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Civil Litigation Committee

Preconditions for alternative decision-making arrangements

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Response to Question Paper 1 of the NSW Law Reform Commission review of the New South Wales guardianship regime

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The NSW Young Lawyers Civil Litigation (**Committee**) makes the following submission in response to the release of Question Paper 1 (**QP1**) of the NSW Law Reform Commission's (**Commission**) review of the guardianship regime in New South Wales.

NSW Young Lawyers

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The NSW Young Lawyers Civil Litigation Committee comprises of a group of over 500 members and covers all aspects of civil litigation with a focus on advocacy, evidence and procedure in all jurisdictions. Our activities, direction and focus are very much driven by our members, which include barristers, solicitors and law students. The Committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

Response to Questions

For ease of reference, the structure of the Committee's response reflects the numbering in *Question Paper 1: Preconditions for alternative decision-making arrangements.*

3. The concept of "capacity"

3.1 Elaboration of decision-making capacity

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

The NSW Capacity Toolkit (**Toolkit**) currently provides a highly informal set of criteria on the question of capacity. The Toolkit does not have the effect of law in NSW, and the criteria are not formally endorsed in the *Guardianship Act 1987* (NSW) (**Guardianship Act**) other than by reference to the general principles in section 4. The Committee

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submits that establishing formal criteria in the legislative regime would provide an important reference point for the NSW Civil and Administrative Tribunal (**Tribunal**) when making decisions about the absence of capacity. A formal reference point would also assist in promoting consistency in Tribunal decision-making.

(2) 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?

While the Committee recognises the importance of including defined criteria for the Tribunal to reference when determining questions of capacity, it is important to leave the criteria sufficiently broad so that the Tribunal can account for the specific circumstances of each case. The Committee proposes the following wording, or wording to similar effect:

> *(1) A person lacks decision-making capacity where they are unable to make a decision (or decisions) for themselves due to an impairment or lack of functioning of the mind.*
> *(2) When determining whether a person has decision-making capacity with respect to subsection (1), the Tribunal should consider whether the person:*
>
> > *(a) understands the facts relevant to the decision;*
> > *(b) can assess the possible consequences of the decision;*
> > *(c) can understand how the consequences of the decision affect them;*
> > *(d) can explain the basis of the decision; and*
> > *(e) is able to communicate the decision, by any means.*
>
> *(3) Nothing in subsection (2) limits the factors that the Tribunal may take into account when determining whether a person has decision-making capacity.*

The above proposal imports the guidelines in the Toolkit, and draws substantially from international examples, including the *Mental Capacity Act 2005* (UK) (**MCA**).[1] The Committee believes the above wording strikes a balance between the need to allow the Tribunal sufficient discretion to meet each case independently, while also guiding its decision-making and promoting consistent decisions.

[1] *Mental Capacity Act 2005* (UK), s 2.

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3.2 Disability and decision-making capacity

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

The Committee's preliminary submission did not address this question directly. After careful consideration of the preliminary views expressed to the Commission, the Committee agrees that the current link between disability and incapacity is not aligned with changing societal perceptions of disability and Australia's international obligations under the United Nations' *Convention on the Rights of Persons with Disability* (**CRPD**). Since the introduction of the Guardianship Act in 1987, the way in which society perceives the question of disability has substantially changed. The introduction of the *Disability Discrimination Act 1992* (Cth) ushered in a new era for the rights and liberties of Australian citizens with a disability. Changes to technology have permitted those persons to engage more fully in the community, and in many cases communicate in ways that were once not possible. In that respect, the current framing of the link between disability and incapacity has become arbitrary. This is more so the case as new technology continues to develop.

3.3 Defining disability

(1) 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?

As noted at 3.2(1), the Committee does not support retaining the link between disability and incapacity in the guardianship regime in its current form. Instead, the Committee propose that disability be an *influential* factor in the Tribunal's determination of whether a person lacks decision-making capacity to merit an order under the Guardianship Act.

