Review of Guardianship Act 1987

Question Paper 4

Seniors Rights Service

Safeguards and Procedures

2. Enduring Guardianship

Question 2.1 Witnessing an enduring guardianship appointment

What changes should be made to the Guardianship Act 1987 concerning:

(a) Eligibility requirements of witnesses
(b) Number of witnesses required
(c) Role of Witnesses

We refer to Question 2.1(a) and (b) and state the current laws are adequate.

In relation to role of witnesses the current law requires that the appointor understand the nature and effect of the document (section 6C(1)(e) Guardianship Act 1987). This is a broad test. We would support the inclusion in the legislation of further detail as to what an appointor must understand such as the scope of the guardian's powers, when the appointment commences, and when the appointment can be revoked.

Question 2.2 When enduring guardianship takes effect

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

If there were to be a register of guardianship appointments, medical evidence could be filed by the guardian with the register indicating that the guardianship appointment has commenced. The medical evidence would need to show that the older person no longer had the mental capacity to make accommodation, lifestyle and medical and dental decisions or it would need to show that, although the older person had mental capacity, they were so physically frail to be at risk of harm even with services assisting them in place.

If the older person wanted to challenge this evidence an application could be made to the NSW Civil and Administrative Tribunal to review the evidence and consider any other medical opinions tendered by the older person.

Question 2.3 Reviewing an enduring guardian's appointment

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

The NSW Civil and Administrative Tribunal should have the power to review the making, revocation and operation of an enduring guardianship appointment.

Currently, the Tribunal can only review the guardianship appointment to see if it is in the best interests of the appointor that it be revoked. If it decides to revoke the appointment it can make a guardianship order (section 6K(2)(3) Guardianship Act 1987). It cannot review a guardianship appointment as to whether the older person had capacity to make it nor can it review a revocation of a guardianship appointment as to whether the older person had capacity to make it. We are of the view that the Tribunal should have these additional powers of review.

Question 2.4 Ending an enduring arrangement

What changes if any should be made to the Guardianship Act 1987 concerning

(a) The resignation of an enduring guardian; and

(b) The revocation of an enduring guardianship arrangement

The current legislation would appear to be adequate.

In relation to revocation of enduring guardianship appointments, there are currently prescribed forms for revocation and the older person's signature is required to be witnessed by a solicitor, barrister, Registrar of the Local Court, or person from NSW Trustee and Guardian who has completed appropriate course.

In relation to resignation of a guardian there is a prescribed form in the Guardianship Regulation and the signature of the guardian must be witnessed by a solicitor, barrister or Registrar of the Local Court, or person from NSW Trustee and Guardian who has completed the appropriate course. If the guardian resigns and the older person lacks capacity the Guardianship Division of NCAT must be notified.

If there was a register in place there should be a requirement to register these documents on the register.

Question 2.5 Other Issues

Would you like to raise any other issues about enduring guardianship procedures?

Seniors Rights Service makes no further comment.

3. Guardianship Orders and Financial Management

Question 3.1 Applying for guardianship and financial management order

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

It is important that the application in relation to the older person is served on the older person so they are aware of the basis of the application. We support the Tribunal serving the application on the subject person to ensure service of the application**.** We understand the Tribunal is undertaking a trial where parties to the application must serve the documents on the Tribunal and each other. We understand that the Tribunal shall still prepare and serve a copy of all documents on the subject older person.

Question 3.2 Time Limits for Orders

(1) Are the time limits that apply to guardianship orders appropriate? If not what should change?

(2) Should time limits apply to financial management orders? If so what should these time limits be?

(1) The current time limits for guardianship orders are adequate.

(2) In relation to financial management orders we recommend that the Tribunal have a discretion to set time limits on financial management orders based on the circumstances of the case presented at the hearing. For example, if a person's capacity may improve based on medical evidence then a date should be set for a review. Further scheduled reviews might also be in the best interests of the older person to ensure the appointed private manager continues to undertake their functions in the best interests of the older person.

Question 3.3 Limits to the scope of financial management orders

Should the Guardianship Act 1987 require the NSW Civil and Administrative Tribunal to consider which parts of the person's estate should be managed?

