



Disability Council NSW

Submission to

Law Reform Commission

Review of the *Guardianship Act 1987*

Question Paper 3:

The role of guardians and financial managers

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Locked Bag 4028, Ashfield NSW 2131

Ph: (02) 8879 9100 www.disabilitycouncil.nsw.gov.au

Email: disabilitycouncil@fac.s.nsw.gov.au

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Disability Council NSW

The Disability Council NSW (also known as ‘the Council’) was established under the *Community Welfare Act 1987* (NSW), and was re-constituted under the *Disability Inclusion Act 2014* (NSW) on 3 December 2014. The *Disability Inclusion Act 2014* provides a rights- based legislation framework for the Council.

The Council's main responsibilities under the *Disability Inclusion Act 2014* are to:

- Monitor the implementation of Government policy;
- Advise the Minister on emerging issues relating to people with disability, and about the content and implementation of the NSW State Disability Inclusion Plan and Disability Inclusion Action Plans;
- Advise public authorities about the content and implementation of Disability Inclusion Action Plans;
- Promote the inclusion of people with disability in the community and promote community awareness of matters concerning the interests of people with disability and their families;
- Consult with similar councils and bodies, and people with disability; and
- Conduct research about matters relating to people with disability.

The Council has 12 members, including a Chairperson and Deputy Chairperson. Each member is appointed for up to four years by the Governor of NSW on the recommendation of the Minister for Disability Services.

Members are selected to be on Council because:

- They live with a disability
- They are an expert on disability
- They want to improve the lives of people with disability.

The Council's members have a variety of disabilities and backgrounds. Members include people from Aboriginal or cultural and linguistically diverse backgrounds (CALD), young people and also people from rural and regional NSW. In addition, the Council includes members who are carers or family members of people with disability.

The Council is funded and resourced by the NSW Government through the NSW Department of Family and Community Services (FACS) and is supported by a secretariat team within FACS.

The Council members meet bi-monthly.

Executive Summary

There is a fundamental need for a decision-making framework recognised by guardianship legislation that is consistent with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and other human rights instruments and provides a continuum of supports that people can access to assist them to make different decisions at different times. The decision-making framework should be supported by resources that actually build the capacity of people with disability to make decisions and drive cultural change to increase recognition of the human rights and decision-making abilities of people with disability.

The Council expects a decision-making framework that:

- is consistent with Australia's obligations under the UNCRPD and other international human rights instruments
- is underpinned by more expansive, comprehensive and human rights centred principles than the current general principles in section 4 of the Guardianship Act
- recognises and allows for the reality that capacity is decision-specific and can change over time
- applies on equal terms to all members of the population who may have difficulty making decisions, rather than specifying impairment or disability as a threshold for application
- is clear about the relationship between guardianship law in NSW and the National Disability Insurance Scheme (NDIS) nominee and other Commonwealth schemes
- mandates and actively promotes alternatives to substitute decision-making, including supported decision-making models that are drawn from local and international models of best practice
- does not over-formalise or over-regulate supported decision-making arrangements
- provides a representative decision-making scheme that can be implemented where a person does not have capacity to make particular decisions and will require the representative to exercise their powers to balance the personal and social wellbeing of the person with that person's will and preference
- provides mechanisms for ensuring accountability of decision makers appointed in a representative decision-making scheme, including monitoring and regular review of orders and decisions
- safeguards people with disability against abuse, neglect and exploitation
- explicitly addresses the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision-making incapacity.

This submission responds specifically to Question Paper 3, as the Council's preliminary submission¹ spoke to issues covered in Question Paper 2. The Council has not responded to all questions.

¹ http://www.disabilitycouncil.nsw.gov.au/_data/assets/pdf_file/0009/369045/Disability-Council-NSW-Preliminary-Submission-to-the-Review-of-the-Guardianship-Act-1987.pdf

Introduction

The Council welcomes the opportunity to make a submission to the review of the *Guardianship Act 1987* (the Guardianship Act) – The role of guardians and financial managers, question paper 3.