In any case, the Committee supports a *restricted* definition of disability. A broad-based definition, such as that included in the *Disability Discrimination Act 1992* (Cth)[2] and *Anti-Discrimination Act 1977* (NSW) (**ADA**),[3] is simply inappropriate where the outcome involves such a significant impact upon a person's individual liberty. By way of example, the ADA definition includes, *"…the presence in a person's body of organisms causing or*

[2] *Disability Discrimination Act 1992* (Cth), s 4.
[3] *Anti-Discrimination Act 1992* (NSW), s 4.

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capable of causing disease or illness".[4] This type of language reflected in the guardianship regime could be overly exploitative. Any definition of disability, therefore, would need to be limited only to those conditions where the subject lacks the capacity to make a decision, or communicate a decision. A focus on the mental capacity of the individual, rather than a reference to any disability, would ensure that the new guardianship regime reflects the current societal perception of disability.

In saying this, however, the Commission should be careful to avoid conflating mental illness with incapacity. As the Committee on the Rights of Persons with Disabilities recently noted, *"perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity"*. On this basis the Committee does not support the continued operation of subsection 3(2)(c) of the Guardianship Act, which defines disability by reference to the *Mental Health Act 2007* (NSW) (**Mental Health Act**). This reference draws no distinction between the regime imposed by the Mental Health Act and that imposed by the Guardianship Act. It presumes, incorrectly, that an individual determined as "mentally ill" would lack decision-making capacity.

3.4 Acknowledging variations in capacity

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

The Committee is of the view that while capacity may change, it is not essential that this point be reflected in the legislation. Rather, the acknowledgment can be implied through legislative provisions that empower the Tribunal to hand down tailored orders that reflect the particular circumstances of the subject, and through other measures.

(2) How should such acknowledgments be made?

The Committee supports measures that implicitly acknowledge that decision-making capacity may change, such as Tribunal powers that:

- allow the Tribunal to specifically tailor orders to meet the requirements of the person subject to the order; and

[4] Ibid, s 4.

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- powers to set automatic review periods in orders that require regular review of the conditions imposed on the person.[5]

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

See above at 3.4(1) and (2).

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

See above at 3.4(1) and (2).

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

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

The preliminary view of the Committee is that this should be the case. A multiplicity of definitions for decision-making capacity is prone to complicate a system and make it difficult for ordinary citizens to navigate. The Committee's view is that plain and consistent language is preferred throughout the guardianship regime.

The Committee notes that it is more difficult to obtain a guardianship order for an individual than a financial management order. In satisfying the requirement for a guardianship order, it must be shown that a person is *"in need of a guardian",* who, *"because of a disability, is totally or impartially incapable of managing his or her person"*.[6] In contrast, a financial management order may be made without the need to show disablement.[7] To satisfy the requirement for a financial management order, the Tribunal must instead be satisfied that:

> *(a) the person is not capable of managing [their financial] affairs; and*

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[5] NSW Young Lawyers Preliminary Submission, Submission Number PGA32 to NSW Law Reform Commission, *Review of the Guardianship Act 1987*, 8.

[6] *Guardianship Act 1987* (NSW), s 3.
[7] Ibid, s 25G.

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(b) *there is a need for another person to manage [their financial] affairs on the person's behalf; and*

(c) *it is in the person's best interests that the order be made.*

A guardianship order necessarily entails a greater restraint on the decision-making ability of an individual, and thus carries with it a requirement to prove that the individual maintains some form of "disability" that causes them to lack decision-making capacity. As noted at 3.2(1) above, in light of new changes to the way in which society views "disability", Australia's signature to the CRPD, and in the general interests of a more cost-effective and consistent guardianship regime, a unification of the definition of decision-making capacity is merited.