We agree, consistent with the UN Convention, that the Guardianship Act 1987 should be worded to consider which parts of the estate should be managed rather than which parts of the estate should not be managed. A person should be allowed to manage that part of their estate of which they are capable of managing. For example a person may be able to manage day to day expenses for necessities but have difficulty with more complex transactions relating to real estate and property.

Question 3.4 When Orders can be reviewed

(1) What changes if any should be made to the process of reviewing guardianship orders?

(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?

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

We refer to Question 3.4(1). The current end of term reviews and own motion reviews, or reviews at the instigation of a person concerned with the welfare of the older person based on new information, are adequate.

We refer to Question 3.4 (2). We recommend that the Tribunal have a discretion to order a review of a financial management order every 12 months or 3 years as appropriate. The order would be based on medical evidence presented at the hearing as to the likelihood of the person to regain capacity or where circumstances indicated a review would be prudent to ensure that the order continues to operate in the best interests of the older person.

We refer to Question 3.4(3). We refer to our comments in 3.4(2) above.

Question 3.5 Reviewing a guardianship order

(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?

(2) Should these factors be set out in the Guardianship Act 1987?

We refer to Question 3.5(1). The factors to consider in a review would include whether the elements of a guardianship order are satisfied.

These factors include whether the older person lacks the capacity to make certain lifestyle decisions, whether the informal arrangements are working or there is a need for a guardianship order, whether an order would operate in the best interests of the older person.

A person concerned with the welfare of an older person may have new information to indicate that there needs to be a change in functions of the guardian, a different guardian appointed, or that the order lapse.

We refer to Question 3.5(2). It would be of assistance to have the considerations of the Tribunal set out in the legislation for clarity.

Question 3.6 Grounds for revoking a financial management order

(1) Should the Guardianship Act 1987 expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

(2) What other changes, if any, should be made to the grounds for revoking a financial management order?

We refer to Question 3.6. We agree there should be a basis for revocation of an order on the basis that "there is a no longer a need for a person's affairs To be under

management". This may be the case because the person has regained capacity or because informal arrangements are working in the best interests of the person there may be no need for a financial management order.

However, we do get calls from people who are carers of an older person going into aged care seeking to enter resident agreements and arrange finances for the older person and they are not an appointed attorney. The older person lacks capacity to make the appointment. In these situations they have found they need a formal appointment to enter into legal contracts and deal with financial institutions. Formal appointments are often required to deal with third parties.

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

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

We recommend that if a private financial manager dies the NSW Trustee and Guardian should automatically be appointed until another person applies to be private manager.

We agree the Public Guardian should become the person's guardian if there is no surviving or alternative guardian under an enduring guardianship appointment until another person applies to be guardian.

4. Registration System

Question 4.1 Benefits and Disadvantages of a Registration System

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

(2) Should NSW introduce a registration system?

(3) Should NSW support a national registration system?

SRS supports the creation of a national register for power of attorney and guardianship instruments. SRS supports the implementation of compulsory filing of documents by attorneys, at least on an annual basis, on decisions taken and financial expenditures.

SRS supports that financial institutions, solicitors, aged care homes and medical professionals be able to search the register to confirm the validity of the authorized representative.

Privacy may need to be balanced against the use and access of the register.

Family members might have genuine reasons to search the register to ensure appropriate documents are in place to protect older relatives, however, there is also the risk they could access the register for the purpose of exploiting the older person. A

recommendation might be for the older person to specify which family members they want to have access to the register upon making the document.

Question 4.2 The features of a registration system.

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

SRS supports the implementation of a mandatory register for power of attorney and guardianship appointments.

SRS states that such a register should be funded by the government and fees should not be charged for the registration of appointments or revocations.

SRS supports the view that the NSW Civil and Administrative Tribunal could advise the Registrar of the financial management and guardianship orders that it makes.

SRS recommends that attorneys appointed under power of attorney appointments registered on the register be subject to random audits in order to mitigate against financial elder abuse.

5. Holding guardians and financial managers to account

Question 5.1 A statement of duties and responsibilities

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

(2) If so:

(a) What duties and responsibilities should be listed in the statement?

