

Response to Submissions Re Guardianship Review

Submissions for Paper 2

Question 5.1 Formal supported decision-making

- (1) Should NSW have a formal supported decision-making model?
- (2) If there were to be a formal supported decision-making model, how could we ensure there was an appropriate balance between formal and informal arrangements?
- (3) If there were not to be a formal supported decision-making model, are there any ways we could better recognise or promote informal supported decision-making arrangements in NSW law?

Submission:

- (1) Yes.
- (2) No comment.
- (3) No comment.

Question 5.2 Key features of a formal supported decision-making model

- (1) Should NSW have formal supporters?
- (2) If so, should NSW permit personal or tribunal appointments, or both?
- (3) Should NSW have formal co-decision-makers?
- (4) If so, should NSW permit personal or tribunal appointments, or both?
- (5) What arrangements should be made for the registration of appointments?

Submission:

- (1) Yes.
- (2) Only Tribunal appointments.
- (3)-(5) No comment.

Question 5.3 Retaining substitute decision-making as an option

- (1) If a formal supported decision-making framework is adopted, should substitute decision-making still be available as an option?

- (2) If so, in what situations should substitute decision-making be available?
- (3) Should the legislation specify what factors the court or tribunal should consider before appointing a substitute decision-maker and, if so, what should those factors be?

Submission:

- (1) Yes.
- (2) Only where there is no other alternative.
- (3) Yes when all other alternatives have been eliminated.

Question 5.4 Other issues

Are there any other issues about alternative decision-making models you would like to raise?

Submission:

No.

Question 6.1: When supporters and co-decision-makers can be appointed

- (1) What requirements should be met before a person needing support can appoint a supporter or co-decision-maker?
- (2) What requirements should be met before a court or tribunal can appoint a supporter or co-decision-maker?

Submission:

- (1) When an informal appointment is not appropriate.
- (2) Check that the situation needs a formal structure.

Question 6.2: Eligibility criteria for supporters and co-decision-makers

What, if any, eligibility criteria should potential supporters and co-decision makers be required to meet?

Submission:

- (1) All of the eligibility criteria set out in paragraph 6.5.

Question 6.3: Characteristics that should exclude potential appointees

What, if any, characteristics should exclude particular people from being supporters or co-decision-makers?

Submission:

- (1) All of the characteristics set out in paragraphs 6.7-6.8.

Question 6.4: Number of supporters and co-decision-makers

What limits, if any, should there be on the number of supporters or co-decision makers that can be appointed?

Submission:

- (1) Only one should be allowed.

Question 6.5: Public agencies as supporters or co-decision-makers

(1) What are the advantages and disadvantages of allowing public agencies to be appointed as supporters or co-decision-makers?

(2) In what circumstances should public agencies be able to act as supporters or co-decision-makers?

Submission:

- (1) Advantages and disadvantages itemised in 6.12-6.20.

Question 6.6: Paid workers and organisations as supporters and co decision-makers

(1) What are the advantages and disadvantages of allowing paid care workers to be appointed as either supporters or co decision-makers?

(2) In what circumstances should paid care workers be appointed as supporters or co-decision-makers?

(3) What are the advantages and disadvantages of allowing professional organisations to be appointed as either supporters or co-decision-makers?

(4) In what circumstances should professional organisations be appointed as supporters or co-decision-makers?

Submission:

- (1) As set out in 6.21- 6.26.
- (2) None.
- (3) As set out in paragraphs 6.21-6.26.
- (4) None.

Question 6.7: Volunteers as supporters and co-decision-makers

- (1) What could be the advantages and disadvantages of appointing community volunteers as supporters?
- (2) What could be the advantages and disadvantages of appointing community volunteers as co-decision-makers?
- (3) In what circumstances do you think community volunteers should be appointed as supporters or co-decision-makers?

Submission:

- (1)-(2) As set out in paragraphs 6.27-6.31.
- (3) None.

Question 6.8: Powers and functions of supporters

- (1) What powers and functions should the law specify for formal supporters?
- (2) What powers or functions should the law specifically exclude for formal supporters?

Submission:

- (1) Only have access to personal matters.
- (2) Entering into specific financial transactions.

Question 6.9: Powers and functions of co-decision-makers

- (1) What powers and functions should the law specify for formal co-decision makers?
- (2) What powers and functions should the law specifically exclude for formal co-decision-makers?

Submission:

- (1) Access personal information and discuss this with supported person.
- (2) As set out in paragraphs 6.61-6.62.

Question 6.10: Duties and responsibilities of supporters and co-decision makers

- (1) What duties and responsibilities should the law specify for formal supporters?
- (2) What duties and responsibilities should the law specify for formal co-decision makers?
- (3) What duties and responsibilities should the law specifically exclude for

formal supporters and formal co-decision-makers?

Submission:

- (1)-(2) Those recommended by the VLRC contained in paragraph 6.63.
- (3) Those set out in paragraph 6.65.

Submissions for Paper 3.

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

Question 2.1: Who can be an enduring guardian?

- (1) Who should be eligible to be appointed as an enduring guardian?
- (2) Who should be ineligible to be appointed as an enduring guardian?

Submission:

- (1) An adult who is not a paid to provide professional services to the person.
- (2) A person not in the category contained in paragraph (1).