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

The definitions could be aligned by reference to a universal definition of "decision-making capacity". In that respect, the Committee restates its proposal at 3.1(2) above. In practice, the Commission could consider removing the differentiation between a guardianship order and financial management order in the legislation, and instead replacing those orders with a generic order that may contain conditions that the order be limited to financial, health or other guardianship matters. That generic order would need to comply with the universal definition of "decision-making capacity" proposed at 3.1(2) and the preconditions discussed below.

3.6 Statutory presumption of capacity

(1) Should there be a statutory presumption of capacity?

As the Committee put forward in its preliminary submission to the Review, while there is a presumption of legal capacity at common law,[8] this should be enshrined in the guardianship regime by the insertion of a new provision.[9] QP1 notes that NSW is the only jurisdiction in Australia that does not have a statutory presumption of capacity:[10]

[8] See *Borthwick v Carruthers* (1787) 1 Term Reports 648; *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432, citing *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 3 All ER 162, 169.

[9] NSW Young Lawyers Preliminary Submission, Submission Number PGA32 to NSW Law Reform Commission, *Review of the Guardianship Act 1987*, 5.

[10] NSW Law Reform Commission, Question Paper 1: Preconditions for alternative decision-making arrangements, *Review of the Guardianship Act 1987*, 13.

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> *Guardianship law in every other Australian State and Territory also provides that the relevant court, tribunal or board cannot order an alternative decision-making arrangement unless it is satisfied of a number of matters, including most relevantly for this Chapter, that a person has a specified level or form of incapacity.*

In the view of the Committee, a statutory presumption of capacity would serve two purposes. First, it would provide an additional layer of protection over and above the common law presumption. Secondly, it would ensure that Australia complies with its obligations under Article 14 of the CRPD which include, *inter alia*, that signatories to the Convention ensure that persons with disabilities:[11]

> a. *Enjoy the right to liberty and security of the person;*
> b. *Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*

Critics of the inclusion of a statutory presumption may suggest that this statutory presumption risks delaying the making of an urgent order. On the contrary, the Committee believe that this presumption would not unduly bind the Tribunal, but rather ensure it upholds a minimum standard of individual autonomy in its decision-making.

A statutory presumption needs to be carefully constructed to avoid the "all or none" construct of capacity that has been the prevailing standard since the common law presumption. This is not only supported by legal literature highlighted in QP1 and relevant Australian Law Reform Commission papers, but also in relevant scientific literature. For example, Moye *et al* wrote in 2007 that:[12]

> *In recent years, the concept of capacity in guardianship has moved away from a global, "all or none" construct toward a more finely tuned, functional definition (Moye, 2003; Sabatino & Basinger, 2000).*

[11] *Convention on the Rights of Persons with Disability*, New York, signed 30 March 2007, [2008] ATS 12 (entered into force 16 August 2008), art 14.
[12] J Moye et al 'A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship' (2007) 47 *The Gerontologist* 5, 591-603.

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The Committee supports a simple presumption of capacity. It need not be complex. It may take the form of the Queensland equivalent provision, which merely provides: *"An adult is presumed to have capacity for a matter"*.[13]

The Commission might, however, consider adding an additional provision similar to that found in section 1 of the MCA, which provides: *"A person is not to be treated as unable to make a decision merely because he makes an unwise decision"*.[14] This principle, the Committee believes, should be reflected in the relevant legislation. It reflects the ongoing notion that guardianship should be a measure of last resort and that every person should be capable of making independent decisions about their own lives.

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

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

The Committee restates its proposal at 3.6(1) that the prospect of an "unwise decision" not lead to the conclusion that a person lacks capacity. The Committee does not believe that further elaboration in this area is necessary. In any case, the Committee submits that any problems with assessing capacity that this proposal is intended to resolve are resolved by the inclusion of a statutory presumption of capacity, as suggested in the Committee's preliminary submission and at 3.6.[15]

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

See 3.7(1) above.

3.8 The relevance of support and assistance to assessing capacity

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

The Committee is of the view that the availability of support and assistance is highly relevant to determining whether an individual has decision-making capacity.