The Council congratulates the NSW Law Reform Commission for actively consulting with people with disability and their representative organisations in considering the legislative changes and resources required to enable people with disability to make decisions and exercise control over their lives.

The review of the Guardianship Act comes at a critical time for the rights of people with disability. Under the NDIS, people with disability, many for the first time, will have choice and control over the services and supports they need to make progress towards their goals. It is more important than ever that the decision-making framework reflects and, as much as possible, upholds the human rights of people with disability and facilitates self determination.

In 2014 the Disability Council consulted widely with people with disability about the NSW National Disability Strategy Implementation Plan (2012-2014).¹ In these consultations, concerns were raised about the guardianship system, indicating a degree of dissatisfaction. It was felt that some aspects of the system were confusing, demoralising and belittling, and were not in keeping with the philosophical framework of the UNCRPD. In short, concerns reflected the prevailing cultural norm of low expectations of the capacity of people with disability to make decisions about how they would like to live their lives.

The Council has considered recent developments in law, policy and practice in Australia and internationally as well as results from these consultations to inform this submission.

Questions

The role of guardians and financial managers – Question Paper 3

2. Who can be a guardian or a financial guardian?

A guardian² or financial manager should ideally be a person who is already in the person's life, in either a paid or unpaid capacity, and who has an established relationship with that person based upon trust and respect.

The person with disability should have the right to participate in the decision as to who is appointed as their guardian, where possible.

A guardian or financial manager must implement person-centred principles and have the ability to support the person to make decisions wherever possible. The person with disability must have the right to participate in all decisions made about them.

In all instances a guardian or financial guardian should annually sign a code of conduct, including a declaration of all potential, perceived or actual conflicts of interest.

2.1 Who can be an enduring guardian?

- 1) Who should be eligible?
- 2) Who should be ineligible?

The person with disability should have the right to choose, where possible, who can be an enduring guardian. This could include family, friends or paid or unpaid support workers. This would require an expansion of the current eligibility criteria for enduring guardians. Rapport and trust between the person and their guardian is essential – as noted above, ideally the guardian will be someone who is already familiar with the person with disability and their day-to-day needs and wishes. However, all enduring guardians should be subject to a 'suitable person' test prior to taking up this role.

Persons **ineligible** for this role should include persons:

- with a criminal record
- who have filed or are filing for bankruptcy
- who are unable or unwilling to provide supported decision-making
- who have a conflict of interest which precludes them, or appears to preclude them, from placing the person's interests ahead of their own.

The Council supports a Tribunal as a regulator and safety mechanism, especially where the person with disability prefers an independent person to be appointed as their guardian.

² It should be noted that some people with disability prefer the term 'advocate' to 'guardian'. For consistency, this submission uses the term 'guardian'.

2.2 Who can be a tribunal-appointed guardian?

- 1) What should the Tribunal consider when deciding whether to appoint a particular person as guardian?**
- 2) Who should be ineligible to act as a guardian?**

2.3 When should the Public Guardian be appointed?

- 1) Should the Tribunal be able to appoint the Public Guardian as guardian?**
- 2) Should there be any limits to the Tribunal's ability to appoint the Public Guardian? If so, what should these limits be?**

The Public Guardian should be appointed as a last resort when:

- a person requires a guardian, and
- the person does not have a suitable person who could be a guardian (for example, where the person is socially isolated, where there is conflict within the family, where the people in the person's life are ineligible).

Persons **ineligible** for this role should include persons:

- with a criminal record
- who have filed or are filing for bankruptcy
- who are unable or unwilling to provide supported decision-making
- who have a conflict of interest which precludes them, or appears to preclude them, from placing the person's interests ahead of their own.

2.4 Should community volunteers be able to act as guardians?

- 1) What could be the benefits and disadvantages of a community guardianship program?**
- 2) Should NSW introduce a community guardianship program:**
 - a) who should be able to be a community guardian?**
 - b) how should community guardians be appointed?**
 - c) who should recruit, train and supervise the community guardians?**

The Department of Human Services, Victoria has run a community guardianship program that appears to have worked well. Should further investigation prove that the Victorian program has been successful, safe and acceptable for people with disability, NSW should consider implementing a similar program.