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

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

Guardians and Financial Managers are under a duty to comply with fiduciary obligations to the older person.

We would support a statement of these duties and responsibilities in similar terms to that set out by the Victorian Law Reform Commission Guardianship Final Report 24 recommendation 288.

In considering financial penalties against guardians and financial managers for breach of their obligations, such a proposal would need to be weighed against the effectiveness in ensuring compliance with fiduciary duties as against ensuring

guardians and financial managers bona fide actions in best interests of the older person are protected.

Question 5.2 The supervision of private managers

What, if anything, should change about the NSW Trustee and Guardian's supervisory role under the NSW Trustee and Guardian Act 2009?

We are of the view that private managers should remain supervised by the NSW Trustee and Guardian as part of their role and that they regularly review the accounts of private managers as this acts as a balance against possible elder financial abuse.

Question 5.3 Reporting requirements for private managers?

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

We would recommend that private managers lodge accounts every 12 months with the NSW Trustee and Guardian as a protection against elder financial abuse.

Question 5.4 Removing private financial managers from their role

(1) When should the NSW Civil and Administrative Tribunal be able to remove a private manager from their role?

(2) Should the Guardianship Act 1987 set out the circumstances in which the NSW Civil and Administrative Tribunal can remove a private manager?

The Tribunal can revoke a financial management order, at request of a financial manager, if it is in the older person's best interests, or if the older person has regained capacity (section 25P(2) Guardianship Act 1987).

The legislation could specify that the Tribunal have the power to remove a private manager if the private manager becomes insolvent, bankrupt or a paid carer for the person whose estate is being managed, similar to section 26 of the Guardianship and Administration Act 200 QLD s26(1)(a) s26(2).

Question 5.5 Reporting requirements of private guardians

Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?

Any requirement for guardians to submit regular reports should be balanced against the consideration that we should not discourage persons from becoming guardians on the belief the role will be too onerous. Annual reports could be made on the status of the older person's welfare to the Public Guardian in a simple format.

Question 5.6 Directions to guardians

Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of the guardians functions?

We support the current law that enables guardians to apply to the Tribunal for directions in relation to their role. We would be cautious in extending this role to others as persons in family conflict may make applications to frustrate the role of the guardian in decision making and use resources of the Tribunal (where that Tribunal has already determined the guardian's role in cases of family dispute by making a guardianship order). There are already protections in place to apply for a review of the order if the guardian is not fulfilling their role.

Question 5.7 Removing private guardians from their role

(1) When should the NSW Civil and Administrative Tribunal be able to remove a private guardian from their role?

(2) Should the Guardianship Act 1987 set out these circumstances

The Tribunal has a current discretion under a review of a guardianship order to remove a guardian from their role when they are not meeting their obligations to the older person under the section 4 Principles of the Guardianship Act 1987. This would appear to be adequate protection.

Question 5.8 Reviewing decisions and conduct of public bodies

What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

The process for internal review and external review to Administrative Division of NSW Civil Administrative Tribunal appear adequate. Perhaps the time limit could be extended from 28 days to allow people some more time to lodge their application and obtain legal advice.

Question 5.9 Criminal offences

Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

SRS supported having criminal offences for breaches by an attorney of their fiduciary obligations to the principal similar to the Power of Attorney legislation in Queensland.

Question 5.10 Civil penalties

Should NSW introduce new civil penalties for abuse exploitation or neglect committed by a guardian or financial manager?

We refer to comments in Question 5.1 above. The advantage of civil penalties is that there is a lower burden of proof to establish breach of these fiduciary obligations.

Question 5.11 Offences, civil penalties and compensation orders

Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

SRS supports the view that Tribunal be vested with the power to order that financial managers pay compensation where loss was caused by failure to comply with their fiduciary obligations. Currently the Victorian Civil and Administrative Tribunal has powers to make compensation orders where an attorney breaches their fiduciary obligations causing loss to an older person.

Clause 5.12 Other Issues

Would you like to raise any other issues about how guardians and financial managers can be held responsible for their actions?

SRS makes no further comments.

6. Safeguards for supported decision-making

Clause 6.1 Safeguards for a supported decision-making model

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

We support the view that the appointer should be free to revoke a supported decision making instrument if they have the capacity to do so. A supported person should be able to ask the Tribunal to revoke a supported decision making order at any time.