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[13] *Guardianship and Administration Act 2000* (Qld), s 11.
[14] *Mental Capacity Act 2005* (UK).
[15] NSW Young Lawyers Preliminary Submission, Submission Number PGA32 to NSW Law Reform Commission, *Review of the Guardianship Act 1987*, 5.

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Overseas jurisdictions shed light on what is acceptable to consider. In England and Wales, for example, the availability of support and assistance, including the ways in which a decision has been communicated, are relevant criteria in a capacity assessment. The guidance of the National Health Service (**NHS**) suggests that *"before deciding an individual lacks capacity to make a particular decision, appropriate steps must be taken to enable them to make the decision themselves"*.[16] The NHS recommends that other methods of communication (such as non-verbal methods), and whether a family member, carer, or advocate is available to assist the person in making a decision, be considered.[17]

Apart from being relevant to the assessment of capacity, the availability of appropriate support and assistance should be taken into account in the procedures of the Tribunal and in consideration of what orders ought to be made. For example, by requiring the Tribunal to consider whether or not there is a different way to communicate with a person, that person is afforded a greater opportunity to participate in the process. If guardianship is required, a less restrictive guardianship arrangement can be provided instead. The Committee believes this arrangement would bring the process in alignment with the principles enshrined in the CRPD.

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

Practically, the statute does not need to specifically list each and every point to consider in relation to the support and assistance available. The Committee instead proposes that a general provision be added to the Guardianship Act requiring that the Tribunal consider support and assistance when determining the question of decision-making capacity. A non-exhaustive list of criteria could also be included in this provision. The following wording, or wording to similar effect, could be included:

> *When determining whether a person has decision-making capacity, the Tribunal must consider the support and assistance already available to that person.*

[16] National Health Service, *What is the Mental Capacity Act?* (no date) <http://www.nhs.uk/Conditions/social-care-and-support-guide/Pages/mental-capacity.aspx>
[17] Ibid.

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3.9 Professional assistance in assessing capacity

(1) 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?

As present, the Tribunal has the power to inform itself as it deems fit.[18] This power is dependent on, *inter alia*, the resources and funding at the disposal of the Tribunal. The Committee is supportive of a proposal to include a special provision in the NSW guardianship regime to make professional assistance available to the Tribunal, provided that the provision does not unduly burden the Tribunal in situations where the incapacity of the individual in question is clear.

The Committee restates the comments made in its preliminary submission emphasising that an effective guardianship regime is as much a matter of funding as it is about an appropriate legislative framework. While the Committee endorses a special provision providing for the availability of professional assistance, it is unclear how this new provision substantially improves the regime, considering a provision to this effect is already available in the Tribunal's procedural statute.

(2) How should such a provision be framed?

If such a provision were to be included in the new regime, the Committee submits that it should be worded in terms that allow the Tribunal to request professional assistance where it forms the view that the capacity of the individual in question is *uncertain*. Where capacity is uncertain, the Tribunal should be empowered to call on professional assistance to determine that question.

The Committee does not support the framing of this provision to *require* the Tribunal to seek professional assistance. This would unnecessarily increase the cost of the guardianship regime.

The Committee proposes that the wording of the provision could include the following, or words to similar effect:

[18] *Civil and Administrative Tribunal Act 2013* (NSW), s 38(2).

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Where the Tribunal is uncertain as to whether a person has decision-making capacity, it may at its discretion request professional assistance to resolve the question.

3.10 Any other issues?

(1) Are there any other issues you want to raise about decision-making capacity?

The Committee does not raise any further issues.

4. Other preconditions that must be satisfied

4.1 The need for an order

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

The Committee is of the view that the Tribunal should be satisfied that a person is "in need" of an order before an order may be handed down. This aligns with the requirements for guardianship and financial management orders under the current regime, and with existing legislation in other states and territories.[19] A protective threshold of this type is in alignment with Australia's obligations under the CRPD, *inter alia*, that parties *"shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life"*.[20]

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

See the Committee's proposal at 4.2(2) above.