Under a community guardianship program, volunteers should be:

- recruited subject to the same criteria outlined in 2.2 above
- required to undertake training and assessment as part of the recruitment process, including learning about the powers and functions of a guardian and gaining a solid understanding of the Guardianship Act
- required to spend a minimum amount of time to develop a rapport with a particular person prior to undertaking the role

- subject to supervision
- required to demonstrate transparency on all decisions they support a person to make.

Regular checks should be employed to ensure the safety of the person with disability and that they are participating to the fullest extent in decisions.

Question 2.5 Who can be a private manager?

- 1) What should the Tribunal consider when deciding whether to appoint a particular person as a private manager?**
- 2) Should the Guardianship Act include detailed eligibility criteria for private managers or is the current 'suitable person' test sufficient?**
- 3) Should the same eligibility criteria apply to private guardians and private managers?**
- 4) What are the benefits and disadvantages of appointing private corporations to act as financial managers?**
- 5) Should the Tribunal be able to appoint a corporation to be a private manager? If so, under what circumstances should this occur?**

The eligibility criteria for the appointment of a private manager should not be overly detailed, with the Council believing that the 'suitable person' test is sufficient.

As with individual guardians, corporations should be required to declare their interests to ensure there are no conflicts of interest, whether potential, perceived or actual. The Tribunal must ensure there are safeguards in place in their appointment of private corporations. The Tribunal should provide ways to ensure private managers are acting as per their orders and in the best interest of the person.

2.6 Should the NSW Trustee be appointed only as a last resort?

- 1) Should the Guardianship Act state explicitly that the Tribunal can only appoint the NSW Trustee as a last resort?**
- 2) If so, how should this principle be expressed in the Act?**

The Council believes the NSW Trustee should only be appointed as the last resort, and that the Act should state this explicitly.

Ideally, the Act would include a list of alternative options that need to be exhausted prior to the appointment of the NSW Trustee. For example, the NSW Trustee could be appointed if:

- The person with disability requests it specifically
- There are no suitable persons in that person's life, due to family conflict, conflicts of interest or other factors.

2.7 Should the Act include a succession planning mechanism?

- 1) Should the Guardianship Act allow relatives, friends and others to express their views on who should be a person's guardian or financial manager in the future?**
- 2) What could be the benefits and disadvantages of such a succession planning mechanism?**
- 3) When deciding to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?**

The Council believes the Act should include a succession planning mechanism, contributing to continuity of support and services for the lifespan of the person. The Tribunal should be required to consider the wishes expressed by the person under guardianship in a succession planning statement. These wishes should only be disregarded if there are justifiable grounds for doing so, such as where the person is being unduly influenced, or the proposed guardian is unable or unwilling to prioritise the will and preference of the person, or they have previously compromised the person's safety.

Question 3: What powers and functions should enduring guardians have?

3.1 What powers and functions should enduring guardians have?

An enduring guardian should have the same powers and function that all guardians are granted. All guardians should implement a person-centred approach, and a rights-based decision-making framework should be utilised for all decisions.

3.2 Should the Tribunal be able to make plenary orders?

- 1) What are the benefits and disadvantages of allowing the Tribunal to make plenary orders?**
- 2) Should the Guardianship Act;
 - a) continue to enable the Tribunal to make plenary orders**
 - b) require the Tribunal to specify a guardian's powers and functions in each guardianship order, or**
 - c) include some other arrangement for granting powers?****

The Tribunal should be able to make plenary orders for a person who has no capacity and as a last resort, or where a person specifically requests it. The powers and functions of a Tribunal-appointed guardian should be specified, to enable a guardian to act with maximum efficiency.

3.3 What powers and functions should Tribunal-appointed guardians have?

- 1) should the Guardianship list the powers and functions that the Tribunal can grant to a guardian? If so, what should be included on the list?**
- 2) Should such a list:
 - a) set out all the powers that a guardian can exercises or,**
 - b) should it simply contain examples?****

The powers and functions Tribunal-appointed guardians should be consistent with other guardians, encouraging maximum efficiency. The Tribunal should list the powers and functions granted to a guardian and should include examples and scenarios, as well as a list of accessible resources for guardians and persons under guardianship.