We also support the view of the Victorian Law Reform Commission that "any person with an interest in the affairs of the supported person" could apply for a review if they believe:

- In the case of a personal appointment, that the supported person lacked the capacity to make the appointment;
- The appointment was not validly made;
- The supported person no longer has capacity to participate in the arrangement or they no longer consent to it
- The supporter is acting in breach of their responsibilities
- The order is no longer appropriate to the supported person's needs, or
- The supporter is exercising undue influence over the supported person.

7. Advocacy and investigative functions

Question 7.1 Assisting people without guardianship orders

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to assist people with disability who are not under guardianship?

We support the Public Guardian having authority to assist people with disability who are not under guardianship.

We support the establishment of a separate public advocate to have investigatory functions to investigate allegations of elder abuse against vulnerable older people. These investigations could be conducted at the public advocate's own motion or at the instigation of a complaint by public or professional or police officer.

Where an older person has capacity and is not under guardianship the older person should be consulted in relation to all aspects of the investigation and any prosecution should only take place with the older person's consent.

Question 7.2 : Potential new systemic advocacy functions

What, if any, forms of systemic advocacy should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to undertake?

We would support the view that the Public Guardian should continue its role to be a voice for groups of people under guardianship orders in relation to issues that affect them collectively. They should continue to provide recommendations to governments on guardianship legislation.

Question 7.3 : Investigating the need for a guardian

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate the need for a guardian?

We support the Public Advocate to have powers to investigate the need for a guardian. The Public Advocate may become alerted to this need through a report of suspected elder abuse.

Question 7.4 Investigating suspected abuse, exploitation or neglect.

Should the Guardianship Act 1987 (NSW) empower the Public Guardian or a public advocate to investigate suspected cases of abuse, exploitation or neglect?

SRS is not convinced the Public Guardian should have an investigatory role although it supports an independent public advocate having such a role.

SRS observes that issues of conflict can arise when implementation and investigation are conducted by the same entity. Certainly the public guardian

might request an investigation and then respond to the reports from or results of that investigation but it should not conduct the investigation.

SRS is also concerned the Public Guardian would not have the necessary skill set, experience or training for an investigation role.

SRS notes that any investigation function should apply to those at risk of abuse regardless of their capacity status.

Question 7.5 Investigations upon complaint or own motion

If the Public Guardian or a public advocate is empowered to conduct investigations, should they be able to investigate on their own motion or only if they receive a complaint?

The public advocate should be empowered to conduct investigations, and investigate a complaint of their own motion or if they receive a complaint.

Question 7.6 Powers to compel information during investigations

What powers, if any, should the Public Guardian or a public advocate have to compel someone to provide information during an investigation?

SRS agrees that public advocates or public guardians should have the power to require people to provide information. However, we note the coercive powers may inhibit reporting and may not be appropriate to domestic situations. Further, such powers should be restricted and carefully used to ensure it is in the best interests of the older person.

Question 7.7 Powers of Search and Entry

What powers of search and entry, if any, should the Public Guardian or public advocate have when conducting an investigation?

SRS submits that the Public Advocate should be able to apply for a warrant to enter a home should there be suspicion of serious risk of harm. We reiterate our previous recommendation that the Public Advocate should have the investigatory role separate to the role of the Public Guardian. The Public Advocate could liaise closely with police forces to arrange entry into a home where there was evidence of elder abuse.

Question 7.8 A new Public Advocate office

Should NSW establish a separate office of the Public Advocate? If so, what functions should be given to this office-holder?

The problems associated with the abuse, exploitation and abuse of incapable and vulnerable older persons may be considered in the light of what arrangements, if any, may be in place for the management of their financial affairs and the guardianship of their person.

The different regimes in place for financial management and guardianship give rise to varying levels of risk for the older person. Firstly, formal management and guardianship orders made by the Supreme Court of NSW or by NCAT provide the highest level of accountability and security and consequently the lowest risk of abuse.