4.2 A best interests precondition

(1) 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"?

The Committee acknowledges the criticism highlighted at page 33 of QP1 that a "best interests" precondition may be overly paternalistic in its approach.[21] In saying this, however, the Committee believes that a "best interests" requirement would add a further protective threshold that would need to be met before the Tribunal imposes an order, which would similarly align with Australia's obligations under the CRPD. In particular, it

[19] NSW Law Reform Commission, Question Paper 1: Preconditions for alternative decision-making arrangements, *Review of the Guardianship Act 1987*, 33.
[20] *Convention on the Rights of Persons with Disability*, New York, signed 30 March 2007, [2008] ATS 12 (entered into force 16 August 2008), art 12.
[21] NSW Law Reform Commission, Question Paper 1: Preconditions for alternative decision-making arrangements, *Review of the Guardianship Act 1987*, 33.

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would go some way to meeting the requirement under Article 14 of the CRPD that persons with a disability are, *"not deprived of their liberty unlawfully or **arbitrarily**"* [emphasis added].[22]

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

The Committee proposes that any "best interests" precondition should be linked to the abovementioned "in need" precondition discussed at 4.1(1) above. The Committee submits that it is unnecessary to distinguish between two separate provisions in that regard. Possible wording for this provision could include the following, or words to similar effect:

> *Before making an order under this Act, the Tribunal must be satisfied that:*
>
> *(a) the person is in need of the order proposed; and*
>
> *(b) it would be in the best interests of the person for the order to be imposed.*

This proposal, combined with the precondition proposal at 4.1 above, in effect would bring the preconditions for Tribunal orders in line with those currently in place for financial management orders. This proposal aligns with the 2010 suggestion of the NSW Legislative Council Standing Committee on Social Issues.[23]

4.3 Should the preconditions be more closely aligned?

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

As is noted at 3.5(1) above, the Committee in principle supports the alignment of the guardianship regime under a unified definition of "decision-making capacity". This view extends to the alignment of the preconditions required to be met before an order can be made.

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[22] *Convention on the Rights of Persons with Disability*, New York, signed 30 March 2007, [2008] ATS 12 (entered into force 16 August 2008), art 14.

[23] Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) 6.58-6.59.

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

The Committee submits that all orders under the new guardianship regime should require the same preconditions to be met, by reference to a common provision, in order to promote simplicity and consistency in Tribunal decision-making.

4.4 Any other issues?

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

In the alternative, the Committee proposes that the Commission consider a "last resort" precondition, similar to that enshrined in the UK's MCA. Section 1 of the MCA requires the following principle to be met prior to the making of an order:

> *…regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*

Inter alia, the provision requires that the UK Court of Protection consider the restriction of liberty a measure of last resort. At present, the Committee sees no reason why such a precondition should not be included in the new guardianship regime, as it would require the Tribunal to have regard to many of the factors discussed in QP1, including the support and assistance already available to that person.

5. Other factors that should be taken into account

5.1 What factors should be taken into account?

(1) What considerations should the Tribunal take into account when making a decision in relation to: (a) a guardianship order and (b) a financial management order?

As noted in the Committee's preliminary submission, the general principles of the Guardianship Act appear to be consistent with Australia's international obligations.[24] In that respect, the Committee propose retaining section 4 of the Guardianship Act in its current form, or in a similar form. The Committee submits that it is important that the new

[24] NSW Young Lawyers Preliminary Submission, Submission Number PGA32 to NSW Law Reform Commission, *Review of the Guardianship Act 1987*, 4.

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regime retain this existing link between the overall decision-making powers of the Tribunal and the general principles upholding the dignity and worth of persons.

(2) Should they be the same for all orders?

The Committee supports the general principles of the Guardianship Act applying to all orders of the Tribunal.

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

The Committee does not raise any further issues.

Concluding Comments

NSW Young Lawyers and the Committee thanks you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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