Provisions) Act* with conditions that address in detail the obligations placed on a forensic patient (such as accommodation, medication, enrolment and participation in educational, training, rehabilitation, recreational therapeutic or other programs), then there may be limited scope for decision making by a guardian appointed under the Guardianship Act with decision making authority about those same issues. The utility of a guardianship order would need to be carefully considered in such circumstances.[12]

Legal Aid NSW submits that there is a need and utility for some forensic patients to have guardianship orders made under the Guardianship Act. Firstly, we highlight that while the Mental Health Review Tribunal may order a forensic patient to live in a particular place or area, the Tribunal cannot negotiate with an accommodation provider or agree with a lessor. It may therefore be necessary to appoint a guardian to carry out practical steps in day to day decision-making.

Secondly, we highlight the role that a guardianship order can play as a transitional measure for forensic patients. A guardianship order can help manage any risk that a forensic patient poses and support their transition into the community. They provide a "less restrictive measure" that can be considered instead of extending a patient's forensic status. If less restrictive measures such as a guardianship order are not put in place, the Supreme Court may have no option other than to extend the patient's limiting term. This

[12] *ERC* [2015] NSWCATGD 14 (2 July 2015) at paras 54-55.

occurred in the case of case of *Attorney General v HRM*, where the Supreme Court considered an application to extend the limiting term of a sex offender with an intellectual disability.[13] NCAT had adjourned an application for a guardianship order until the proceedings for the extension of the man's limiting term under the MHFPA had been heard. The Court therefore could not be satisfied that a less restrictive regime was available. It commented:

> ... it does seem that the learned members of NCAT have hesitation about making orders in a case where the Supreme Court has made orders under schedule 1 of the Act and the person is subject to ongoing supervision by the Mental Health Review Tribunal. Whether or not that is a correct view of the availability, or utility, of guardianship orders, of course, is a matter which in the first instance will fall for decision by NCAT.
>
> However, it does seem to me that the difficulty in this case – approaching the level of catch-22 – is that given the virtually unanimous opinion of the experts that HRM does need help and support to manage the risk that he does present to the community, this Court cannot be satisfied in the absence of an alternative less restrictive regime already in place that the application at hand should be dismissed.[14]

This issue is becoming more relevant because historical offences are increasingly being brought before the courts. Offenders who are prosecuted are often older and/or experience comorbid chronic diseases that adversely affect their cognitive functioning and may therefore end up as forensic patients. This is likely to increase further following the Royal Commission into Institutional Responses to Child Sexual Abuse.

To help address the above issue, Legal Aid NSW recommends that the Guardianship Act be amended to expressly state that a guardianship order may be made in respect of a forensic patient as defined under section 42 of the MHFP Act. As with the MHA, the Guardianship Act could state that a guardianship order is effective only to the extent that the terms of the order are consistent with any determination or order made under the MHFP Act in respect of the patient. This would ensure that the guardianship order complements rather than replaces orders under the MHFP Act.

[13] See *Attorney General v HRM* [2016] NSWSC 1189 at paras 23 and 27.
[14] At paras 23-24.

Other factors that should be taken into account

Qu 5.1: What factors should be taken into account?

What considerations should the Tribunal take into account when making a decision in relation to:

(a) a guardianship order

(b) a financial management order?

Should they be the same for all orders?

Are there any other issues you want to raise about the factors to be taken into account when making an order?

General principles

Legal Aid NSW does not have major concerns with the current list of general principles set out in section 4 of the Guardianship Act. However, we would support modernisation and expansion of those principles, so that they better reflect the "social" model of disability and emphasise the human rights of those with impaired decision-making capacity. This includes, relevantly, the principles and approach to capacity enshrined in the United Nations *Convention on the Rights of Persons with Disabilities*. Given the experience of the CCLS, we highlight that the Convention expressly refer to the rights of children with disabilities, including the need to respect their "evolving capacities", and their right to express their views freely on all matters affecting them.[15]

We also consider it preferable that the NSW guardianship legislation principles refer to people with "impaired decision-making capacity", rather than "persons with disabilities" more generally, given the more targeted application of the legislation.

In other jurisdictions, we support the approach taken to general principles in the Queensland *Guardianship and Administration Act 2000*, and the Victorian Guardianship and Administration Bill 2014. We would be comfortable with similar principles being embodied in NSW guardianship legislation.

Other considerations for guardianship orders

Legal Aid NSW does not have any major concerns with the other factors that the Tribunal must currently consider before making a guardianship order. However, we would suggest that:

- the Tribunal consider not just the views of the person's "spouse", but also the views of family members and other people who have a close, genuine and ongoing relationship with the person
- a reference to "the practicality of services being provided to the person without the need for the making of such an order" may not be necessary if the Tribunal is

[15] See Convention on the Rights of Persons with Disabilities, arts 3 and 7.

required to be satisfied, before making an order, that other less restrictive or less intrusive means have been implemented or considered and are not sufficient.

We also acknowledge that these factors may need to be refined or amended depending on what general principles are adopted in the legislation, and any statutory definition of capacity, to ensure consistency and avoid any overlap.

Finally, Legal Aid NSW suggests that these factors be considered by the Tribunal before making a financial management order. There is no reason why the Tribunal should not consider the views of the person and their family or other support people before making such an order. Cultural and family considerations are also relevant to financial matters. Cultural factors, for instance, often influence how many is shared and spent amongst families.