Secondly an older person may have made a formal Enduring Power of Attorney and/or an Enduring Guardian appointment. Such appointments may provide greater choice, flexibility and other advantages for the older person. However there is a lower level of accountability in relation to actions taken by the attorney/guardian and therefore a greater risk of abuse.

Thirdly management of the financial affairs and guardianship decisions on behalf of the incapable older person may be undertaken on an informal basis by a relative or friend. Such person may, for example be a co-signatory to the older person's bank account and have access to their bank account password. Such informal arrangements give rise to the lowest level of accountability and therefore the greatest risk of abuse particularly where the older person is socially isolated and has significant assets.

The abuse of incapable older persons may come to the attention of their friends or distant relatives. Such potential whistleblowers may have a genuine concern for the welfare of the older person but they may also be reluctant to become actively involved and take the necessary steps of applying to the Supreme Court or NCAT for a financial management and /or guardianship order.

It is in those circumstances in particular, that whistleblowers should be able to report allegations of abuse to an independent **Public Advocate** who could then investigate and if appropriate make application for financial management and guardianship orders.

Where an Enduring Power of Attorney and Enduring Guardianship are in place the Public Advocate may apply for a review.

It is submitted that NSW establish a separate office of the **Public Advocate** which would be independent of the NSW Trustee and Public Guardian and independent of any judicial body.

The functions of the **Public Advocate** may include :-

- Receiving and investigating where appropriate complaints of elder abuse and determining whether application should be made to Supreme Court or NCAT for financial management and guardianship orders and for review of an Enduring Power of Attorney.

- Acting as applicant of last resort in proceedings in the Court or NCAT. For greater certainty as to the standing of the Public Advocate to act as an applicant the relevant legislation may be amended by adding the Public Advocate as a party.

See *Guardianship Act* (sections 25I and 25S) ; *Powers of Attorney Act 2003* (section 35) ; and *NSW Trustee and Guardian Act 2009* (sections 41 and 54) .

- As a party to Court or NCAT applications the Public Advocate could use the available processes of issuing summonses requiring the production of relevant documents.

- Applying to the Supreme Court for directions to NSW Trustee; and also applying to NCAT for administrative review of decisions by NSW Trustee on behalf of persons under management and also decisions by Public Guardian. The Public Advocate would be added as a party. See attached *NSW Trustee and Guardian Act 2009* (sections 61 and 62); and *Guardianship Act* (section 80A)

- Investigating complaints of elder abuse and where appropriate referring matters of alleged criminal conduct to the police.

Question 7.9 Other Issues

Would you like to raise any other issues about the potential advocacy and investigative functions of the Public Guardian or a new public advocate?

SRS makes no further comment.

<u>Chapter 8 : Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal</u>

Question 8.1 Composition of the Guardianship Division and Appeal Panels

(1) Are the current rules on the composition of the Guardianship Division and Appeal Panels appropriate?

We support the appointment of 3 members to a hearing of the Guardianship Division of the NCAT. One lawyer, a member with a medical professional qualification and a member with a community based qualification.

If not, what would you change?

Question 8.2 Parties to Guardianship and Financial Management Cases

(1) Are the rules on who can be a party to guardianship and financial management cases appropriate?

We refer to our comments in Question 7.8 to this submission that the Public Advocate should be able to be a party to NCAT proceedings.

We are also of the view that the other people who are currently parties to an application are appropriate. The parties include the applicant, the subject person, the

wife husband or defacto partner or carer, the Public Guardian and NSW Trustee and Guardian, the enduring guardian, enduring power of attorney, anyone joined by the Tribunal as a party.

(2) If not, who should be a party to these cases?

We refer to Question 8.2(1).

Question 8.3 The requirement for a hearing

When if ever would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

We are of the view that hearings are appropriate to ensure that the views of the subject person are considered when making any guardianship or financial management orders or conducting a review of the orders. It is appropriate parties and their legal representatives (where in attendance) can hear the evidence and then put forward their views. We support hearings where the older person attends ideally in person or otherwise by video conferencing or telephone.

Question 8.4 Notice requirements

(1) Are the current rules around who should receive a notice of guardianship and financial management applications and reviews adequate? If not, what should change?