3.4 Are there any powers and functions that guardians should not be able to have?

- 1) Should the Guardianship Act contain a list of powers and functions that the Tribunal cannot grant to a guardian?**
- 2) If so, what should be included in this list?**

Guardians should not have the power to make decisions about personal relationships, such as whether a person can marry.

3.5 What powers and functions should financial managers have?

- 1) What powers and functions should be available to a private manager?**
- 2) What powers and functions should the NSW Trustee have when acting as a financial manager?**
- 3) Are the current arrangements for granting powers to private managers adequate? If not, how should powers be granted to private managers?**
- 4) Should the legislation list the powers that a financial manager cannot exercise?**

All financial issues should remain with the financial manager. The financial manager should employ a person-centred approach and consider, where possible, a person's will and preference. The regulations should be consistent across the board for financial managers, private managers and for the NSW Trustee functioning as financial manager.

The list should include the use of a third party expert for complex decisions, or those decisions that have a significant financial impact for the person with disability.

3.6 Should the roles of guardians and financial managers remain separate?

- 1) What are the benefits and disadvantages of keeping the roles of guardians and financial managers separate?**
- 2) What are the benefits and disadvantages of combining the roles of guardians and financial managers?**
- 3) Should the roles of tribunal-appointed guardians and financial managers remain separate?**

Combining the two roles would, within a supported decision-making framework, allow for more integrated decision-making to benefit the person with disability.

However, combining the two roles increases the risk that a person becomes subject to abuse or undue influence from the one person exercising both roles, necessitating the implementation of regular checks and other safeguards.

Question 4: What decision-making principles should guardians and financial managers observe?

4.1 What decision-making principles should guardians and financial managers observe?

A supported decision-making model should be implemented that is consistent with Australia's obligations under the UNCRPD's Article 12³ and other international human rights instruments, and which provides a continuum of supports that people can access to assist them to make different decisions at different times. The decision-making framework should be supported by resources that actually build the capacity of people with disability to make decisions and drive cultural change to increase recognition of the human rights and decision-making abilities of people with disability.

The decision-making model should be based upon the National Decision-Making Principles and Guidelines recommended by the Australian Law Reform Commission⁴. These recommendations contain principles and legal frameworks concerning individual decision-making.

The aims of any decision-making model must be that:

- supported decision-making is encouraged
- representative decision-makers are appointed only as a last resort
- the will and preferences of a person are considered in any decision that affects a person's life, even if these wills and preferences are seen as the 'wrong' wills and preferences
- laws and legal frameworks contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

4.2 Should guardians and financial managers be required to give effect to a person's 'will and preferences'?

4.4 Should NSW adopt a structured will and preference model?

A person's will and preferences must form the basis of all decisions made for a person by a guardian or financial manager. The use of an appropriate decision-making framework will help guardians and financial managers to uphold person-centred principles and balance a person's will and preference against their wellbeing and safety in a transparent manner and balanced approach. People with disability must be given the opportunity to fail and take risks, opportunities which other adults take for granted.

³ Article 12, United Nations Convention on the Rights of People with Disability (2008)
<http://www.refworld.org/docid/45f973632.html> (UNCRPD)

⁴ <https://www.alrc.gov.au/publications/3-national-decision-making-principles/national-decision-making-principles>
Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability.

Additional comments

It has been brought to the attention of the Council that the Powers of Attorney Unit is located within the Department of Finance, Services and Innovation with the Land and Properties Information Office, rather than in the Guardianship Division within the NSW Department of Justice.

On the face of it, this would appear to increase the possibility of confusion and unnecessary delays. The Council considers that it would be useful to have at least one officer from the Powers of Attorney Unit based in the Guardianship Division for immediate advice and assistance and so that the Powers of Attorney units witness first hand what the issues for guardianship.

Council would be grateful to receive further information on this issue, and to discuss it further with the Law Reform Commission or other sections of Justice.