MEMORANDUM

To: **The NSW Law Reform Commission**

From: **The Supreme Court of New South Wales**

Date: **18 March 2016**

Re: **Review of the Guardianship Act 1987 NSW, Preliminary Submission**

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1. This memorandum has been prepared in response to the NSW Law Reform Commission's call for preliminary submissions on its review of the *Guardianship Act* 1987 NSW.

2. The LRC's terms of reference (published on its website) demonstrate a perceived need to respond to the Report of the Australian Law Reform Commission entitled "Equality, Capacity and Disability in Commonwealth Laws" (ALRC Report 124) dated August 2014.

3. A basic premise of the ALRC Report is that, in dealing with people in need of protection because of an incapacity for self management of their person or property:

    (a) there is a clear distinction between a "substitute decision-making model" of decision-making and a "supported decision-making model" of making decisions on behalf of, or affecting, a person in need of protection; and

    (b) it is useful to frame legislation in terms of such models.

4. That premise attributes too great a significance to theoretical "model" constructs about decision-making, based on an artificial distinction that, despite best intentions, is capable of directing attention away from service of the welfare and best interests of a person in need of protection. Nobody disputes the need to respect the autonomy and dignity of a person in need of protection; the need to engage such a person in any process of decision-making affecting him or her; or the need to make decisions for such a person if he or she is unable to do so personally. Our law remains acutely aware of the fiduciary obligations of protected estate managers (financial managers) and guardians. That awareness informs "the welfare principle".

5. An overly strong emphasis on "substitute decision-making" versus "assisted decision-making" paradigms might also lead government into the error of thinking that practical problems of people in need of protection can be addressed by a legislative embrace of a "model" of decision-making unconnected with recognition of:

(a) a need to focus on the protective *purpose* of making decisions on behalf of, or affecting, a person in need of protection; and

(b) an ever-present need to provide adequate *financial* support for those in need of protection and those charged with assisting them.

6. Rather than be confined by perceived distinctions between competing theories about decision-making *models*, all decision-making on behalf of, or affecting, a person incapable of managing his or her own affairs (person or property) should be guided (as it now is) by:

(a) recognition that, whatever the *form* of decision-making, its *substance* should be governed by a protective *purpose*; and

(b) general principles (such as those found in section 4 of the *Guardianship Act* 1987 NSW and section 39 of the *NSW Trustee and Guardian Act* 2009 NSW) designed to inform all decision-making.

7. Whatever, if any, legislative or administrative changes may be effected as a result of the ALRC Report, nothing should be done to limit the inherent, protective jurisdiction of the Supreme Court of NSW.

8. Government, at all levels, should be encouraged to preserve the protective (*parens patriae*) jurisdiction of the Supreme Courts of all Australian States and Territories.

9. Different considerations may apply to Federal courts and tribunals, as opposed to State and Territorial courts and tribunals, because of limitations imposed on Federal bodies by the Australian *Constitution*. Problems attending an exercise of Federal jurisdiction should not unnecessarily be visited upon State bodies.

10. Insofar as the ALRC Report is informed by the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), or human rights jurisprudence, care needs to be taken not to encumber decision-making on behalf of a person in need of protection with bureaucratic constraints based on "rights" of indeterminate content.

11. The work of NCAT (and its statutory predecessors governed by the *Guardianship Act* 1987 NSW) has been greatly assisted by the "general principles" set out in section 4 of the Act, since given broader operation (for example, in guiding decision-making of the NSW Trustee, the Mental Health Review Tribunal and the Court) by comparable provisions found in the *NSW Trustee and Guardian Act* 2009, section 39. These statements of principle reflect, and reinforce, a strong and vibrant tradition of Equity jurisprudence in NSW.

12. The LRC should note that there has also been a liberalisation of management of the Court's protective jurisdiction since the seminal decision of the Court of Appeal in *Holt v Protective Commissioner* (1993) 31 NSWLR 227. This is largely a reflection of changing social conditions, recognised in both legislative reforms and procedural adaptations.

13. The process of liberalisation has been noticed in various judgments of the Court, including *David by his Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436F-437B; *M v M* [2013] NSWSC 1495; and *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245.

14. The Court of Appeal is currently seized of an appeal by a protected person, acting as a litigant in person, from a judgment (*A v A* [2015] NSWSC 1778) that reviews recent jurisprudence on the meaning of incapacity for self-management: see *A v A* [2016] NSWCA 17. The principles relating to management of an *estate* are not wholly dissimilar from those relating to management of the *person*. Functional capacity for self-management is central.

15. Leaving aside cases involving the welfare of minors, most of the day-to-day work relating to the appointment, removal and supervision of guardians (formerly, "committees of the person") is now undertaken by NCAT's Guardianship Division. Nevertheless, from time to time, the Court is called upon to exercise its jurisdiction over "the person" in aid of that exercised by NCAT. See, for example, *IR v AR* [2015] NSWSC 1187.

16. On the whole, NCAT's Guardianship Division is to be commended for the quantity, and quality, of the work it performs. It bears a heavy workload.

17. Potential for conflict and confusion in public administration exists in the Commonwealth's introduction of the National Disability Insurance Scheme. The Commonwealth should be encouraged to work through the agency of State instrumentalities with a view to avoiding, or minimising, difficulties associated with overlapping regimes of administration.

18. Upon any review of the protective jurisdiction, allowance should be made for the increasing use in the Australian community of enduring powers of attorney and the appointment of enduring guardians. Private arrangements of this character (actively promoted by the NSW Government, through the NSW Trustee) *both* ameliorate administrative problems associated with management of the affairs of a person in need of protection *and*, as more people resort to such arrangements, give

rise to potential problems where lay people, unmindful of fiduciary obligations and unsupervised by the NSW Trustee, act in disregard of rights of a principal.

19. It might be necessary, in the future, to consider whether all enduring powers of attorney and enduring guardianship appointments should be registered before taking effect. However, care needs to be taken not to introduce overly bureaucratic constraints on families managing their own affairs.

20. As important as legislative responses to current social conditions may be, in the context of this State's protective regime an equally (or more) important consideration may be the need to ensure that public instrumentalities responsible for administration of the regime are adequately funded.