It may be arguable that the children of the subject person should receive a notice of the application for an order or a review as they would often have an interest in the welfare of the older person and all children may not be applicants.

(2) If people who are not parties become entitled to notice, who should be responsible for notifying them?

It is submitted that there may be a role in ensuring that the Tribunal officers at least contact all parties and children of the older person and check they have been notified of hearing dates and received a copy of the application from the applicant.

Question 8.5 When a person can be represented

When should a person be allowed to be represented by a lawyer or a non lawyer?

We are of the view that the current considerations set out in the Practice Direction of the Guardianship Division of NCAT for leave for legal representation are adequate. The considerations include:

- The nature of seriousness of the interests of the party that are affected by the proceedings;
- Whether the parties interests and point of view conflict with those of other parties;

- Whether the proceedings involve complex legal or factual issues;
- Fairness between the parties. It may be unfair if one party is represented but another is not, particularly if the subject person is unrepresented or the parties are in conflict;
- Whether representation may assist a party to focus on the relevant issues and may promote a conciliatory approach to proceedings.

We would recommend that where an application is made for legal representation and leave is refused that written reasons for the refusal be provided by the Tribunal.

Question 8.6 Separate Representatives

How should separate representation be funded?

The separate representative conveys the wishes of the subject person to the Tribunal and objectively assesses the evidence to determine what is in the person's best interests.

We understand Legal Aid fund separate representatives or , where there is no entitlement to Aid, appoint a separate representative in most cases.

We would recommend Legal Aid consider SRS as an avenue for separate representation for clients who are socially and economically disadvantaged..

Question 8.7 Representation of a Client with impaired capacity

Should the Guardianship Act 1987 (NSW) or the Civil and Administrative Tribunal Act 2013 (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

When a person lacks capacity to understand the nature of the legal proceedings they are unable to be legally represented. The solicitor may be able to act as a McKenzie Friend to aid the older person before the Tribunal. The solicitor can act as a separate representative if appointed by the Tribunal to do so.

Question 8.8 Timeframes for finalizing Guardianship Division cases

What if any changes to the legislation are required to support the timely finalization of Guardianship Division cases?

We would make the observation that guardianship cases should be resolved in a timely matter. Often there is conflict surrounding the person with capacity impairment which could place that person at risk if orders are not made promptly. We note the Tribunal is able to make a temporary order until opportunity for a full hearing and permanent orders are made.

Question 8.9 Appealing a Guardianship Division decision

(1) Is the current process for appealing a Guardianship Division case appropriate and effective?

Generally a party has a right to appeal to the Internal Appeal Panel on a question of law against a final decision of the Tribunal. The party does not require permission or leave before such an appeal will be heard.

If however a party wishes to appeal on any other ground other than a question of law against a final decision, the party must obtain the permission or leave of the Appeal Panel to do so.

If the person argues that the Tribunal misunderstood the facts or the evidence, leave to appeal is required.

It is our view that these provisions are an adequate application of appeal rights.

A consideration might be given to an extension of time limit of 28 days for Guardianship Division matters as the subject person may take longer to get legal advice on appeal rights due to disability constraints and challenges.

(2) If not, what could be done to improve this process?

We refer to our comments in Question 8.9(1).

Question 8.10 Privacy and Confidentiality

What, if anything, should be changed in the law to protect the privacy of people involved in the Guardianship Division cases?

We are of the view that the current rules where there identity of the subject person and anyone involved in the case cannot be published or broadcast is adequate provision for privacy.

Question 8.11 Access to Documents

(1) Who should be allowed to access documents from the Guardianship Division cases?

Parties should be able to access the documents in relation to a case and to obtain copies which are provided by the Tribunal.

In relation to non parties consideration needs to be given to the privacy of the subject person so that their private information is not on display to anyone claiming to have an interest in older person's affairs but who does not have a significant enough interest to be joined as a party. Careful consideration needs to be given to this release of information, or if any information to such persons is to be released.

(2) At what stage of a case should access be allowed?

Parties should be given access to documents before the hearing so that they can review the material before the hearing is conducted and be familiar with the evidence before the Tribunal.

Question 8.12 Other Issues

Would you like to raise any other issues about the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal?

SRS makes no further comment.