Question 2.2: Who can be a tribunal-appointed guardian?

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

Submission:

- (1) Persons meeting the criteria currently adopted by Guardianship Tribunal as set out in paragraph 2.17 and 2.18 as well as further criteria set out in paragraph 2.20.
- (2) Those persons who do not meet the criteria in (1) above as well as a paid carer or health provider.

Question 2.3: When should the Public Guardian be appointed?

- (1) Should the Tribunal be able to appoint the Public Guardian as a guardian? If so, when should this occur?

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

Submission:

- (1) As a guardian of last resort or when there is serious family conflict.
- (2) Yes where the criteria in paragraph (1) are not met.

Question 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?**
- (3) **If NSW does 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?**

Submission:

- (1) Any such program would need to be closely monitored by the Public Guardian to have the advantages outweigh the disadvantages.
- (2) Only if the assessment recommended in paragraph 2.32 reaches that conclusion.
- (3) These questions should be more appropriately answered by the assessment.

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? If so, what should these common criteria be?
- (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?

Submission:

- (1) Whether they meet the “suitable person” test as currently used by the Supreme Court.
- (2) The current “suitable person” test is sufficient.
- (3) No comment.
- (4) No comment.
- (5) Yes only where the Supreme Court makes the appointment after applying its current tests.

Question 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?

Submission:

- (1) Yes providing it includes the other criteria recommended in submission 2.3 (1) above.
- (2) No comment.

Question 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 who to appoint, should the Tribunal be required to give effect to the wishes expressed in a succession planning statement?

Submission:

- (1) Yes.
- (2) The arbitrator would be aware of the attitude of the family etc. However this may put undue pressure on the arbitrator to enact the decision which is now being made in changed circumstances.
- (3) No.

3. What powers and functions should guardians and financial managers have?

Question 3.1: What powers and functions should enduring guardians have?

- (1) Should the *Guardianship Act* contain a more detailed list of the powers and functions that an adult can grant to an enduring guardian? If so, what should be included on this list?
- (2) Should the *Guardianship Act* contain a list of the powers and functions that an adult cannot grant to an enduring guardian? If so, what should be included on this list?

Submission:

- (1) No.
- (2) No.

Question 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?

Submission:

- (1) Advantage of not being bound by a finite list for an infinite number of situations. It has the disadvantage of person so appointed not knowing the full extent of their powers which may change from time to time as the common law changes or clarifies the powers.
- (2) Continue with plenary orders.

Question 3.3: What powers and functions should tribunal-appointed guardians have?

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

Submission:

- (1) No.

(2) Not applicable.

Question 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?

Submission:

- (1) Yes.
- (2) All the provisions contained in paragraphs 3.40-3.43 excluding “manage the estate of the represented person when they die”.

Question 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? If so, what should be on this list?

Submission:

- (1) All those conferred on that person by the NSW Trustee.
- (2) All those currently held.
- (3) Yes.
- (4) Yes. All the provisions contained in paragraph 3.74 excluding “managing the estate of the principal upon their death”.

Question 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?

Submission:

(1)-(2) As set out in paragraphs 3.78-3.80.

(3) Yes.

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

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

What principles should guardians and financial managers observe when they make decisions on behalf of another person?

Submission:

Those general principles outlined in paragraph 4.7 and the principle to “consider the person’s right to be treated with dignity and respect”.

Question 4.2: Should guardians and financial managers be required to give effect to a person’s “will and preferences”?

- (1) What are the advantages and disadvantages of the current emphasis on “welfare and interests” in the Guardianship Act’s general principles?
- (2) Should “welfare and interests” continue to be the “paramount consideration” for guardians and financial managers?
- (3) What could be the benefits and disadvantages of requiring guardians and financial managers to give effect to a person’s will and preferences?
- (4) Should guardians and financial managers be required to give effect to a person’s will and preferences?

Submission:

(1) As set out in paragraphs 4.24-4.28.

(2) Yes.

(3) As set out in paper paper 2 paragraphs 5.33-5.35.

(4) Only where that is possible.

Question 4.3: Should NSW adopt a “substituted judgment” model?

- (1) What could be the benefits and disadvantages of a “substituted judgment” approach to decision-making?
- (2) Should the *Guardianship Act* require guardians and financial managers to give effect to the decision the person would have made if they had decision-making capacity (that is, a “substituted judgment” approach)?
- (3) If so, how would guardians and financial managers work out what the person would have wanted? Should the legislation set out the steps they should take?

Submission:

- (1) As per set out in paragraphs 4.51-4.54.
- (2) No.
- (3) Not applicable.

Question 4.4: Should NSW adopt a “structured will and preferences” model?

- (1) What could be the benefits and disadvantages of a “structured will and preferences” approach to decision-making?
- (2) Should guardians and financial managers be required to make decisions based upon a person’s will and preferences?
- (3) If so, how would guardians and financial managers work out a person’s will and preferences? Should the legislation set out the steps they should take?
- (4) What should a guardian or financial manager be required to do if they cannot determine a person’s will and preferences?

Submission:

- (1) 4.60-4.72
- (2) No.
- (3) Not applicable.
- (3) Not applicable.



(4) Not applicable.